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President, Dan M. Burt

June 4, 1986

U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Re: Offender Characteristics

We at Capital Legal Foundation feel very strongly that a defendant's criminal record should be one of the most heavily weighted elements in determining the length of his sentence. Recidivism is a problem with complex roots, but also a fact of social experience. It must be taken into account in structuring sentences.

Once convicted a defendant must accept his guilt and be punished according to the needs of society, and the circumstances surrounding the offense. It is at this stage in the judicial proceeding that the focus on protection of the defendant should shift to protection of the public. Too many convicted criminals are given the opportunity to commit crimes again, and the courts are filled with too many defendants who possess unreasonably lengthy criminal records.

Studies indicate that rehabilitation does not work, and we must therefore, turn to crime control/deterrence and just punishment models of sentencing. The present parole system of release after one-third time served is inadequate and has very little deterrent value.

The time is right for the Sentencing Commission to take a clear strong stand on behalf of the public which deserves the right to walk in the neighborhoods of our cities without fear of becoming another victim.

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Chairman of the Board **Leslie M. Burgess**, President, Burgess International, Inc.
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Dan M. Burt, President, Capital Legal Foundation • **Alan Feld**, Professor-of-Law, Boston University
Rufus W. McKinney, Vice President, Southern California Gas Co.

I. How much weight should prior records be given?

Very substantial weight should be given to this factor. A defendant's criminal record should greatly affect his sentence because it is one of the most reliable indicators of future conduct. A habitual criminal should receive a different sentence than a one-time offender. No one has the right to continuously injure other people without some just form of retribution. The public needs to be protected more from a person who is a habitual criminal, one who lives a life of irresponsible crime and destruction, than from one who has not exhibited a permanent lifestyle of crime.

The chance of a habitual criminal reverting to his old ways is great, and if a criminal wishes to continue to play the game, it is he, rather than the public, that should pay the price.

II. Specifics

Serious Felony Prior Convictions should be given much more weight than less serious or felonies misdemeanors. Clearly, a person with prior convictions for armed, robbery, rape and assault with intent to kill while armed e.g., is more dangerous to the public than, for example, a person who has three prior convictions for shoplifting. The Commission should also view prior convictions in light of the potential future conduct of the defendant. It should ask, who will be protected by his imprisonment, or suffer from his early release.

A rapist with 3 prior convictions of rape is more likely to rape again than a one-time rapist with 3 prior convictions for car theft. The Commission (or Sentencing Judge) should reflect on the likely future course of conduct, and sentence accordingly.

III. Age of Prior Convictions/Juvenile Convictions

Consistent with the approach that habitual criminals are at least unlikely to change, it is our view that "occasional criminals" are able to change. A decay factor of ten years for prior convictions is reasonable. Although the judge should view all prior convictions, older convictions (i.e., ten years or more) should be given less weight than more recent convictions. If a defendant has had no convictions in the past ten years, it is a good indication that he is less likely to commit more offenses than one who has criminal convictions every year or two.

This is an area for judicial discretion. In light of the overcrowded prisons, the trial judge should be allowed to consider older convictions with some flexibility when determining a sentence.

IV. ARRESTS

Previous arrests should not be given any weight if we are to maintain the innocent until proven guilty standard, and we should. Unless convicted, a defendant should not suffer additional penalties for something he is presumed not to have done.

V. Crimes Committed While On Probation and Parole

The fact that a defendant was on probabtion or parole at the time of the offense should be given serious consideration. Parole and probation could be viewed as societal manifestations of trust that the defendant is ready to return to society and will not commit more crimes. A breach of that trust justifies sterner treatment than would be given to one who has not breached that trust. The commission of a crime while on parole or probation further indicates a recidivist tendency and thus a greater need for society's protection.

VI Other Factors

The Commission should also consider factors such as community ties, employment history, and family responsibilities. Defendants that exhibit a potential for rehabilitation should be given the chance if there is relatively little danger to the public. However, if a defendant has a lengthy criminal history, he will probably not have a good employment record, strong community ties etc., which in turn indicates the unlikelihood of reformation.

As mentioned in our earlier remarks, Capital Legal Foundation is of the opinion that the seriousness of the current offense, and the make-up of the victim involved should also heavily influence the sentence to be given.

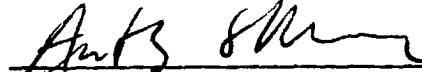
For example, a convicted criminal who brutally assaulted an elderly or handicapped person should be treated more harshly than one who fought with an able-bodied young man.

Also, a defendant who shows no remorse for his actions should be treated differently than one who is remorseful. Lack of remorse is a good indication that a convicted criminal will commit future offenses.

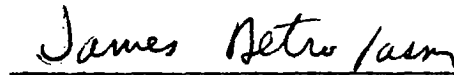
Conclusion

In conclusion, Capital Legal Foundation believes that a defendant's prior criminal record should have a great impact on sentencing. It is the best indicator of future conduct, and will best fulfill the goals of deterrence, just punishment and protection of the public.

We strongly recommend that the U.S. Sentencing Commission weigh heavily a defendant's prior criminal record, in determining his sentence.



Anthony S. Murry



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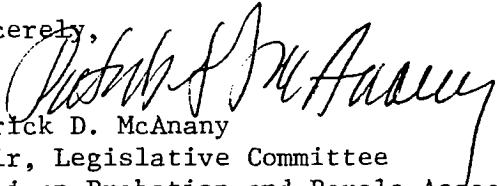
Mr. William W. Wilkins
Chairman, The United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

Enclosed is a draft of responses to the questions posed by the Commission on use of past criminal records in sentencing directed to Mr. Malcolm McDonald, President of the American Probation and Parole Association. I have written as Chair of the Legislative Committee of APPA.

I would appreciate it if I could be placed on the mailing list of the Commission directly so that requests made to Mr. McDonald could reach me expeditiously.

Sincerely,


Patrick D. McAnany
Chair, Legislative Committee
American Probation and Parole Association

COMMENTS OF AMERICAN PROBATION AND PAROLE ASSOCIATION ON USE OF
PRIOR RECORD IN SENTENCING FOR THE FEDERAL SENTENCING COMMISSION

Submitted By

Patrick D. McAnany, Chair, Legislative Committee

Context of Sentencing Reform and Use of Prior Record

Before responding to the specific questions put by the Commission to APPA, I would like to raise the general question of use of prior record in a sentencing context, particularly the context of the reform occurring during the past ten years.

The past decade of reform efforts can be summed up by its renewed interest in punishment and a concomitant concern for due process. On the one hand, the growth of prison populations reflect a demand for a serious societal response to serious offending. On the other hand, how punishment choices are made have come to be seen as having critical ethical and political consequences. The notion of just deserts or a retributive view of criminal sentencing has been adopted to explain and justify the use of the criminal sanction. This in turn has sensitized Americans to the dangers of open discretion which had characterized sentencing up until recently.

The philosophy of just deserts posits a requirement that the sanction be based only on the past offense, not on factors of future behavior. Further it mandates that punishment be commensurate with the degree of wrongdoing and that offenders committing equally serious offenses be punished equally. All of this is hardly new for American courts since these principles were inherited from Common Law and have been embedded in our criminal justice system for centuries. But during the last one hundred years their prominence has been obscured by other goals of sentencing, such as deterrence, rehabilitation and incapacitation. Each of these goals serves legitimate interests of society for protection from further offending on the part of convicted offenders and from potential offenders at large in the community. Thus, their orientation is directed toward future behavior and seeks to control and limit that behavior by the choice of sanction. The measure for such choices look^u to factors different from the instant past offense and its seriousness to less precise fac-

tors such as risk of future offending, amenability to treatment and perception of the threat of punishment. It is easy to see that a sentencing cannot simultaneously accomodate all of these goals without considerable danger of contradiction and inconsistency. If the principles of desert are adhered to, then some sacrifice of control over the future will occur. One cannot sentence a car thief to a term commensurate with the offense and expect to long incapacitate an offender likely to recidivate.

The point is that some priorities be established in determining how the sanction is set. While it might appear attractive to compromise between the two sets of goals and assign weight to both, the past and future orientations are contradictory by nature. Perhaps the setting of priorities is a moot question because of the nature of the legislation underlying the Sentencing Commission's work. As I understand the mandate of the Commission, it is to propose guidelines which measure both the seriousness of the current offense and the offender's past record in a matrix method. Such a format for determining the length of sentences already professes desert type principles. But how the factor of past record is perceived and how it is weighted may undercut the general premise of desert.

Past record can be understood both as a measure of culpability for desert and of risk for prevention. An understanding of the difference between the two is important in how the Commission goes about its work. Why past record is considered at all in sentencing derives from a very strong tradition among judges in this country and elsewhere that such considerations are appropriate and necessary. Research has shown that past record in sentencing is one of two most frequently considered factors by judges and other professionals connected with sentencing, the other being seriousness of current offense. Thus, it appears to be not a question of whether we will use past record, but how we explain it and what weight we will give it.

Desert theorists adopt several possible positions on past record. From a strict justice perspective, past record may be irrelevant since past offenses have been punished and the offender acquitted of his debt. This position has the weight of tradition and practice against it. The second position would argue that past record is always relevant because it is an indicator of a hardened attitude toward wrongdoing, a willing choice made in the teeth of past experience of conviction and punishment. A third position argues that it is unjust to punish, and keep punishing, for offenses already accounted

for, but that it is not unjust to discount the commensurate rate for first offense. Under this conception, first and perhaps second offenders would be given sentences somewhat below the norm, but as past record lengthens, this discount would be lost. The problem with the third position appears to be its conflict with experience of participants. True, there is a sentiment for first offenders as less culpable. But there is also a definite sentiment that three time losers need to be cracked harder, not only or even mainly because they are a menace to society, but because they are more culpable.

There are many unanswered questions in any of these explanations. But one thing desert theorists agree on is that the main measure of commensurate desert is seriousness of present offense, and past culpability can never weigh so heavily that it distorts a low level offense into a high level one. One cannot turn a shoplifter into the sentence equal of an armed robber just because of ten past convictions.

The other use of prior record is preventive in nature. As difficult as prediction of future offending is most persons connected with sentencing entertain the hope, at least, of stemming the tide of further offending by those sentenced. One of the best indicators of further offending is past offending. Thus, criminal record, rather than other indicia of social life, appears to justify longer sentences. However, there is still adherence by many researchers to the notion that certain social factors, such as age at first offense, substance abuse, family ties and employment history, contribute strongly to more accurate predictions of recidivism. The problem with using these factors in sentencing is twofold. First, the availability of accurate information as to each of them is problematic. But second, several of them may trench on unconstitutional grounds such as race because of the strong ties of race and employment, for instance. But further, they appear not at all to coincide with the base notion of blameworthiness on which the criminal sanction is levied. For these reasons, most sentencing guidelines are fashioned by the simple grid of offense seriousness and past criminal convictions.

We can conclude this section by saying that past record has a place within the sentencing guidelines, but its place is secondary to the seriousness factors of the current offense.

II. Responses to Specific Questions

1. How should the Commission define felony and misdemeanor offenses?

The simplest and fairest way appears to depend on state characterization of offense. This would create some disparity across offenders, but would honor the fact that establishing seriousness is the primary role of the state. Further, since less weight is being given past record in determining seriousness of present (federal) offense, the disparities across jurisdictions in defining and punishing offense would be less distorting. Trying to create a general norm for translating state offenses into uniform categories by nature or sentence is too heroic a venture for the Commission whose energies should be devoted elsewhere.

2. How should prior felony convictions be weighted?

To keep the sentencing system consistent it would be useful to assign differential weighting based on seriousness. Already other sentencing guidelines systems make the distinction between felonies and misdemeanors. The creation of a felony ranking that includes four or five levels provides the opportunity to create at least greater and lesser type felonies for use in calculating past record. Beyond that, the contribution to fairness would diminish since past record is not an exact measure of heightened culpability.

3. What decay factor, if any, should the Commission build into the guidelines?

The passage of time from a past conviction is an indication of separation from attitudes of wrongdoing. The longer the time, the more the presumption of renewed temptations and resistance to them is confirmed. This suggests that the point of release from confinement is the appropriate demarcation for decay since community release offers ample opportunity to most offenders to recidivate. The time factor for decay might well be differential according to seriousness. For instance, misdemeanors would not be considered after four years of release; lesser felonies after six years; and serious felonies after eight years.

4. Should prior juvenile offenses be considered?

The Commission should not consider juvenile delinquency adjudications. First, for federal delinquency adjudications, there is a policy of not prosecuting these in federal courts and the consideration of the few that are processed would create serious disparity problems because of the many which are referred to state courts. State court adjudications of delinquency create their own style of problem. Many states do not allow courts to use these in adult sentencing. Others do, but have varying rules on access, use, decay and the like. It would be a messy business for the Commission to try to create a formula that would treat these matters in an evenhanded way. Even if these threshold problems of uniformity could be overcome, the use of juvenile adjudications undercuts a still viable policy of the setting apart of such juvenile crimes. If they would be considered, surely age would be a consideration, with younger delinquents being less responsible. But all of these problems suggest the wiser course of not considering juvenile delinquency adjudications at all in federal sentencing.

5. How should the Commission handle military, tribal or foreign convictions?

APPA has position on this.

6. Should the Commission consider previous arrests?

The Commission would be wise to disregard arrests in assessing prior record. As such arrests are not a sufficient indicium of guilt, and trying to determine which among several arrests not ending in conviction do indicate responsibility is problematic. While a string of arrests suggests that the person is at very least close to people committing crime, they lack the final authentication of conviction. If we are concerned with justice to all parties, then unexplained arrests provide little comfort of accuracy and fairness. Once the sentence has been determined, arrests may contribute to a judgment about level of security or other programmatic needs.

7. Should the fact that the defendant was on probation and parole at the time of the offense be weighted?

Under a desert notion of sentencing, probation and parole are themselves part of, or fully, a just sanction. The fact that an offender re-

offended at a point in time close to his conviction or incarceration date may contribute to seriousness because of absence of decay, but there should be no notion of an "ingratitude factor." Often field officers, and sometimes courts, or boards, make an assumption that they are doing the defendant a favor by placing them on probation or releasing them to parole, and this sense of beneficence is injured when their choices go sour. But a special penalty for insulting the generosity of probation or parole officials is surely out of place.

8. What level of sentence aggravation should be given for what level of prior record?

The answer to this question has been suggested in much of the above discussion. First, the weight given to past record should not be allowed to distort the primary measure of desert, current offense seriousness. Second, the contribution of past record to seriousness through culpability is real but tenuous. Therefore, we need to place lesser reliance on it. Third, perhaps the best way to conceptualize the commonsense judgment that multiple offense criminals should be punished more is to create a discount on first offenders moving through the norm for second offenders to an additive feature for third offenders. After that, past record should be held constant at that additive level. To put it into figures may do a disservice to the other features of the guidelines as they are developed, but perhaps a 20% discount for first offenders, the norm for second, and a 33-50% addition for third and more offenders, might be appropriate.

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May 21, 1986

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William W. Wilkins, Jr., Chairman
The United States Sentencing Commission
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Dear Chairman Wilkins:

Pursuant to your letter of April 25, 1986, the committee formed by the Association of the Bar of the City of New York to study the work of the Sentencing Commission ("the committee") met to consider the impact a defendant's prior criminal record should have on sentencing and, in particular, to respond to the questions raised by the Commission. The committee members, however, were somewhat uncertain concerning the focus of the questions posed. Specifically, were they intended to elicit our views as to whether certain factors should be considered by the Commission -- and therefore built directly into the guidelines and/or a grid -- or whether the same factors should be considered by the sentencing judge in determining the actual sentence to be imposed. As you can see, our uncertainty is reflected in some of our responses.

1. For guideline purposes, we believe that the Commission should define felony and misdemeanor offenses by the statutory maximum of the offense, i.e., a misdemeanor should be a crime punishable by a maximum of one year incarceration. If the statute enables the guidelines to permit sentencing judges to consider the nature of the offense, this should be the determining factor. Otherwise, we believe the determining factor should be the statutory maximum of the offense.

2. The committee believes that prior felony convictions should be weighted by seriousness of the offense, the number of prior felony convictions, and the relationship which the prior felony conviction bears to the present offense. For example, a prior conviction for securities fraud may be more

relevant to the present offense of false statements to a federal agency than a prior conviction for assault. Further, we agree that serious prior offenses should count against the offender more in establishing the current sanction than relatively less serious prior offenses. In this regard, the seriousness of prior offenses should be delineated with reference to a number of factors:

- a. whether the prior offense involved violence
- b. the number of people affected
- c. the amount of revenue involved
- d. the extent of deviousness of the crime,
e.g., were Swiss banks used?
- e. the relative role or degree of culpability
of the defendant where the prior offense involved multiple
defendants
- f. the number of years of imprisonment served
on the prior offense
- g. the degree of relatedness between the prior
and present offenses
- h. the statutory maximum of the offense. In
this regard, we would exclude consideration of possible or
actual fines imposed since, under the present statutes,
many possible fines do not measure significantly the
seriousness of the offense.

3. The committee agrees that some decay factor should be built into the guidelines in connection with consideration of a defendant's prior criminal history. We, therefore, recommend that only prior convictions occurring within the past 10 years be factored into the possible sentence except that the 10 years should be tolled for any time spent in incarceration during that period.

4. We believe that prior juvenile offenses should be considered in establishing sentences for adult offenders and, further, should be given the same weight as adult convictions, unless the age at the time the offense was committed is relevant. The decay factor should be the same as for adult convictions. See #3, supra.

In responding to these questions, we have assumed that the reference to "juvenile offenses" was to crimes such as juvenile delinquency, which are unique to juveniles. Since, however, a reference to a "juvenile offense" could also refer

to any offense committed by a juvenile, even if the offender was treated as an adult, we suggest that the guidelines provide a clear definition of "juvenile offense".

5. It is the committee's belief that military convictions should be handled in the same manner as any other prior commissions. Tribal convictions, however, are a matter beyond this committee's competence.

With respect to foreign convictions, we suggest that the Commission refer for some guidance to the substantial body of existing law governing the introduction of a foreign conviction into evidence at trial. The use to be made of a foreign conviction also bears on how the committee would respond to the question. Thus, would a prior foreign conviction automatically upgrade the seriousness of the present sentence or is it merely a factor to be considered by the sentencing judge? Moreover, the particular foreign jurisdiction may be extremely relevant in determining the significance to be accorded the prior conviction. Thus, a conviction under English law might be accorded more weight than a prior Soviet conviction.

6. We do not believe that the Commission should consider previous arrests per se when determining a defendant's prior criminal record. The facts relating to those arrests, however, should be considered to the extent they are relevant. Once again, we believe that this is a factor which should be left to the discretion of the sentencing judge rather than built into the guidelines.

7. The fact that a defendant was on probation or parole at the time of the offense should not, in our opinion, be considered. We believe, however, this to be an area where the guidelines should clearly delineate which judge should be responsible for sentencing which offense. In addition, the Commission may wish to consider whether the guidelines should make consecutive sentences mandatory or optional in such instances.

8. We believe that the level of sentence aggravation to be given for the level of prior criminal record is already treated adequately in 28 U.S.C. § 994(i), which mandates that a substantial term of imprisonment be imposed upon defendants who have two or more prior felony convictions.

Finally, the committee believes that prior criminal record should be one of the most significant factors in sentencing, along with other relevant factors such as cooperation and whether a defendant entered a guilty plea or went to trial.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

William W. Wilkins, Jr.

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May 21, 1986

Please let us know if we can be of further assistance.

Very truly yours,



Jane W. Parver

JWP:mf

PREPARED STATEMENT
OF
DONALD L. CHAMLEE
CHIEF, DIVISION OF PROBATION
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
ON
DEFENDANTS' CRIMINAL RECORDS
BEFORE
UNITED STATES SENTENCING COMMISSION
WASHINGTON, D. C.

MAY 22, 1986

Chairman and Members of the United States Sentencing Commission

Mr. Chairman, I am Donald L. Chamlee, Chief of the Division of Probation of the Administrative Office of the United States Courts. I appreciate the opportunity to appear today and address the Commission's concerns about how a defendant's criminal record should affect his sentence.

To briefly describe my background, I entered the Federal Probation System in 1961 as a U.S. Probation Officer in Sacramento, California. Prior to that time I worked as a county probation officer and state parole officer in California. I came to Washington, D.C. in 1968 and have held a variety of positions in the Probation Division, including Editor of Federal Probation Quarterly and Deputy Chief. I assumed my present position in December 1983. I hold Bachelor's and Master's degrees in Criminology from the University of California at Berkeley and in 1972 completed a 1-year criminal justice fellowship at Harvard Law School.

My remarks today cover three major areas: the current standards in the Federal Probation System relating to prior criminal records, how those standards translate into statistical information that is currently available, and what can we tell you about availability and reliability of prior criminal record information - the questions raised by the Chairman in his May 1, 1986 letter inviting this appearance. To better respond to the last question our office has conducted a telephone survey of 39 probation offices and I will report on those results.

CURRENT STANDARDS

Much of the investigative activities of the Federal Probation System involve the preparation of presentence investigation reports to aid the court in imposing sentence. Critical to that process is the assembly of a complete and verified prior criminal record for a convicted defendant. Rule 32(c) of the Federal Rules of Criminal Procedure is the probation officer's authorization for preparing presentence reports. It specifies what the presentence report shall contain, i.e., "(A) any prior criminal record of the defendant; (B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior; (C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and (D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense." Rule 32 does not exclude any specific kinds of information. Case law has imposed, however, some limitations on the information contained in the presentence report. In making its sentencing decision the court is prohibited from considering prior convictions of a defendant that were invalid because, in violation of his sixth amendment right to counsel, he had not been represented by counsel or had not properly waived counsel. Similarly, the court is prohibited from treating as a conviction any previous criminal charges against the defendant that resulted in dismissal or acquittal.

Leading appellate decisions hold that information to be used in imposing sentence, including the prior criminal record, must be inherently reliable. In United States v. Tucker, 404 U.S. 443 (1972), the Supreme Court ruled that it was unconstitutional for a court to consider in its sentencing decision prior convictions of the defendant that were invalid because counsel had not represented the defendant or no waiver of counsel had been made (violation of sixth amendment). Prior criminal record is a determinative factor in sentencing; however, unconstitutional convictions may not serve to enhance the sentence an offender receives. The rationale of Tucker is that consideration of invalid prior convictions in sentencing misinforms rather than informs the court's discretionary judgment.

Accordingly, since convictions obtained in violation of a defendant's sixth amendment rights are improperly relied on as prior record, it is incumbent on the probation officer preparing the presentence report to verify, during the course of his investigation, whether the defendant's previous convictions 1/ were obtained when the defendant was represented by or waived counsel.

1/Under present constitutional doctrine no criminal defendant may be deprived of his liberty as the result of any criminal conviction, whether felony or misdemeanor, unless he was afforded the right to counsel. See Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). As a general rule, a defendant has a right to counsel in all felony cases and in all other offenses for which incarceration is a potential penalty.

Examination of the court record relating to such convictions ordinarily provides the requisite information. The verification and its results should be listed for each prior conviction. It is the court's responsibility to disclaim on the record reliance on invalid convictions at the time of imposing sentence.

A second limitation which the Supreme Court has placed on sentencing information is found in Townsend v. Burke, 334 U.S. 736 (1948). In Townsend the Court ruled invalid the sentencing of a defendant based on assumptions about his criminal record that were materially false. For example, the sentencing court in Townsend had treated as convictions previous criminal charges against the defendant that either had been dismissed or had resulted in acquittals. This rule of accuracy applies to all data in a presentence report because it is a patent violation of due process to sentence on the basis of materially false information.

Probation officers are required to verify the facts contained in the presentence investigation report. Any unverified information is to be clearly labeled as such. The standards to be followed by probation officers are set forth in a monograph, The Presentence Investigation Report, Publication 105, Probation Division, Administrative Office of the United States Courts, April 1984. The current standards relative to the prior criminal record are contained in Appendix A.

Before moving on to the second major topic, I will discuss a special case, juvenile adjudication records. As described in Appendix A, the prior record section of presentence investigation reports contains only records of referrals to juvenile court for acts which, if committed by an adult, would constitute a crime. "Status offenses," such as runaways, truant, beyond parental control, are not considered crimes and are described in the Personal and Family Data Section of the report. Juvenile adjudication records in the report are limited, therefore, to crimes or alleged crimes.

As the Commission is aware, juvenile records are not uniformly available, and state laws vary considerably, affecting a Federal Probation officer's access to sealed, expunged, terminated, and active records. In 1982, the General Accounting Office reported on this problem in its report, Federal Parole Practices: Better Management and Legislative Changes Are Needed, GAO, July 16, 1982. The report notes that 94 judicial districts were surveyed, 90 responded, and 58 reported some problems in obtaining juvenile reports. The pertinent pages from the report are attached as Appendix B. Not only do state laws vary, there are differences between Federal circuits. Also, at Appendix B, is an opinion of the Eighth Circuit, U.S. v. Slipka, 735 F.2d 1064 (8th Cir. 1984), which extends the ruling of U.S. v. Tucker, cited above, to juvenile adjudications. In the Eighth Circuit therefore, district courts may not use a juvenile adjudication where there was no meaningful right to counsel, even if the adjudication was

made prior to the 1967 Gault 2/ decision. Other circuits have not ruled on this issue, and presumably pre-1967 uncounselled juvenile adjudications would still appear in presentence reports in those circuits.

CURRENTLY AVAILABLE STATISTICAL INFORMATION

Prior criminal record information is collected principally for the presentence investigation report. That is the core, and a number of additional uses flow from it. Criminal record data are used in actuarial predictive devices that we rely on in assigning persons on probation or parole to high or low activity supervision. The record information also contributes to our statistical information system. In 1983, in anticipation of the creation of the Sentencing Commission, the Federal Probation System initiated a new and expanded data collection system. Known as FPSSIS, the Federal Probation Sentencing and Statistical Information System, this system collects substantially more data about offenses and offenders than the previous statistical system. FPSSIS was designed to provide support for the creation of sentencing guidelines.

2/In Re Gault, 387 U.S. 1 (1967) (Juvenile must be advised of his right to be represented by counsel and, if he is unable to afford counsel, that counsel will be appointed.)

After sentencing, the probation officer reports a summary of prior record information to the FPSSIS database in Washington, D.C.

This information includes:

- the number of prior juvenile adjudications
- the number of prior adult convictions
- the number of major and minor prior commitments.

Also reported is:

- whether any of the prior conviction offenses were substantially the same as the instant offense
- whether the defendant experienced prior revocation of supervised terms of probation, parole, or pretrial release
- whether the defendant was under criminal justice jurisdiction, such as bail release, probation, or in escape status, for another offense at the time of the instant offense or sentencing for the instant offense
- whether the defendant was in prison within the past 60 months.

Because of the need to limit the complexity of the coding, much potentially useful information is not captured. For instance, one cannot learn of the nature of prior offenses from FPSSIS. Hence we cannot know if there is a history of violence or whether the prior record is ancient. Moreover, we cannot know whether the defendant adjusted well to prior terms of probation or terms in prison.

For the past 8 years we have also been developing the Probation Information Management System (PIMS) which is currently in pilot testing in the Northern District of Ohio. This system was also designed with the presumed needs of the Sentencing Commission in mind. PIMS captures far more detailed prior record information than does FPSSIS. Through it we can know the nature of prior offenses, how long

ago they occurred, whether violence was involved, and adjustment to previous terms of community supervision.

I shall now turn to the third, and final, part of my remarks - the results of our telephone survey of 39 probation offices.

To determine the availability of prior record information to probation officers conducting presentence investigation reports, the Division conducted a survey of 39 of the 94 Federal court districts. At least one district was contacted in most states. The survey instrument was structured to cover accessibility of all aspects of the nature of prior convictions (see Appendix C). Due to time constraints the survey sought to elicit a representative sampling for the Commission's inquiry and is not presented as a scientifically valid study. The survey was taken by telephone and handled by two officers with current field experience. The questions were posed in a consistent manner. The chief in each district was the principal respondent and the areas covered were:

- felony vs. misdemeanor vs. petty offense
- availability of offense description details
- representation by counsel
- subsequent supervision revocation
- type of supervision termination and date
- availability of juvenile offense data
- tribal offense data
- foreign offense data.

A tabulation of the survey results (see Appendix C) shows that 31 of the 39 respondent districts have access to centralized criminal history facilities usually at the state level of government. These

facilities most often provide a listing of the charges for which an individual was arrested. Details of the incident (offense) and the disposition or adjudication of the charges often is not provided. Although a centralized system is available in virtually all the districts surveyed, it was only as reliable as the local agencies' degree of participation. Generally, participation is at a high level in metropolitan areas and progressively diminishes as one goes to the more rural communities. Thus in predominantly rural districts participation is so inconsistent or minimal that a "no" response was the more accurate one. The centralized system in the best of cases is still only a starting point for a record search, and followup with the local agencies and jurisdictions is an absolute necessity.

The recording by agencies and courts of offenses into categories of felony, misdemeanor, and petty offenses, is not uniform and much of the survey responses were probably influenced by the officers' own independent knowledge of the state criminal code and the jurisdiction and practices of the local felony and misdemeanor courts.

Records are readily available in most felony cases and some serious misdemeanors but diminish with the age of the occurrence and/or seriousness of the charge. It should also be noted that "ancient" criminal offense information (that is, arrests occurring more than 15 years previously) is oftentimes difficult to obtain.

Recovery of information on juvenile offenses is also a problem and becomes more so as the offender grows older. Twenty-four of the 39 respondents responded that juvenile records are purged ranging from the time the defendant reaches his 18th birthday to an extreme of 20 years after the record is posted. Juvenile records will often be

purged by the time the defendant reaches his 25th or 26th birthday. In the responses to the purging practice and accessibility to records, it is not entirely clear if a distinction exists or was being made in juvenile records maintained by the local probation department and the official records of the juvenile court. In retrospect this question could have been better defined. In any event the survey suggests no reliable pattern except that the jurisdiction is centralized at the county level and requires more specific defendant information to begin a search. At least a few of the respondents offered the opinion, based on their view of current laws, practices, and trends, that in the future access to juvenile criminal records may be diminished.

The survey was unable to cover some western region districts having significant reservation caseloads. Of the 12 districts reporting Native American reservations within their boundaries, 8 have tribal courts. Six of these eight seldom have difficulty determining tribal records, while two reported they could sometimes recover these records. Two cautions are noted in regard to reliability and utility of tribal court information. Recordkeeping among tribal courts varies. Some tribal court records contain inadequate information. At least one respondent noted that tribal court adjudications are not always consistent with the practices found in the U. S. court system. For example, the record detailing an "adjudication" of a case involving an assault may not clearly cite a finding of guilt but may only report the accused is to compensate the victim monetarily. Disposition of serious crimes may thus be informal and even civil in nature. Tribal courts for the most part do not afford the opportunity for legal representation, yet most districts believe that inclusion of

this record is nonetheless critical in informing the court of the defendant's overall behavior.

Only eight respondents indicated a frequent need to obtain foreign offense history information and reported little difficulty in so doing. Most of these districts border Canada and have developed a good routine for record checks. A significant number of respondents noted they receive criminal record information from foreign countries after the presentence report. Much of this information involved countries other than Canada and came by way of Interpol.

Reliable, accurate, and timely prior record information results only from active and sometimes aggressive search by the probation officer. The most comprehensive results come from officers knowledgeable in the peculiarities of the local keepers of the record. Even then, ferreting out and making sense of the raw information can be time-consuming and, at times, the most trying task for the officer who perseveres in his assignment.

Mr. Chairman, this completes my formal presentation. I shall be pleased to respond to any questions the Commission may have.

A P P E N D I X A

APPENDIX A

PRIOR RECORD

Juvenile Adjudications

Essential Data:

Date, charge, location, disposition, and representation by counsel of all referrals to juvenile court by law enforcement officials.

Comment.--The probation officer should report all referrals to the juvenile court involving acts which would, if committed by an adult, constitute a crime. Status offenses, e.g., runaway, incorrigible, truant, beyond parental control, etc., are more properly described in the Personal and Family Data section.

Each entry, in chronological order, should include the date of referral, the name and location of the juvenile court, whether or not the juvenile was represented by counsel, the juvenile's age, the charge, and the disposition.

Example:

10/1/66	Shoplifting	Marion County	10/20/66:
Age 14		Juvenile Court	Informal Probation
		Salem, Oregon	Supervision (6 mos.)

Defendant was represented by counsel.

A subsequent paragraph may be appropriate to describe circumstances surrounding serious violations, the defendant's performance under supervision, or the defendant's institutional adjustment.

An offender's past is often highly relevant to the sentencing inquiry. Hence a court may consider an offender's juvenile history including any juvenile court dispositions. There are, however, several caveats to observe. **First, juvenile delinquency adjudications are not criminal convictions and should not be identified as such.** Second, even though state laws generally limit the use of juvenile records as evidence in any court proceedings, the weight of authority is that sentencing use is permissible. The presentence should also report, however, whether the juvenile record is a set-aside or sealed court record or whether such information is of a confidential nature. If a juvenile court disposition has been **destroyed**, then a probation officer should **not** refer to it in the presentence report.

Finally, **juvenile delinquency proceedings in which a juvenile was not afforded his right to counsel are invalid and may not be relied upon by the sentencing judge.** During the presentence investigation the officer should verify whether the juvenile had counsel or waived his right to counsel with respect to each juvenile disposition.

ADULT RECORD

Essential Data:

Date of arrest, charge, location, date and disposition of all arrests, and representation by counsel.

Include if Pertinent:

Detainers and details of charges lodged against defendant. Defendant's explanation of why he was involved in previous offenses. Codefendants in previous offenses. Details of arrests occurring subsequent to present offense. For serious offenses include a summary of the offense and prior probation, parole, or institution adjustments and dates.

Comment.--The identification record (fingerprint record) of the Federal Bureau of Investigation is a good source of information on the arrest record of a defendant. The FBI record is not always complete, and the probation officer should also make inquiry from state and local identification bureaus, police departments, and sheriffs' offices in those cities and communities in which the defendant has worked or resided. The defendant can also be a valuable source of knowledge and may provide information regarding missing dispositions or pending charges and whether or not he was represented by counsel.

The sixth amendment to the Constitution provides the right to counsel in all criminal cases, other than petty offenses where a fine is the only penalty. In 1972 the Supreme Court in U. S. v. Tucker (Appendix C) made it essential, for sentencing purposes, to determine whether or not the defendant was represented by counsel or had legally waived counsel in any prior convictions where the right to counsel applied. Only convictions in which the constitutional right to counsel was provided are valid. Invalid convictions may not be considered when determining the sentence. It must be stated in the report whether or not the defendant was represented by counsel. If it cannot be determined whether or not the defendant was legally represented, this circumstance must also be stated. (Generally, for offenses committed subsequent to the Tucker decision, the defendant should have been represented by counsel.)

Where the FBI fingerprint record does not give the disposition of a case, the probation officer should communicate with the law enforcement office which filed the print or the court in which the

case was tried to determine the outcome. Arrests without dispositions are not convictions and should be clearly identified.

Many times one offense will result in multiple entries on the fingerprint record. When this duplication occurs, make only one entry for each offense. If the defendant admits arrests which are not reflected in official arrest records, indicate they are by his or her admission.

If the defendant has an institutional record, ascertain the date of commitment and release, the institutional adjustment, and the present release status. When available, include information about prior probation or parole adjustment and dates of supervision.

All military courts-martial are reported in a Military subsection. Serious military offenses with a civilian counterpart may be cross referenced in the prior record section.

List all prior arrests in chronological order, including the date of arrest, age of the defendant, charge, arresting agency, court disposition, and the source(s) providing the information. If there are a number of sources, they may be included in the summary of the offense.

Example:

Age 27	4/6/69	Multnomah County	7/13/69:
	Burglary I	Portland, Oregon	3 years State Prison
		(Multnomah	released: 7/12/71;
		Sheriff's Office)	parole supervision
			expired: 7/6/72

Not determined whether represented by counsel.

According to the Sheriff's office report, sheriff's deputies were called by neighbors who had seen the subject break a back window and then enter the house next door. When the deputies arrived subject was apprehended while fleeing the premises with a camera, silverware, and jewelry.

According to his state parole officer, subject cooperated and satisfactorily completed his period of parole supervision.

For serious offenses summarize the circumstances of the offense. If the defendant has compiled a lengthy history of misdemeanor and/or traffic arrests, these may be summarized in a narrative form. Data should include the time period involved, the general type(s) of offenses, and the range of dispositions.

Example:

From 1968 to 1977, Mr. Jones was arrested five times for drunkenness and four times for minor traffic violations resulting in bail forfeitures or fines ranging up to \$50, and two jail terms of less than 10 days (both for drunkenness). He was represented by counsel for only three of the intoxication offenses.

Arrests subsequent to the present offense are to be recorded in the same manner as those set forth in the Adult section. They should be clearly labeled because they may reflect persistent problems. Further, the interest of other jurisdictions may have an impact on disposition of the present case.

A P P E N D I X B

APPENDIX B

Probation officers frequently experienced problems in gaining access to offenders' juvenile records

The Commission relies on the probation officer to furnish complete information in the presentence report on an offender's juvenile record because this information is used to calculate the individual's salient factor score. Thus, the absence or presence of this information in the presentence report can have a significant impact on the number of months an offender will serve in prison before release. In most judicial districts, probation officers are unable to obtain complete information on offenders' juvenile convictions because the records have either been destroyed or state and local authorities will not release the information. Without complete access to all juvenile records, the Commission cannot consistently calculate salient factor scores for all offenders.

When the Commission's hearing examiners calculate an offender's salient factor score, a juvenile record can adversely affect four of the seven categories. These categories include the number of prior convictions and commitments, age at behavior leading to first commitment, and probation or parole violation. Also, juvenile records can affect 8 of the 11 possible salient factor score points. If information on juvenile records were available, salient factor scores could change from very good to poor and result in the offender being placed in a more severe parole guideline range. For example, consider

a simple bank robbery case in which the offender had a serious juvenile record. If the information were not available, the parole guideline range would be 24 to 36 months. If it were, the proper parole guideline range would be 60 to 72 months.

In January 1981, we asked the Probation Division to contact all judicial districts to identify any problems experienced in obtaining access to juvenile records when preparing presentence reports. The results of this survey showed that 58 of the 90 judicial districts reported some problem in obtaining juvenile records. 1/ The two principal problems encountered by probation officers in gaining access to juvenile records are that records are destroyed after certain periods of time, or states and localities have placed prohibitions on releasing this information to anyone. The following examples illustrate some of the problems encountered by probation officers in obtaining access to juvenile records.

--The District of Connecticut reported that probation officers could not obtain access to any juvenile records on individuals who have reached their 21st birthday because all records are destroyed. In those cases where the defendant has pleaded guilty to a felony and is under 21, the probation officer may have access to juvenile records if the defendant signs a release form.

--The Middle District of Florida reported that its probation officers did not actively seek and use juvenile records because such records were supposed to be destroyed under Florida state law once an offender reaches 21 years of age. Also, this district reported that it was useless to make any inquiry concerning juvenile records because most defendants sentenced in this court were adults.

1/The Probation Division obtained responses from 90 of the 94 judicial districts.

- The Southern District of West Virginia reported that state law prevents anyone, including probation officers, from obtaining access to juvenile records. Also, this district reported that all juvenile records were destroyed after an individual reached the age of 18.
- The District of Wyoming reported that state law makes no provision or exceptions on the disclosure of juvenile records without the consent of the court. The chief probation officer also reported that several state judges interpret the law to mean that juvenile records cannot even be released to the Federal district courts or any law enforcement agencies.

The Commission's parole guidelines were established to promote consistency in parole release determinations. One essential ingredient for consistent parole release determinations is uniform access to the information necessary to formulate offenders' salient factor scores. When probation officers are unable to obtain access to juvenile records, the Commission will not have all the information it needs to properly and consistently implement parole guidelines. Thus, offenders with juvenile records may be treated inequitably depending upon whether probation officers can obtain access to this information and furnish it to the Parole Commission.

Our analysis of the 342 presentence reports included a determination of the impact that the absence of juvenile records might have on an offender's parole prognosis. We ignored all references to juvenile records and recomputed the salient factor scores to establish new parole prognosis ratings for the 342 cases. We found that in 97 cases, the parole prognosis improved by at least one category. For 104 cases, the elimination of juvenile records had no impact on the original parole prognosis. In the remaining 141 cases, there was no change in the parole prognosis because no juvenile records were reported in the presentence reports.

The following case illustrates the impact of the availability of juvenile records on an offender's parole release date.

--Ed had a serious juvenile record including five felony convictions and four incarcerations. Also, he violated parole as a juvenile. In October 1978, Ed was given a 10-year regular adult sentence in the Southern District of Ohio for armed bank robbery. The presentence report included information on Ed's juvenile record. Using the presentence report, the Commission's hearing examiners determined the offense severity as very high and his salient factor score as 1. The offense severity of very high and a salient factor score of 1 equates to a parole guidelines range of 60 to 72 months. In the event the probation officer had been unable to obtain access to the juvenile records, Ed's salient factor score would have increased to 8. The parole guidelines range for a very high offense and a salient factor score of 8 calls for 36 to 48 months. Thus, the absence of juvenile records could result in 2 to 3 years' difference in the amount of time served for the same offense.

Several chief probation officers told us that steps should be taken to make juvenile records available to probation officers preparing presentence reports for Federal district courts. One chief probation officer stated:

It would appear that many or most states have enacted very restrictive and overprotective laws on juvenile records which were intended for the protection of the juvenile who came into conflict with the law by immaturity and poor judgment, and deserves to have a "second chance" without that juvenile incident and record being held against him or her as a handicap in future life. I doubt that such legislative intent was to conceal and overprotect the juvenile who continues to violate the law and shows no sign of rehabilitation, but that has been one of the unexpected results of such laws. If the state laws would permit exception disclosures to other courts and agencies preparing presentence reports, such as Federal law under Title 18, Section 5038(1) and (2), a more evenhanded administration of justice could be administered for both the protection of the juvenile and society.

He also stated that he had recently testified on this matter before the state legislature in an attempt to get the state law revised.

APPENDIX C

TELEPHONE SURVEY QUESTIONNAIRE

District: _____ Officer: _____ Title: _____

1. Are adult records centralized? Yes 31 No 8
2. If yes, at what level? State 23 County 8
3. Do record searches require going to:
law enforcement agencies 36
juvenile courts 34
other courts 36
parole/probation offices 36
institutions 10
4. Do available records indicate if offense is felony or misdemeanor?
Usually 16 Sometimes 8 Rarely 15
5. Are reliable records available for misdemeanors and petty offenses?
Usually 17 Sometimes 21 Rarely 1
6. Are reliable records available for felony offenses?
Usually 38 Sometimes 1 Rarely 0
7. Are details of the offense available on misdemeanors?
Usually 17 Sometimes 14 Rarely 8
8. Are details of felony offenses available?
Usually 37 Sometimes 2 Rarely 0
9. Is representation of counsel or waiver of same available?
Usually 29 Sometimes 7 Rarely 3
10. Do records reflect offense of conviction as misdemeanor or felony?
Usually 23 Sometimes 9 Rarely 7
11. Is reliable information available as to probation violations/revocations?
Usually 27 Sometimes 11 Rarely 1
12. Are termination dates on probation terms available?
Usually 33 Sometimes 4 Rarely 2
13. Is reliable information available on method of release on incarcerated cases, i.e., parole, mandatory release, EGT?
Usually 34 Sometimes 3 Rarely 2
14. Is reliable information available on parole violations/revocations?
Usually 30 Sometimes 6 Rarely 3
15. Is information available on date of parole termination?
Usually 34 Sometimes 3 Rarely 2
16. Are juvenile records centralized? Yes 31 No 4

17. If yes, at what level? County - 26; State - 3; District (Circuit) - 2
18. Are reliable juvenile records available and accessible?
Usually 19 Sometimes 11 Rarely 5
19. Are juvenile records purged? Yes 24 No 9
Unknown 1
20. If yes, when? After 5 yrs. [1], 7 yrs. [1], 10 yrs. [2], 14 yrs. [1],
20 yrs. [1]. At age 18 [3], age 21 [7], age 26 [1].
Varies [3]. Unknown [4].
21. Does your district have Indian reservations? Yes 12 No 27
22. Do they have tribal courts? Yes 8 No 2
Unknown 2
23. Are records relating to tribal court convictions available?
Usually 6 Sometimes 2 Rarely 0
24. If so, what types: details of offense 7
conviction (judgments) 7
representation 5
other 0
25. What concerns do you have regarding use or lack of use of prior
record relating to offenses on the reservation?
1. None [3]
2. Not afforded opportunity for legal representation [4]
3. Records not completely reliable [2]
4. Tribal record is critically necessary despite inherent
problems [3]
26. Do you have regular need to check for foreign criminal record?
Yes 8 No 31
27. If so, what countries are usually involved?
Canada [4] Colombia [1]
INS [1] Nigeria [1]
Interpol [3] Central/South America [2]
28. Could you get accurate foreign records to meet dictation date?
Yes 4 No 2
29. What are the major difficulties in interpreting or utilizing foreign
records?
1. None [2]
2. Authenticating for evidentiary purposes [1]
3. Locating court of jurisdiction for disposition and
legal representation [4]
4. Not detailed enough [1]
5. Determining offense comparability [1]
6. Delay in receipt [1]

May 14, 1986

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

Dear Commissioner Wilkins:

Reference is made to your letter of April 29, 1986. In regard to your specific questions, for all adult arrests yielding convictions, records are centralized in New York.

As to the other questions, in necessary information. When more detailed information is needed, to the legal offices often necessary. Within the State outside of New York, there are many Court and Probation Offices in the State. The five counties within

LAST OF TESTIMONY FOR
THURSDAY'S HEARING. PLEASE
ADD TO YOUR BLUE FOLDER.

THANKS,
PAUL

Generally, the cases which result in convictions, this is some information, which went to the Police, it may be that

headquarters
involved.
information or
often
Court and
felonies,
Probation Offices
Court within

in cases
convictions,
involving arrest
the Police,

New York State

In New York City, there are central records for individuals institutionalized for felony convictions. misdemeanor offenses, but elsewhere in New York State the records are less centralized.

There are no centralized records available in regard to juvenile arrests and convictions, and for all practical purposes the only information available at all in regard to such matters is through the Probation Department in each County. Arrests occurring after the individual reached his 16th birthday are treated as adult arrests.

May 14, 1986

Accurate records are generally available and accessible on all criminal charges and arrests for adults which lead to convictions. The available records indicate clearly whether the offense was a misdemeanor or a felony. Recently, cases which result in dismissal or acquittal have been removed from the computerized central State filing system and access to such information is denied at both the Court and centralized police level. There is no problem in regard to determining whether or not a defendant was represented by counsel, inasmuch as such representation has been mandated in New York State for many years. Information is generally available on Probation sentences as to dates of termination and violations where revocations have resulted. On all felony sentences, accurate information is usually available and accessible as to the date and method of release from custody and the date of termination. Information is also readily available as to the dates of revocations, but information as to the details of the violations are usually available only if they occurred within the last few years.

In this District, there are no native American Indian reservations. We do have regular need to check criminal records in Mexico, Central America, South America, Great Britain, Europe, the Mid East, parts of Africa (Ghana, Nigeria, South Africa, Morrocco) India, Pakistan, Nepal, Thailand, the People's Republic of China, Hong Kong, Taiwan, South Korea and Japan. Response time, the amount of information provided and the usefulness of the information varies greatly, not only from country to country, but also depending on what method is used (that is, whether the request went to Interpol, the State Department, the Embassy of the country involved, etc.). Sometimes the significance of the case or the defendant to the country involved is a major determining factor as to whether or not useful information is provided. Interpreting and using the information once it has been provided is usually not a problem.

In regard to the issues raised in your April 25, 1986 letter, it is my opinion that it is the statutory maximum of the offense of conviction which should determine whether an offense is a misdemeanor or a felony. I know of no practical way of giving differential weights to more or less serious offenses. Although I have mixed feelings on the subject of including a decay factor, if one is included I believe that it should be ten years from the release from supervision to the beginning of the instant offense. I would apply a similar standard for juvenile offenses, but restrict those to be considered to only those offenses which would be offenses had the individual been an adult. I would suggest similar standards for military convictions in that only those convictions should count which would be for offenses prosecutable in State or Federal Courts had not the individual been in the military. All foreign convictions should count if the offense behavior would have been prosecutable had the individual committed the offense in the United States. As I have no experience with tribal convictions, I would not wish to offer an opinion on that subject.

May 14, 1986

I am quite comfortable with the current Parole Commission standards for weighing the fact that the defendant was on Probation or Parole at the time of the offense and the level of sentence aggravation for the number of convictions and periods of incarceration the defendant has. Although I feel very strongly that juvenile arrests and adult arrests which did not lead to conviction should be a part of the sentencing process*, since information in regard to these matters is often not available, it is difficult to include them in a guideline situation. However, I suggest that standards could be developed for use of such information when it is available as well as for the use of "ancient" prior record information if that has particular relevance to the sentence at hand.

Very truly yours,



JOEL WEBER
U.S. Probation Officer

*See Page Three A

(JW:map)

I would like to offer three examples of situations where the use of dismissed cases would be relevant in determining sentence. All three are actual examples.

Example #1: Defendant A was arrested for selling \$30.00 worth of Cocaine to a New York City Police Officer acting in an undercover capacity. He entered a plea of guilty to this offense on 1/29/86. On 3/1/86, he was arrested with others for openly hawking Cocaine. That case was dismissed when laboratory analysis revealed that the vials containing a substance which appeared to be Cocaine in fact contained no controlled substance. The arresting officer on the 3/1/86 matter indicated that the defendant had told him that he had purchased the Cocaine at that location and had not been selling it. The defendant had made a similar claim before the Court prior to entering his plea of Guilty on 1/29/86. The 3/1/86 arrest was dismissed prior to the date Defendant A was scheduled to be sentenced. During the course of the pre-sentence investigation, he denied current involvement with either the sale or abuse of drugs.

Example #2: John Gotti who has been frequently publicly identified as the reputed head of the largest organized crime family in the New York City area is currently facing Racketeering charges in the Eastern District of New York. During March 1986, prior to jury selection in the Federal Court, Gotti went to trial on local assault and robbery charges. The alleged victim in that case first did not appear in Court and then stated that he could no longer identify any of his attackers. The charges against Gotti were dismissed. It seemed quite apparent to anyone watching interviews with the alleged victim on television that he had been intimidated. In fact, on 5/13/86, the Honorable Eugene Nickerson in the Eastern District of New York revoked Gotti's bail, in part based upon testimony at a hearing which convinced the Court that the witness/victim in the assault and robbery case had been intimidated.

Example #3: On March 15, 1977, Leroy "Nicky" Barnes was arrested by federal authorities in New York and charged with the distribution of massive amounts of Heroin. Prior to his conviction later that year, a story regarding Barnes appeared in the magazine section of the New York Times with a picture of Barnes occupying the front page of that magazine section. He was described in that article as "Mr. Untouchable", in part because during the seven years prior to his federal arrest, he had seven cases against him either dismissed or result in acquittals. If the Court had only been allowed to consider prior convictions and periods of imprisonment or incarceration stemming from those countable convictions and the period for decay was judged to be from the time of last release to the present arrest, then Barnes would have had guidelines based upon no prior criminal record. In fact, prior to 1965, Barnes had six convictions, and during early 1966 he was convicted on Heroin charges and sentenced to fifteen to twenty years confinement. Although this was later overturned on appeal, Barnes was in custody from early 1966 to mid 1970. It should also be noted that while on Probation or Parole prior to 1965, Barnes had a number of revocations which lead to his return to prison. Some of these were for technical matters, and some of these were for new convictions. In the opinion of the undersigned, revocations which lead to incarceration or imprisonment of more than thirty (30) days should be counted as convictions.

(JW:map)

RECEIVED MAY 19 1986

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

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C. RAYMOND MARVIN
Executive Director
General Counsel

May 15, 1986

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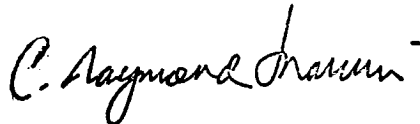
The Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, DC 20004

Dear Judge Wilkins:

Thank you for keeping this Association informed of the work of the U.S. Sentencing Commission and for inviting the Attorneys General to provide their views on the effect a defendant's criminal record should have in sentencing. We will continue to keep our membership apprised of your requests for information, and to encourage them to express their views directly to the Commission.

We look forward to receiving further information about the Commission's activities, and we hope we can continue to be of service. With best personal regards, and

Sincerely,



C. Raymond Marvin

OFFICE OF THE
PROBATION OFFICER
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
719 13TH ST., N.W.
WASHINGTON, D.C. 20005-3982

WILLIAM H. WEBB, JR.
CHIEF PROBATION OFFICER

May 19, 1986

U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1200-A
Washington, D.C. 20004

Attention: Offender Characteristic
Section

MEMORANDUM

FROM: Tobin P. Sullivan
U.S. Probation Officer

SUBJECT: Offender Characteristics

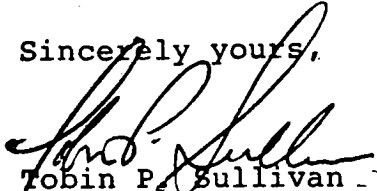
The following is provided as a response to the issue of "offender characteristics", specifically, the impact of a defendant's prior criminal record upon the ultimate sentencing disposition. Recognizing the definitional disparity among various states, and between states and the federal system concerning the issue of felony and misdemeanor offenses, for guideline purposes it is my estimation that the determining factor should be the nature of the particular instant offense. The more severe offense behaviors would typically include crimes of violence, fraud of an extended nature, offenses jeopardizing the United States, and major drug violations. Additionally, mitigating or aggravating circumstances in a particular case would justify a decision to increase a severity rating. The statutory maximum for a particular offense should be commensurate with the offense severity. The length of a particular sentence imposed regarding an individual would also take into consideration various other factors including salient elements of an individual's profile such as employment background, drug history, etc. With regard to the weight of prior felony convictions, although all prior convictions should be considered in establishing a final disposition, it is my belief that felony convictions should be weighted more seriously taking into consideration

all convictions is important, whether felony or misdemeanor, particularly with a view toward establishing a pattern of behavior for an extended period of time and in attempting to identify causative factors leading to specific antisocial behaviors. For the purpose of pattern identification, I would discourage the use of the "decay factor" when considering a defendant's prior criminal history. This is particularly important when it is adjudged that an individual has become involved in serious offenses of a similar nature. Additionally, juvenile offenses should be considered in establishing sentences for adult offenders particularly in such cases where the charges as a juvenile are of a serious nature and further amplify a pattern of arrests behavior. However, the Commission may wish to apply the decay factor to certain status offenses, e.g., runaway, incorrigible, truant, beyond parental control, etc.

Concerning the Commission's handling of military convictions, I would strongly suggest that all serious military offenses with a civilian counterpart be included in an individual's prior record. Additionally, serious foreign and tribal convictions should also be handled in a similar manner. Although we would certainly recognize that arrests alone do not constitute criminal convictions, they are an essential element of an individual's profile as numerous arrests without convictions very often serve to identify an individual's level of manipulation and criminal sophistication. Finally, the occurrence of an arrest of an individual during a period of community supervision, either probation or parole, is quite significant in this officer's estimation. Any arrest during a period of supervision is a strong indicator of an individual's apparent lack of coping skills and general readiness to begin a favorable long-term adjustment in the community.

Again, I appreciate this opportunity to provide the Commission with my thoughts on the topic of prior record and offender characteristics prior to the next hearing. Unfortunately, I will be unable to attend the hearing in view of previous commitments.

Sincerely yours,


Tobin P. Sullivan
U.S. Probation Officer
Phone: 633-0440

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA
PROBATION OFFICE

BURTON L. MATTHIES
CHIEF PROBATION OFFICER

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FTS 541-5223

May 16, 1986
Lincoln

Mr. William W. Wilkins, Jr.
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: April 25, 1986 Letter

Dear Mr. Wilkins:

My experience has been that actual incarceration, regardless of whether or not the offense to which the person finally pled, was a felony or misdemeanor is, while still far from perfect, the best indication of the seriousness of prior offenses. With the exception of offenses involving serious physical violence or major drug dealing, probation with no jail time is by far and away the the most popular sentence in most jurisdictions. In that light, the imposition of any jail time at all for a first offense would indicate that the offense was serious.

While the placement on probation without any serious negative sanctions can, of course, reflect a judge who is "faint of heart", I think by and large such a sentence reflects mitigating circumstances and/or a perception that the person has "learned his/her lesson and deserves another chance." Since we are discussing prior offenses our hypothetical malfeasant obviously didn't "learn his/her lesson". To my mind, the mere existence of a prior offense, regardless of whether it was a felony or misdemeanor, is serious, and the existence of more than one offense, regardless of whether they were felonies or misdemeanors, strikes me as a geometric progression of the measure of an individual's disinterest in remaining crime-free.

How should prior felony convictions should be weighted? I believe that, for purposes of establishing guidelines, the mere existence of prior felonies should be viewed with a good deal of negativity regardless of the nature of the offense. Perhaps the guidelines should not try to hone this to a fine edge, but rather leave some discretion with the sentencing court, with clearly stated criteria guidelines which would allow a court to sentence a person either below the guidelines or above the guidelines. Those conditions justifying a sentence below the guidelines could include such items as the individual's completion of in-patient treatment for chemical dependency, a viable follow-up treatment

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plan, a specific plan to make the victim whole, and some realistic appraisal that the plan could succeed. Decisions above the guidelines should be allowed if the pattern of prior felony offenses reflects an ongoing propensity towards violence against others or a continued involvement in the same type of criminal activity, participation in which the defendant has vociferously assured prior sentencing jurisdictions would cease.

I do not believe a "decay factor", should be considered unless the person has remained virtually free from contact with law enforcement authorities for a period of ten years from the date of release from the last period of probation supervision, parole supervision, or incarceration.

What weight should be given to prior juvenile offenses? I believe that juvenile offenses which involve placement in a custodial setting should be treated just as seriously as any prior adult offense. Perhaps more so, since the propensity towards probation in juvenile cases is even more pronounced than in adult cases. The same timelines that I noted for decay factor in adult offenses, it would seem, should apply in juvenile matters.

Military convictions pursued by a Judge Advocate have never appeared to me to differ to a great extent from their civilian counterparts and should probably be viewed in the same light as civilian convictions. I have had no experience with foreign convictions but would not believe that convictions for offenses defined by any democratic society as serious enough to merit incarceration should be ignored. Tribal offenses should perhaps be considered if the offense for which the individual is being sentenced is an offense occurring on the reservation.

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I would have a great deal of problem with giving any weight whatsoever to previous arrests in and of themselves. While they give a supervising officer a good picture of the individual's propensity towards negative contact with law enforcement, they have obviously not given a judicial officer or prosecutor grounds to convict.

The fact that the person was on probation or parole at the time of the offense is perhaps one of the gravest transgressions and clearest indication that the individual is not interested in remaining crime-free. To me, it merits removal of the violator from society for a period of time. I think it should be given great weight and be regarded as a prima facie case for incarceration with a period of court-ordered supervision after release from incarceration. I think it would be safe to say that anybody who has had two felony convictions within a two-year time period, or three felonies within a five-year time period is a prime candidate for twice the sentence that would otherwise be imposed. Once again, this might be an area where the Sentencing Commission can set down guidelines for the sentencing court to use in finding it to be appropriate to sentence someone "above the guidelines" without being subject to appeal by defense counsel.

The last paragraph mentions your grab bag of eleven specific factors for the commission's consideration. Since volumes have been written on these subjects by various criminologists, it would be presumptuous to distill all of that wisdom into anything brief enough for anybody to read, the presumption being that anybody would be so inclined to condense it or read it. Obviously, to the extent that a person has education and/or vocational skills which make gainful employment more likely, the person can be seen as a better candidate for probation than someone who has no previous employment history and few prospects of establishing one. To the extent that a person has community

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ties and family ties and responsibilities, they can be regarded as better probation risks than a transient. Chemical dependency is certainly a contributing factor in a majority of criminal violations. Someone who in overcomes their chemical dependency in an established program and who continues to address that dependency should at least be considered for "street" supervision. These positive factors should perhaps support the sentencing court making a decision "below the guidelines." If these positive factors manifest themselves during the course of the presentence investigation, well and good. The absence of these factors or a significant portion should then perhaps merit a decision above the guidelines.

I find myself deferring to and thinking more and more often of the possibility that the sentencing court be allowed wide discretion in making decisions above and below the guidelines. This is because I suspect that no commission or bureau, regardless of how talented is ever going to be able to take into consideration all of the events surrounding a defendant's life, the offense, and how they have blended together to bring the person before the sentencing court. Many people in their thirties, with a pathetic prior record, have finally decided that it is time to "retire" from criminal activity and to deny them the opportunity would perhaps be a costly mistake. Obviously, making decisions below the guidelines is more justified when the sentencing court can cite the positive presence of these eleven factors and the likelihood that taken together they can insure that the person would be able to enjoy a successful period or probation supervision. The converse is true if all of these factors are absent and would speak for sentencing above the guidelines and in imposing a period of court-ordered supervision after discharge from prison. The person can then be monitored and returned to prison if they have not yet seen fit to refrain from criminal activity or from participation in the activities which eventually lead to criminal prosecution.

Respectfully submitted,

William R Beach

William R. Beach
U. S. Probation Officer

WRB:mf

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National Association of Criminal Defense Lawyers

May 19, 1986

Mr. Paul K. Martin
Communications Director
United States Sentencing Commission
National Place, North Office Tower
14th Floor
1331 Pennsylvania Avenue, N.W.
Washington, D. C. 20004

RE: NACDL Comments Concerning Offender
Characteristics and Treatment of
Prior Record

Dear Mr. Martin:

Pursuant to our telephone discussion, enclosed please find a copy of the NACDL position paper on offender characteristics and the treatment of prior criminal records. These comments are respectfully submitted for consideration by the full commission in connection with a public hearing to be conducted May 22, 1986. Although a representative of this association will not be testifying, the comments are respectfully submitted to assist the Commission in carrying out its statutory mandates.

If I can be of further assistance, please do not hesitate to contact me.

Very truly yours,

BIERMAN, SONNETT, SHOHAT,
& SALE P.A.

BENSON B. WEINTRAUB
Vice Chair, NACDL
Sentencing Commission
Liaison Committee

BBW/jlm

cc: Alan Ellis, Esquire, Chairman
NACDL Sentencing Commission Liaison Committee
Marcia G. Shein, Esquire

**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
POSITION PAPER ON OFFENDER CHARACTERISTICS
AND THEIR USE IN DEVELOPING SENTENCING
GUIDELINES AND POLICY STATEMENTS**

Submitted by:

Marcia G. Shein, President
NATIONAL LEGAL SERVICES, INC.
Sentencing and Prison Alternatives

**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
POSITION PAPER ON OFFENDER CHARACTERISTICS
AND THEIR USE IN DEVELOPING SENTENCING
GUIDELINES AND POLICY STATEMENTS**

Introduction

This is the second of several position papers that the National Association of Criminal Defense Lawyers intends to submit to the Sentencing Commission. These position papers are an effort to encourage the Commission to consider what NACDL views as relevant factors for the establishment of the eventual guidelines to be used in the sentencing process.

One of our primary concerns is the use of offender characteristics in the application of sentencing alternatives. In reviewing the individuals who will be providing testimony to the Commission orally, and reviewing some position papers already presented concerning offender characteristics by the Federal Legislative Committee, it appears that much is being focused on the prior record of the offender in determining guidelines pursuant to offender characteristics.

It is our position that in viewing the prior record there must be additional considerations applied in determining periods of incarceration.

Classification of Offender Characteristics

Offender characteristics have long been a problem of statistical studies. Several instruments of measurement have been used by the Parole Commission in an attempt to evaluate offender characteristics for the purposes of establishing parole release guidelines. These offender characteristic instruments have been identified as the U.S.D.C. 75 Scale, the Revised Oregon Model, and the traditional Salient Factor Score evaluation used by the Parole Commission at present. (See EXHIBIT A)

Statistical studies have shown a tendency towards being able to predict recidivism versus non-recidivism. To eliminate the weighted content of these statistical studies, it may be appropriate to pursue reviewing offender characteristics in some basic categories, leaving the additional information to be submitted to court at the time of sentencing pursuant to 18 U.S.C. 3577.

No limitations shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Prior record will automatically be a factor for the court to consider in determining an appropriate disposition. However, an investigative process should

develop to ensure the court has as much information as possible about an offender, background information, characteristics of personality, and other interested areas of the offender's life to determine appropriate sanctions.

The sentencing proceeding in and of itself will become a critical hearing wherein a number of things must be resolved related to an offender.

More focus should be placed on the offender's background and not simply the crime as it relates to three specific areas: (1) first offender status; (2) offense severity; and (3) age of the offender.

Considerations of Offender Characteristics When Determining First Offender Status

The most lenient sentence should be imposed on the first offender. First offender status should bar consideration of any offenses that relate to moderate traffic violations, citations or minimal fines for misdemeanor conduct offenses. The difference in weighing that information negatively versus positively would be the consecutive nature of the minor violations of the law. A numerical value can be placed on the number of minor and major violations of the law that would interfere with first offender status.

The detailed background information submitted to the court through prosecution and defense counsel should enhance any first offender considerations in determining how much mitigation should be applied to the guidelines. First offenders should be considered not only for the bottom of the guidelines but relevant to their full background reports, decisions below the guidelines, and the implementation of alternatives to incarceration.

The prison system is inundated with first offenders of non-violent crimes who need to be placed back in the community.

Though the United States attempts to focus on particular areas of crime, thus enhancing sentences in those areas of crime for a particular political period of time, it is not necessary in all cases to enhance sentencing simply because it is a national problem. The importance is weighing the background of the individual in comparison to the crime and the potential for the individual to be placed back into the community without further risk of recidivism. This can be weighed through a background report as well as the standards applied to first offenders being given every opportunity to prove themselves to the community, the court, and other interested parties.

The emphasis of the sentencing guidelines for the purposes of offender characteristics should be first offenders versus non-first offenders. The established guideline, accordingly, will then allow the court flexibility pursuant to other information that will be submitted at the time of sentencing. What happens when this information and the first offender status are combined is that the court begins at the bottom of the guidelines with a particular offense severity rating and determines whether or not there is a reason to go below the guidelines or to use a sentence of an alternative to incarceration.

It is at this critical moment that the court has an opportunity to rectify some of the overcrowding conditions in the prison system and, therefore, should utilize every possible element available of the offender's characteristics to support a decision for an alternative to incarceration.

A number of researchers over the past five years have determined that, "There is a strong tendency to over-classify and over-incarcerate; yet incarceration provides an answer for a very small percentage of the total population of offenders," (James H. Jay, "State Prisons on Trial," State Legislation, volume 2, February 1979, page 5).

In addition, other researchers have identified that "Even minor reductions in the sentence length of a convicted offender could make a substantial difference in the inmate population . . ." (James Self, "A Review of Sentencing Practices and Options," Georgia Department of Offender Rehabilitation, March 1982).

Offense Severity

The Commission has already reviewed testimony and documents concerning offense severity ratings and a method of determining same. The offense severity rating standard should be adjusted with two specific interests in mind:

1. The **culpability** of the offender (position in the offense as compared to co-defendants).
2. The **term of the involvement** of the offender in the offense (incidental offender versus term conspirators).

The determination of the above two factors can be related to the investigative process of the offense information as submitted to the court through the government pre-sentence report. The relationship of the offender with the offense information will be critical in determining whether or not the offender is an **incidental**

offender and would be classified as a first offender. Technically, even term offenders would be considered first offenders if this was the only offense in which they were arrested. However, that is where the importance of the full offense information can clarify the difference between first offenders (incidental offenders) versus term offenders. The term offender should not be given first offender considerations and should be held accountable for the upper range of the guidelines. The background information is the key to determining this in conjunction with the offense severity rating and whether or not the lower portion of the guidelines should apply or an alternative to incarceration should apply in the sentencing process.

Age of Offender As it Relates to
Offender Characteristics

The Youth Corrections Act was abolished in 1984 with the passage of the Comprehensive Crime Control Act. It is our contention that youthful offenders should be given every possible consideration for minimal sanctions in regard to incarceration. The youthful offender has long been known to recover from difficulties in a shorter period of time than might be evidenced by the adult

offender for an offender twenty-five years of age or younger with first offender status and peripheral role status in an offense, minimal incarceration, if any at all, would be appropriate. Again, this particular offender characteristic can be applied to the other offender characteristics as previously mentioned in providing a solid core basis in determining how offender characteristics would fit with the offense severity rating. Offender characteristics should be applied in relationship to the minimum and maximum sanctions under the guidelines that will be used for determining a sentence of above or below the established guidelines.

Prior Offender Status

In answering the Commission's questions, it is apparent that the Commission is addressing the issue of prior record from the age-old approach of considering the prior conviction as crucial in terms of sentencing. Though it is a major relevant factor, it is not the only factor. The purpose of our presentation is to indicate that these other factors must be taken into consideration with the offender status in terms of prior convictions in determining effective sanctions. More importantly, we

should reverse our thinking process and come from the first offender status versus the non-first offender status in determining what sanctions should be applied. Hopefully this fresh approach from the more positive perspective will lend itself to a more viable standard for determining appropriate sentences.

The Pre-Sentence Investigation As It Would Support
Offender Characteristics Relating to Prior Record

Rule 32 presently requires a specific procedure by the district court during a sentencing hearing to determine if there is any challenge to the accuracy of the pre-sentence report. The importance of the accuracy in the pre-sentence report as it relates to the offense information has been well litigated. It is important that the pre-sentence investigation be accurate as it relates to any prior record as well as the instant offense to ensure that the problems of offender characteristics and offense severity are clearly resolved prior to sentencing and before incarceration.

The premise of the laws which first established the importance of the accuracy of the pre-sentence investigation and the right to due process comes from Townsend v. Burke, 334 U.S. 736, 92 L.Ed. 1690 (1948), and

United States v. Tucker, 404 U.S. 443, 30 L.Ed. 2d 592 (1972). Material inaccuracies have long been a problem in the sentencing process (see United States v. Fatico, 458 F.Supp. 388 (D.C. N.Y., 1978), aff'd at 603 F.2d 1053.

The importance of maintaining quality control over the pre-sentence investigation concerning prior record and offense information is imperative. The importance cannot be over-emphasized as it will represent stability in the guidelines for offense severity and offender characteristics. Recent GAO reports have commented on the lack of quality control from the judicial district pre-sentence investigation reports and find that this very investigation has been the most litigated and damaging to an offender when it is proven to be materially inaccurate. It is our belief that a sentence consistent with the fair administration of justice and due process cannot be based upon spurious, inaccurate, or ruinous information of a material nature (see Townsend v. Burke, supra). Furthermore, as expressed in U.S. v. Malcolm, 432 F.2d 890, (2nd cir., 1970), misinformation or inaccuracies which are materially untrue regarding a prisoner's prior record, or material false assumptions as to any facts relevant to sentencing, "renders the entire sentencing proceedings invalid as a violation of due process." The

actual sentence length (accountability/punishment) is the end product of many decision makers (often mutually exclusive of each other's thinking). As observed recently by the Georgetown Law Journal, "12th Ed. Review of Criminal Procedure, U.S. Supreme Court and Court of Appeal" (1981-82), several parties play a role in determining a sentence.

The prosecutor initially affects the sentence by deciding what charges to bring against the defendant, by engaging in a plea bargain and by making sentencing recommendations.

The probation officer who conducts the pre-sentence investigation and prepares the pre-sentence report affects the sentence through his control of information available to the judge about the defendant.

The legislator determines the range of sentences available to the sentencing judge, the judge selects a sentence within that range . . .

Since the PSI report serves as the "guiding light" for decision making illumination by the court system in determining the actual length a defendant serves in prison, it is imperative that the **accuracy** of offense information and prior record be clear before determining a guideline range or a sentence to be imposed.

The Administration Office of the U.S. Courts, Division on Probation, "PSI Report," Publication No. 105, speaking to the issue of offender characterization and hearsay information cautions the PSI investigator to

"verify the facts contained in the pre-sentence investigation report." Whenever a disclosure of information sources is appropriate, such sources are to be shown in the body of the report . . . and clearly label any unverified information. Immeasurable harm may result from unverified information presented as "fact" (page 5). Further, the investigator is admonished, "labeling of a defendant is to be avoided because it connotates varying perceptions of the defendant which may not be accurate." If a defendant is termed a "ring leader" or a major "organized crime" figure, the source, such as the investigating officer, must be revealed or the facts from which such conclusions is derived is clearly set forth. If the defendant challenges the veracity of information, the court can determine its accuracy or discount reliance on it in sentencing. These are imperative considerations that the Sentencing Commission must review in determining appropriate methods of handling the guidelines and the sentences the courts would be allowed to impose pursuant to same. It is this, the very essence of the PSI, that documents the basis for the Sentencing Commission's guidelines. It also will document for the court the appropriateness of the variables that will be applied to

those guidelines as to prior record and offense information.

Impact of a Defendant's Prior Criminal
Record on Sentencing

In answering the Commission's questions, we have identified them in numerical order as follows:

1.

The largest issue still being addressed by researchers is the issue of misdemeanor and felony offenses from state to state. The disparity issue is a critical factor in their considerations. There must some standardized method of handling the definitional terms of the offenses. It appears that if the offense if a state offense that the felony misdemeanor standard of the state should be applied to any considerations concerning same. In the federal system, the system is somewhat standardized and therefore would not present a disparity question when viewing prior federal offenses in relationship to the prior record of the offender.

2.

Prior convictions should be weighed on the type of offense committed as it relates to the instant offense before the court. Is it an indicator of behavioral

problems in the community over the long term, or is it an indicator of short-term difficulties that led to the instant offense. A numerical value on the number of prior offenses is a critical consideration since more than one or two prior offenses in a short term would indicate some serious changes in a particular offender's pattern of behavior in the community and could be considered a warning sign for the present offense situation. The only weight that should be applied to the prior offenses is the standard weight as it would relate to the instant offense. Violent crimes should be viewed as the most serious.

The decay factor should be any offenses committed 10 years or more before the instant offense. The decay should be determined by the date the offense was committed or the date of arrest. All subsequent actions from those two dates are indicative of the punishment results of the offense beginning its process.

3.

Prior juvenile offenses should be considered when they are closely related to the age of the offender. Status offenses should not be considered in determining prior record information. Status offenses are those which might be classified as runaway, truancy, etc. They should not be given the same weight as adult convictions unless

those convictions are at the term of an individual's change from juvenile to adult. The short-term range should be approximately 3-5 years from the changeover process. The severity of the juvenile offense might be a consideration but still within the parameters of the 3-5 year changeover process. In other words, the connection between the juvenile offense and the adult offense should be within a 3-5 year range. The decay factor would be after 3-5 years depending on the age of the offender. This would be most effective after the age of 21.

According to a report to the Nation on Crime and Justice from the U.S. Department of Justice's Bureau of Justice Statistics, October 1983:

Most referrals to juvenile court are for property crimes, but 20% are for status offenses.

4.

The Commission should handle military convictions in the same fashion as prior convictions. There are still offenses against the government in some form. With respect to foreign convictions or tribal convictions, there is a question as to veritability of the reporting process. If the prior conviction can be handled with strong documentation and not simply statement of arrest through the inter-poll reporting process, then it can be

considered. Those offenses being considered should have like comparisons to the instant offense.

5.

A frequent misapplication of prior arrest records result in a PSI when arrests are taken as an indication of guilt in a criminal matter.

Only those arrests which resulted in a furtherance of the charge should be applied. Despite the fact that previous arrests indicate contacts with the criminal justice system, they cannot be considered as an indication of guilt and therefore should not be so applied in a PSI unless adjudication resulted from the rest.

An offender's prior status on probation or parole should be one of the highest considerations for offender characteristics in determining the ability to remain in the community. It should be weighed most seriously in comparison to all the prior record information considered. It indicates that the offender has not received the message intended from the original case and disposition which placed that person on probation or parole. It is more important to increase the sanctions for individuals who are under supervision at the time of a secondary offense than for those whose offenses are considered prior and terminated.

Sentence aggravation as related to prior record has a number of variables that need to be applied. There is a great deal of variability based upon what type of prior offenses have been committed, how many, and how long ago. The most simplistic manner of determining sentence aggravation based on prior record would be to categorize between misdemeanors and felonies and violent and non-violent offenses within those two categories. The other element would be the number of prior offenses and the pattern they identify in terms of consistency.

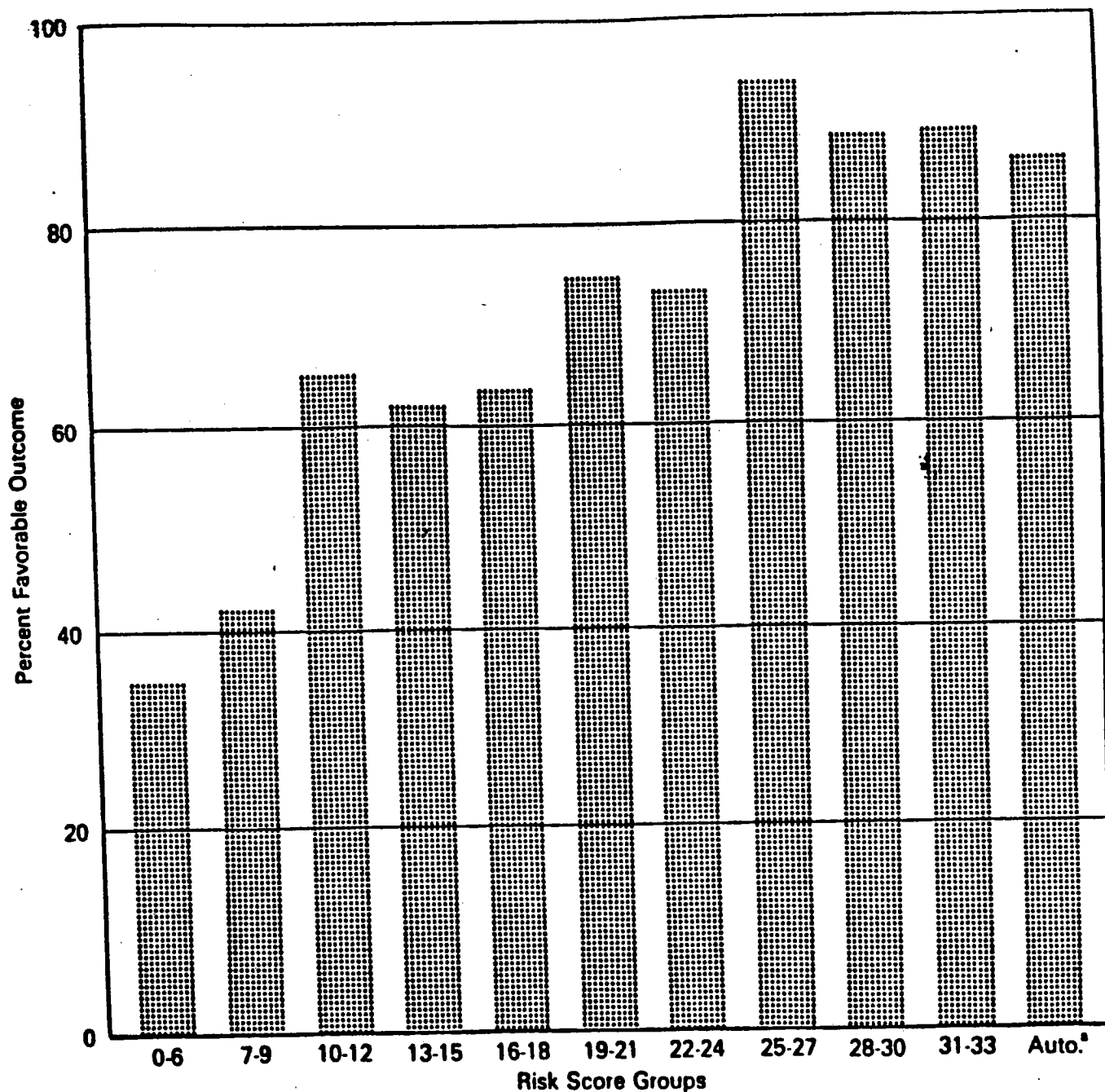
Submitted by,

Marcia Shein gg.

Marcia G. Shein, President
NATIONAL LEGAL SERVICES, INC.
Sentencing & Prison Alternatives

EXHIBIT A

USDC 75 Model **Risk Score Groups by Percent Favorable Outcome**



^aIt should be noted that scores were not computed for cases meeting the automatic category assignment components of these two models. The two models classified these offenders as minimum risk cases.

NOTE: "Favorable Outcome" is defined to mean that the offender was not arrested or convicted for a new offense while under parole or probation supervision, did not commit a technical violation, nor was the offender's parole or probation revoked.

This table is based on a national sample of approximately 1,324 probation and parole supervision cases drawn from eight different U.S. Court Districts. The sample was drawn in 1974 and data collection was completed in 1978. The period of followup therefore covers persons placed on either probation or parole who were followed to the termination of their supervision. Approximately one-third of the sample were parolees.

SOURCE: "A Validation and Comparative Evaluation of Four Predictive Devices for Classifying Federal Probation Caseloads" (Washington, D.C.: Federal Judicial Center, January 1981).

U.S. PROBATION OFFICE FOR THE DISTRICT OF COLUMBIA

U.S.D.C. 75 SCALE

To Obtain Raw Scores:

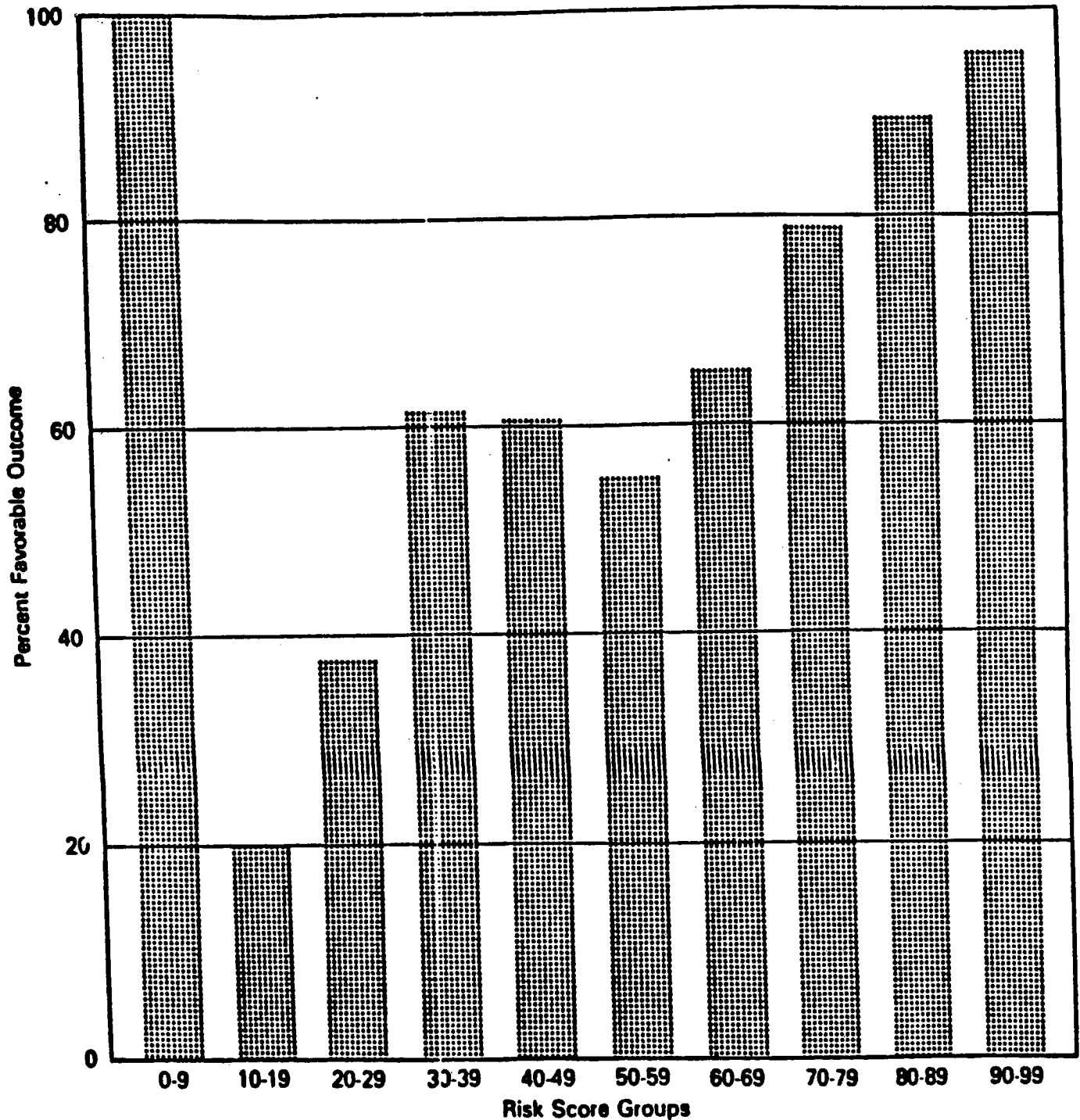
Instructions: If the client has a high school degree (exclude GED) and no history of opiate abuse, check the box to the right, ignore items A through E, and place the client in the Excellent Risk Category Automatic

Otherwise use items A through E to determine the rating.

<u>Characteristics:</u>		<u>Points</u>	
A.	28 years of age or older at time of instant conviction.....	7	_____
B.	Arrest-free period of five (5) or more consecutive years (juvenile and adult arrests).....	4	_____
C.	Few prior arrests (none, one, or two).....	10	_____
D.	No history of opiate usage	9	_____
E.	At least four (4) months steady employment prior arraignment on present offense.....	3	_____
Sum of points			_____

Name _____ Reg. No. _____

Revised Oregon Model **Risk Score Groups by Percent Favorable Outcome**



NOTE: "Favorable Outcome" is defined to mean that the offender was not arrested or convicted for a new offense while under parole or probation supervision, did not commit a technical violation, nor was the offender's parole or probation revoked.

This table is based on a national sample of approximately 959 probation and parole supervision cases drawn from eight different U.S. Court districts. The sample was drawn in 1974 and data collection was completed in 1978. The period of followup therefore covers persons placed on either probation or parole who were followed to the termination of their supervision. Approximately one-third of the sample were parolees.

SOURCE: "A Validation and Comparative Evaluation of Four Predictive Devices for Classifying Federal Probation Caseloads" (Washington, D.C.: Federal Judicial Center, January 1981).

**U.S. Probation Office for the District of Oregon
REVISED OREGON MODEL**

To Obtain Raw Score:

<u>Characteristics:</u>	<u>Points</u>	
A. Arrest free period of five or more consecutive years	12	_____
B. No history of opiate usage	9	_____
C. Few periods of incarceration (none, 1, or 2)	8	_____
D. Most recent conviction does not involve checks, forgery, or burglary	7	_____
E. No previous probation or parole failures . .	7	_____
F. No family criminal record	6	_____
G. No alcohol involvement	6	_____
H. Presently employed or productively occupied .	6	_____
I. No history of drug abuse or extensive use of marijuana	5	_____
J. First arrest occurred after the age of 14 . .	5	_____
K. Twelve months steady employment within one year prior to <u>arraignment</u> for present offense	6	_____
L. Four to eleven months steady employment prior to <u>arraignment</u> for present offense. (If given 6 pts. on item K, add 4 pts. for this item)	4	_____
M. Meaningful family ties	5	_____
N. Favorable living arrangement	5	_____
O. High school graduate or equivalency	4	_____
P. Few prior arrests (none, 1, or 2)	4	_____
Subtotal . . .		_____
Q. If the offender's present crime involves one of the following, deduct 25 points from subtotal:		
1. Any crime of violence		
2. Sale of "hard" narcotics for profit		
3. Extortion		_____
Total points . .		_____

NAME _____ REG.NO. _____

S A L I E N T F A C T O R S C O R E (SFS 81)

Item A: PRIOR CONVICTIONS/ADJUDICATIONS (ADULT OR JUVENILE)

None = 3
 One = 2
 Two or Three = 1
 Four or More = 0

Item B: PRIOR COMMITMENT(S) OF MORE THAN THIRTY DAYS
 (ADULT OR JUVENILE)

None = 2
 One or Two = 1
 Three or More ... = 0

Item C: AGE AT CURRENT OFFENSE/PRIOR COMMITMENTS

Age at commencement of current offense
 26 years or age or more = 2
 20-25 years of age = 1
 19 years of age or less = 0

***Exception: If five or more prior commitments of more than
 thirty days (adult or juvenile), place an "X" here _____
 and score this item = 0

Item D: RECENT COMMITMENT FREE PERIOD (THREE YEARS)

No prior commitment of more than thirty days (adult or
 juvenile) or released to the community from last such
 commitment at least three years prior to the commence-
 ment of the current offense = 1

Otherwise = 0

Item E: PROBATION/PAROLE/CONFINEMENT/ESCAPE STATUS VIOLATOR
 THIS TIME

Neither on probation, parole, confinement, or escape
 status at the time of the current offense; nor com-
 mitted as a probation, parole, confinement, or escape
 status violator this time = 1

Otherwise = 0

Item F: HEROIN/OPIATE DEPENDENCE

No history of heroin/opiate dependence ... = 1
 Otherwise = 0

TOTAL SCORE

Note: For purposes of the Salient Factor Score, an instance of criminal
 behavior resulting in a judicial determination of guilt or an admission
 of guilt before a judicial body shall be treated as a conviction, even if
 a conviction is not formally entered.

RECEIVED MAY 19 1986

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
PROBATION OFFICE

PAUL E. PANTHER
CHIEF PROBATION OFFICER
P. O. BOX 870
HAMMOND, INDIANA 46325

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May 12, 1986

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FORT WAYNE, INDIANA 46802
(219) 423-1375

Mr. William W. Willkins, Jr.
The United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

The following is my response to your request written on April 25, 1986. The first part of my discussion will follow the questions about prior record consideration. The second part of this response will give my view concerning your list of offender characteristics.

Felonies and misdemeanors in a prior record should be defined by statute. It is felt that the issue of disparity can be corrected later by weighing the nature of the offense.

The weight of all (federal, state and local) convictions could be considered similar to the severity ratings for federal offenses used by the present Parole Commission. This severity rating would give more weight to the more serious previous offenses.

As an operational tool, no decay factor should be built into the guidelines. Throughout this discussion, I have kept the word "guidelines" in mind. It appears that there will still be room for a judge to vary for good reason. Hopefully this will protect the individual who in fact made one mistake and ten (10) years later simply made another. On the other hand, it would not protect the criminal who became wiser and harder to detect before being caught again several years later. If a decay factor is utilized, I feel that a starting point should be at the supervision release date. The conviction date and the prison release date are inappropriate since the individual could spend the majority of this time in confinement or under supervised release. Often times he would be involved with forced compliance, rather than his establishment of self-control to stay away from criminal activity.

Prior juvenile offenses should be considered in establishing sentences for adult offenders. This is especially true of offenses which would be felonies if committed by an adult. This question, as with others, becomes very difficult when considering the ramifications and differences between juvenile court systems. We are discussing guidelines and not absolutes, thus the sentencing judge should be allowed to take into consideration the circumstances under which the juvenile offenses occurred.

I was a director of activities in a juvenile detention home for seven (7) years prior to my present twelve (12) year involvement with the Federal Probation System. From an observational point of view, those individuals who committed felony acts as juveniles and continued in their adult life with felony involvement, were individuals who needed to be most recognized with. In addition, the individuals who committed status or even felony acts as juveniles and corrected their ways will not be seen in Federal Court. Thus, the decay factor will not have to be considered.

Military convictions should be handled like all other convictions, that is, defined by statute. A small town, city, metropolis or military base all have their rules to live by. They may differ, but there is still something to be said about the individual who chooses to violate the law in his particular surroundings. Once again, disparity would be corrected when looking at the nature of the offense.

In establishing guidelines, only convictions should be used in determining a defendant's prior criminal record. The guidelines are set up for the majority of cases that would allow the least error. While patterns of arrest can tell you many things about an individual, they are too vague for guidelines.

If an individual is on probation or parole supervision at the time of a new offense, it is felt that the weight of the offense could be multiplied times two (2). It is felt that the individual's continued involvement while under supervision is very indicative of his determination to continue in a life of crime. As prisons continue to be over crowded and we again recognize the need for alternatives rather than only punishment, it would be necessary to show that parole and probation are not "passes" but rather a chance to make a change. If the individual chooses to not change in his criminal behavior, then the consequences need to be greater. On the other hand, there are cases where a tapering off in criminal behavior is needed, similar to the alcoholic who falters before making a firm commitment. It is hoped that the judge will have the flexibility to recognize these situations.

It is felt that the severity rating which I discussed earlier could allow for the level of sentence aggravation. I believe that its development would be at the core of your guidelines. I do not need to repeat the several studies that have been done in regards to prognosis for future criminal behavior. I would simply state that a large number of offenses are created by a small number of repeating offenders.

A prior record is one of the few concrete characteristics that can be used in weighing an individual's impact on his community. However, with few exceptions, this prior record usually relates to what is known as "street crimes". Until the investigation and prosecution of white collar offenders can become as sophisticated as the offenders themselves, I feel that prior records for street crimes and white collar crimes need to be differentiated. Characteristics such as; age, education, vocational skills, physical condition (including drug dependency), previous employment record, family ties and community ties become extremely prejudicial towards the less fortunate street offender, who simply has not been blessed with the advantages or developed the skills of other offenders. However, in a number of ways they can have relevance in a particular sentencing. Thus, guidelines should be formed to allow the use of these characteristics as mitigating or aggravating circumstances, but the term relevance rather than mere existence needs to be stressed.

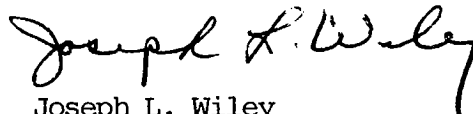
Mr. William W. Wilkins, Jr.
Page 3

An individuals role in the offense, criminal history and degree of dependence upon criminal activity for a livelihood are absolute factors that should be considered by a sentencing judge.

Other factors which are extremely difficult to place in guidelines can be more relevant in determining the affect of an appropriate sentence and the individuals outcome. Such factors would include; cooperation, remorse and admission of their wrong doing.

Once again I have attempted to respond to the Sentencing Commission in brevity. Thank you for your continued exploration of field ideas.

Respectfully,

A handwritten signature in cursive script, reading "Joseph L. Wiley". The signature is written in dark ink and is positioned above the printed name and title.

Joseph L. Wiley
Supervising U.S. Probation Officer

JLW/sh

RECEIVED MAY 19 1986



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG

LEROY S. ZIMMERMAN
ATTORNEY GENERAL

May 14, 1986

16TH FLOOR
STRAWBERRY SQUARE
HARRISBURG, PA. 17120

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

Dear Mr. Watkins:

Through my association with the National Association of Attorneys General I have learned that the United States Sentencing Commission is seeking contributions to the Commission's study concerning what impact a defendant's prior record should have on sentencing. On behalf of the Pennsylvania Office of Attorney General, I am honored to contribute to this worthwhile project.

In July of 1982, the Pennsylvania General Assembly adopted sentencing guidelines developed by the Pennsylvania Commission on Sentencing. The guidelines were designed to serve as a benchmark for the court to consider in sentencing felonies and misdemeanors, by providing a numerical scoring system to assess the seriousness of the defendant's prior record score, and the gravity of the current conviction. A sentence range chart then provides suggested sentences for each combination of offense gravity score and prior record score, listing minimum, aggravated minimum, and mitigated minimum sentences for each score combination.

In the nearly four years that the guidelines have been in use they have provided a means to achieve individually tailored sentences which still fall within certain uniform parameters.

Pennsylvania's sentencing guidelines score prior record offenses according to the following system:

Three points are added for each prior conviction or juvenile adjudication of delinquency for the following offenses: murder, voluntary manslaughter, kidnapping, rape, involuntary deviate sexual intercourse, arson endangering persons, and robbery felony I.

Two points are added for each prior conviction or juvenile adjudication of delinquency for: aggravated assault, burglary, felony violations of the Controlled Substance, Drug, Device and Cosmetics Act and all other felonies not specifically assigned three points.

William W. Wilkins, Jr., Chairman
May 14, 1986
Page Two

One point is added for all ungraded felonies, all felony IIIs, possessing instruments of crime (weapons only), possessing a prohibited offensive weapon, a former convict owning a firearm, firearms carried without a license, carrying firearms on public streets or public property in Philadelphia, unauthorized sale of firearms.

All other misdemeanors receive one point for two or three prior convictions, or two points for four or more prior convictions. When the current offense is driving under the influence, a prior record score is not computed.

No decay factor is built into the system, but the prior record score may not exceed six points.

Juvenile convictions are considered only when two conditions are met: (1) when the juvenile adjudication was due to conduct which would have been a felony had the perpetrator been an adult; or (2) when a weapon was used in the commission of the crime and when the juvenile adjudication occurred because of conduct entered into after the defendant's 14th birthday.

While Pennsylvania's sentencing guidelines do not specifically address military and tribal convictions, I suggest that these convictions be considered only when the conduct resulting in the conviction would have been a felony or misdemeanor had the defendant been a civilian (or non-tribe member).

Our system provides that only convictions in which a sentence was imposed may be considered in determining a prior record score. Technical parole and probation violations should not be considered, but felonies and misdemeanors committed during the terms of parole or probation should be considered.

Finally, I would suggest that the distinction between felony and misdemeanors be drawn with a view to the seriousness of the offense, with the line of demarcation being those crimes which pose serious threats to life and property.

Thank you for this opportunity to contribute to this project. I hope that Pennsylvania's experience with sentencing guidelines will prove a valuable contribution to your study.

Very truly yours,



Robert L. Keuch
Executive Deputy Attorney General
Director, Criminal Law Division

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May 13, 1986

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Chairman

The United States Sentencing Commission

1331 Pennsylvania Ave. N.W.

Suite 1400

Washington, DC 20004

Re: Yours of April 25, 1986

Mr. Wilkins:

Regarding the question of how a defendant's criminal record should affect his sentence, I have attempted to poll a wide range of knowledgeable authorities and there are the following comments to be made.

1. The whole scenario of what is referred to as "offender characteristics" suggests that there is some justification for crime. It suggests there is justification for almost any crime. The study of which we spent 2½ years developing called Crime by Choice by Dr. Morgan Reynolds and which you have in your Commission library builds a case on the fact criminals commit crime because they want to.

There is nothing in the Constitution or the Bill of Rights or moral law that says a person has to become a criminal. He or she does so by choice just as you choose to work in the environment of Washington, DC. There is nothing that says the individual has to become a criminal.

The argument that the criminal is a victim of society has, after 43 years of trying for justification, been completely repudiated.

2. As to how a defendant's prior criminal record should impact on sentencing, this characteristic of our criminal code is one of the primary reasons we have an oversupply of crime for the justice system we have set up to handle it.

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William W. Wilkins, Jr.
May 13, 1986
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Precisely what is wrong with paying attention to the criminal act rather than the criminal's so-called welfare? What about the welfare of the victim? Isn't that what criminal justice is all about? Aren't we actually in the business of trying to prevent crime?

We fail to see why we have a justice system dependent upon a jury of our peers and then go to such elaborate lengths to withhold the necessary information to those peers for them to make good, honest judgement. If they are indeed "our peers," then they should be allowed to perform as such. Give them all the facts of the criminal's record.

The criminal either committed a crime or he didn't. If he didn't, he should be let go. If he did, he should be punished. Remember he got into crime of his own choice.

Crime is but another occupation for making a living--it's a business. It should be and is measured like any other business or gainful occupation on a risk/reward ratio. Anyone going into business measures the risk against the possible reward. If he can, hopefully, make more reward than the risk he has to take, then it's a good deal. Society, through our courts and justice system has, over the years, made crime a very good business to be in. They have consistently lowered the risk of going into or staying in the crime business. It's as simple as that.

3. This hocus-pocus about "defining felony and misdemeanor offenses" only becomes important if indeed the criminal laws are going to be codified by the federal system. Granted, there needs to be a standardization. There is nothing difficult about this. The definitions of felony and misdemeanor need only be adjusted to be brought up-to-date where they are measured by current-value dollar amounts. The nature of the offense seems to be the most reasonable. The part which is measured in dollar amounts should be adjusted to include all damages to the victim. Once those damages are assessed, then the classification should be quite clear.
4. Defendant's prior criminal history: The whole purpose of the criminal justice system is supposed to be a deterrent for crime. The notion that a "decay factor" enters into prior record, in any case, implies again that there is some justification for crime. It implies there is value for on-the-job experience as if the

criminal were a job applicant. This again is part of the picture I have tried to paint and tends to lower the risk for being in the crime business. If indeed the criminal justice system is not for the deterrence of crime or for the protection of the victim or society, then perhaps these finer points about juvenile offenses as a prior record for adult offenders; military convictions; tribal convictions; prior criminal records regardless of whether convictions or not; and on and on serve only to lengthen the trial while the lawyers practice their rhetoric. Indeed, it does not serve society and, in the last forty years, this has proven to be a fact.

5. The mandate under which you operate that "the Commission shall consider whether the following matters, among others, with respect to a defendant have any relevance... etc;" if indeed this Commission really seeks and expects to bring about meaningful change in our crime rate in America, then I suggest those matters we have listed so far are irrelevant and serve no useful purpose in truth or in fact. If the purpose for criminal justice is as I have stated, it seems to me such questions are irrelevant and others should be of importance at this time. Those being such as:
 - a. Right and wrong as determined by society's own standards.
 - b. A substantial increase in the cost of being in the crime business through an increase in the sentencing in every case and the time served in all cases.
 - c. It is suggested that if a person is going to be given life, then life should be served. If that is not the case and he will be out in 20 years, then give him 20 years. Anything else is make believe and fantasy. Yes, I understand this is done ostensibly as a method of controlling the inmates in prison.

I wonder who do we think we are kidding? The criminals know how much time they are going to have to serve because it's well publicized. Indeed, their attorneys will tell them as soon as they have been sentenced how long it will be before they get out.

If you doubt this, then you should be visiting

William W. Wilkins, Jr.
May 13, 1986
page 4

one of the prisons after an execution. Everything is quiet, everything is in order, and everyone in the prison is quite easy to get along with. The effect is dramatic.

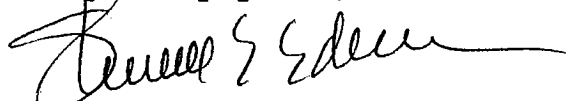
6. As to the "elements of age, education, vocational skills, mental and emotion condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant, etc.---," I'm suggesting that the criminal system is for the protection of society while the remedies available to us to improve the system are long-term. Imprisonment and other forms of punishment are short-term corrections and are seldom constructive to the criminal. The permanent corrections need to be made through our public school system, K-12.

We have definite ideas as to how this is to be done effectively. However, since this is outside of the scope of your letter, I won't go into it.

I hope this has been helpful. We can afford to be direct in our analysis even though I realize this is not pragmatic. But then our role is to analyze and report. Political implementation is another thing entirely.

We would like very much to be kept informed of the progress of this Commission and will endeavor to respond as often as possible when asked to do so.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Sherrill E. Edwards", with a long horizontal flourish extending to the right.

Sherrill E. Edwards
President

SEE:sz



Bureau of Justice Statistics Special Report

Sentencing Practices in 13 States

By Herbert Koppel
Statistician, BJS

October 1984

The sentencing of a convicted offender is a key event in the complex process by which criminals in the United States are brought to justice. The judge is acting for society in determining whether or not the offender will go to prison and, if so, for how long. This report will examine the sentencing of convicted felons in several States with respect to whether or not they are sent to prison and the lengths of their sentences.

State law and policies

Every State has its own set of laws and practices for sentencing criminals, and the differences among them are substantial. An earlier brief overview of sentencing practices, Setting Prison Terms (Bureau of Justice Statistics Bulletin, NCJ-76218, August 1983), presents much useful descriptive information, as does a recent report by the New York State Division of Criminal Justice Services.¹ However, it requires more than 200 pages to describe the basic features of the sentencing laws in each State.²

In addition to the different laws that govern sentencing, there are differences in how specific offenses are defined and classified by the criminal code in each State.

In some States, the law specifies a rather wide range of sentence lengths for each crime; the judge has broad discretion in selecting a sentence from

A fundamental issue in the administration of justice concerns the type and length of sentences given to convicted offenders. In this Special Report, the Bureau of Justice Statistics reports findings from a survey of selected States.

Among key findings are the following: despite the wide diversity among States in their sentencing systems, there appears to be a reasonable consistency in the end results produced; incarceration is much more likely for serious crimes against the person than for property crimes or drug crimes; the likelihood of incarceration increases markedly with increasing severity of the offense and increasing seriousness of the offender's criminal history; and rates of incarceration and sentence lengths appear comparable from State to State for similar crimes committed by persons with similar criminal records, when differences

among sentencing systems are taken into account. In most cases, these data were obtained from criminal justice Statistical Analysis Centers in the States. Such centers have been established with support from the Bureau of Justice Statistics in 40 States, the District of Columbia, Puerto Rico, and the Virgin Islands. In addition to providing data to BJS, their functions are the gathering, analysis, and dissemination of statistical information pertaining to crime and criminal justice in their States for the benefit of decisionmakers, criminal justice practitioners, and the public.

The Bureau of Justice Statistics will continue to report on sentencing practices in the States as further changes occur and will attempt to expand the data base to include all States.

Steven R. Schlesinger
Director

within that range. In other States, the judge's discretion is limited by law to a relatively narrow range of sentence lengths.

The judge usually is empowered to decide whether or not an offender will be sent to prison at all; he can suspend a prison sentence, impose a sentence of probation or a fine or, in some cases, select an alternative to incarceration such as requiring the offender to make

restitution or to perform community service. This discretionary power, however, is far from absolute; as of January 1983, 48 States and the District of Columbia had enacted laws mandating a prison sentence for certain serious offenses or under certain aggravating circumstances.³ Examples include use of a firearm in committing a felony, certain violations of drug laws, and a history of prior felony convictions.

The judge's sentence is not the only factor that determines the length of an offender's stay in prison. The parole board often has considerable discretionary power in deciding when a prisoner will be released. In some States, the board can release a prisoner at any time after incarceration. In at least nine States, parole board discretion has been abolished completely.⁴ Most parole boards have discretionary authority that falls between these limits. In addition, 47 States, the District of Columbia, and the Federal system have provisions that enable an inmate to earn "good time"; that is, a reduction in the length of the prison stay through good behavior or participation in certain programs.

Sentencing systems

Differences among sentencing systems are so great that any comparison of sentence lengths among States is nearly meaningless unless the sentencing systems are taken into account. In some States, sentences may be relatively short, but with a high probability that all or nearly all of the sentence actually will be served. In other States, the sentences may be very long, but most offenders will be released after serving only a fraction of the sentence imposed by the courts.

There has not been complete consistency in defining the various types of sentencing systems that are used by the States. The following definitions have been adapted from those developed by the New York State Division of Criminal Justice Services.⁵

Indeterminate sentencing. In jurisdictions that use indeterminate sentencing, the court sets upper and lower bounds on the time to be served. The lower bound may be explicit or implicit. The actual release date (and therefore the time actually served) is determined subsequently by parole authorities.

With minimum/maximum indeterminate sentencing, the court specifies both minimum and maximum prison terms, but the parole board determines the actual release date within those limits. The States vary as to whether "good time" may be deducted from the minimum, the maximum, or both.

With fixed indeterminate sentencing, only a single prison term is specified by the court, but it is treated as a maximum for which an associated minimum automatically is implied. The implied minimum might be zero for all sentences, one year for all sentences, or a fixed proportion of the maximum.

Determinate sentencing. The court specifies a fixed term of incarceration

which must be served in full (less any "good time" earned in prison). There is no discretionary parole release.

Mandatory sentencing. The court is required to impose an incarcerative sentence, often of specified length, for certain crimes or certain categories of offenders. There is no option of probation, suspended sentence, or immediate parole eligibility.

Presumptive sentencing. The judge's discretion is constrained by a sentence length that is set by law for each offense or class of offense. This sentence must be imposed in all unexceptional cases. When there are mitigating or aggravating circumstances, however, the judge is allowed to shorten or lengthen the sentence within specified boundaries, usually with written justification being required.

In recent years, a number of States have reformed their sentencing systems, most often changing from indeterminate sentencing to a determinate system in which presumptive or mandatory provisions are included and parole discretion is eliminated or drastically curtailed.

The judge's role

Individual judges differ in the rationales, attitudes, and beliefs that affect their sentencing decisions. A survey in Delaware⁶ asked judges of the Superior Court to assign priorities to five possible rationales for sentencing decisions: rehabilitation; deterrence of the offender from further criminality through fear of punishment; deterrence of others; retribution; and incapacitation (protection of the public while the offender is incarcerated). The survey found "an absence of a common philosophy or rationale for punishment" among the judges and concluded that "the dispersion of action and opinion in the judiciary is as diverse as would be found in the general population."

It may be that, in at least some instances, the judge making a sentencing decision takes into account the possibility of early release through parole and the accumulation of "good time." As an illustration, the Delaware survey states that a judge would have to impose a sentence of 19 years to be sure that the person would remain incarcerated for at least 5 years. A striking example occurred recently in Maryland. A man who had murdered three people and wounded several others at his former place of employment was convicted on 75 charges and sentenced to 3 consecutive life terms plus 1,080 years.

Several States have instituted or are considering the use of sentencing guide-

lines. Such guidelines are aimed at improving the consistency and rationality of sentencing by basing sentencing decisions upon offense severity, the offender's criminal record, prevailing sentencing patterns, or some combination of these factors. The guidelines may be advisory, or they may be prescriptive and presumptive, requiring the judge to explain sentences outside the specified ranges.

Incarceration rates

When a convicted person is sentenced, the most fundamental decision is whether or not he or she will be incarcerated. The judge usually is free to make this decision but, in many States, incarceration is mandatory for certain serious offenses or for persons with prior felony convictions. Also, the judge may be required to provide written justification for any departure from presumptive guidelines.

Not every sentence to incarceration involves a substantial term of confinement in a State prison. In some States, a very short term may be imposed, which may be served in a county jail or State prison, in cases where the offender does not have a significant criminal record and where the offense was not especially serious or significant mitigating factors were involved. Such short sentences often are combined with other sanctions such as fines, restitution, performance of community service, or participation in drug or alcohol treatment programs. Several States make use of split sentences, which consist of a short prison term to be followed by an extensive period of supervised probation. Some sentences provide for part-time incarceration; typically, the person is released during the day to work at an outside job, but spends nights and weekends in confinement. In most of the data that follow, a sentence is considered incarcerative if it involves any amount of confinement.

Specific offenses. Table 1 shows the incarceration rates (percentage of convictions that resulted in sentences of incarceration) for certain categories of offenses in six States.

Because of the different ways that offenses are defined by statute in the various States and the different formats in which the States provided their data, and because of the different ways individual statutory offenses had to be combined to fit generic crime categories, the comparability of this information is somewhat limited. In particular, where different States show significantly different incarceration rates for the same crime category, this may be caused by differences in the specific offenses that were included in

Table 1. Incarceration rates for specific crime categories

Crime type	Iowa ^a 1980-83		New York 1982		Oklahoma 1978-82		Pennsylvania 1981		Washington 1971-82		Wyoming 1981-84	
	Number of con- victions	Percent incar- cerated	Number of con- victions	Percent incar- cerated	Number of con- victions	Percent incar- cerated	Number of con- victions	Percent incar- cerated	Number of con- victions	Percent incar- cerated	Number of con- victions	Percent incar- cerated
All felonies	2,125	39.3%^b	22,287	44.5%	*	*	37,147	35.0%^b	78,036	20.3%	*	*
Serious violent crimes^c	161	74.5	7,380	67.7	7,472	57.3%	4,507	59.7	14,854	38.3^d	427	56.7%
Criminal homicide ^e	22	86.4	893	90.6	599	78.1	484	73.3	1,834	52.8	72	88.9
Rape	28	92.9	224	97.8	618	71.0	198	77.3	4,530	27.2 ^d	86	68.6
Robbery	38	100.0	5,290	67.4	2,506	79.2	2,010	73.4	3,464	56.1	111	57.7
Aggravated assault	73	50.7	973	41.5	3,749	37.2	1,815	39.1	5,026	30.8	158	34.8
Serious property crimes^f	849	31.2	6,585	36.2	19,822	36.5	9,131	43.9	40,506	19.3	1,309	35.0
Burglary	351	36.5	5,124	38.8	9,168	43.6	3,165	61.3	*	*	731	37.4
Larceny	382	25.4	1,235	24.8	7,895	25.1	5,393	33.7	*	*	381	28.1
Auto theft	98	33.7	g	g	2,379	46.9	447	41.6 ^h	*	*	152	42.1
Arson	18	36.8	226	40.7	380	37.6	126	53.2	*	*	45	31.1
Drug crimes	148	29.7	3,168	38.9	6,982	33.9	3,606	26.9	13,911	12.1	253	43.9

* Data not available.

^a Three counties.^b Includes certain misdemeanors which would be classified as felonies in many other states.^c Criminal homicide, rape, robbery, and aggravated assault.^d Includes other sex crimes in addition to rape.^e Includes murder and non-negligent manslaughter.^f Burglary, larceny, auto theft, and arson.^g Auto thefts in New York are included with larceny.^h Due to statutory changes, many auto thefts in Pennsylvania are included with larceny.

the category rather than by differences in sentencing policy.

For example, drug offenses may range from smoking marijuana to the large-scale distribution of heroin. In the case of robbery, most States define several separate statutory offenses of different degrees of severity, depending upon such considerations as whether a weapon was used and the extent of injury to the victim. Incarceration is more likely (and sentence lengths are greater) for the more serious statutory offenses within a given category. When data for the various statutory offenses are aggregated, the combined incarceration rate for the entire category can be affected significantly by which statutory offenses are included and their relative prevalence.

Despite these limitations, table 1 shows quite clearly that incarceration is much more likely for serious crimes against the person than for property or drug crimes.

Offense severity and criminal record. It is useful to examine incarceration rates in terms of offense severity and the offender's criminal record, instead of relying upon definitions of specific offenses that are difficult to reconcile among the different States. In several States, the law groups offenses into classes of different severity, and in some cases the statutes define categories of offenders in terms of their prior criminal records. Where such legal categories do not exist, researchers have devised similar categories for use in their investigations.

The data in table 2 are presented separately for each State because of the different ways that offenders and offenses have been grouped into cate-

gories. These data show the percent of convictions that resulted in incarcerative sentences.

Table 2 shows that, in virtually all cases, the likelihood of incarceration increases markedly with increasing severity of the offense and increasing seriousness of the offender's criminal history.

For the data from Illinois, New York, and Connecticut, the felony classes are defined by statute and are listed in decreasing order of severity. For Minnesota, the three tabulated severity categories are condensed from the ten levels of severity defined by the State's sentencing guidelines. For North Carolina and Maryland, offenses have been classified by the nature of the crime (violent crimes, property crimes, drug crimes, etc.), and these categories are listed in what is generally perceived to be the order of decreasing severity.

All of the offender classifications in table 2 are based on the number and seriousness of the person's previous convictions. The classifications in New York are defined by statute. Minnesota's sentencing guidelines define seven levels of criminal history scores; these have been condensed into the three levels used in the tabulation. The offender classifications were defined by researchers for Connecticut and by the sentencing guidelines advisory board for Maryland.

Effects of guidelines and changes in sentencing laws. The Minnesota guidelines were designed to embody retribution as the primary purpose of sentencing.⁷ Because of this, they place more emphasis upon the seriousness of the current offense and less upon the offender's criminal history

than usually had been the case in the past. The data in table 2 show that this objective was achieved. For example, in the case of the most severe offenses being committed by those with the least serious criminal histories, the incarceration rate increased from 47.4% to 79.0%. For those with moderately serious criminal histories who were convicted of the least severe offenses, the incarceration rate dropped from 38.4% to 9.6%.

The preguidelines data for Maryland were not used because of the small sample size (339 cases) and because no significant difference in incarceration rates had been observed between corresponding portions of the preguidelines and postguidelines samples. This similarity is not surprising, since the guidelines that were tested in Maryland were intended to reduce unwarranted variations in sentencing rather than to bring about a change in the aims or philosophy of sentencing.⁸

In North Carolina (table 2) incarceration rates increased for all types of felonies (except "morals" offenses) after determinate sentencing was instituted. This is somewhat surprising because the new legislation did not affect the judge's power to decide whether or not a convicted person would be incarcerated. It has been conjectured that the judges may have been influenced by the legislation in interpreting the specified prison terms as a tacit recommendation by the legislature for incarceration, or that the increased incarceration rates were merely the continuation of a previous trend toward more frequent use of imprisonment.⁹

Arrest offense vs. charged offense vs. conviction offense. The data for Connecticut (table 2) include some

misdemeanor convictions that resulted from plea bargaining where the original charge had been a felony. Plea bargaining, with respect to the charge and the sentence, is prevalent in many jurisdictions. The aggregate data from Connecticut for 1976-77 and 1979-80 cover 2,756 convicted persons. Only 92 were tried; the other 2,664, or 96.7%, were convicted as the result of guilty pleas. For the Maryland postguidelines sample of 2,928 convicted persons, 74.9% were convicted through guilty pleas.

Plea bargaining is not the only reason that the level of the offense may be reduced between arrest and conviction. Often the formal charge filed by the prosecutor is for a lesser offense than the one for which the police had made the arrest. The police need only show "probable cause" when making an arrest; the prosecutor must be prepared to prove guilt "beyond a reasonable doubt."

Table 3 shows data from Oregon covering persons who were arrested in 1979.¹⁰ These data provide information on the relationship between incarceration rates and whether or not the conviction offense was the same as the arrest offense. These data also include the percentage of convicted persons who were sentenced to any incarceration and the percentage who were sentenced to at least 1 year. Incarceration rates were higher, for both violent crimes and property crimes, when the arrest offense and the conviction offense were the same.

Sentence lengths

Average (mean) sentence lengths for various offenses and groups of offenses are shown in tables 4, 5, and 6. The three tables cover, respectively, minimum/maximum indeterminate sentences, fixed indeterminate sentences, and determinate sentences. As noted earlier, extreme caution must be used in making comparisons among the different States because of differences in the statutory definitions of offenses and in the ways individual offenses have been aggregated. In general, the tables show that the longest sentences are imposed for serious crimes against the person.

Data for Illinois are shown for minimum/maximum indeterminate sentences (table 4) and for determinate sentences (table 6) during the years 1978-82. Determinate sentencing was initiated near the beginning of that period, but persons whose offenses were committed when the indeterminate sentencing laws were in effect were subject to punishment under those laws. The average lengths of deter-

Table 2. Percent of convictions resulting in incarceration for selected States based on offense and criminal history classifications

Illinois, 1979-81								
Offense class ^a	Number of convictions		Percent					
All felonies	76,787		39.3%					
M (murder)	1,092		99.9 ^b					
X	6,713		100.0					
1	1,748		57.0					
2	26,591		37.7					
3	31,547		26.5					
4	9,096		33.0					
^a By statute, there are six classes of felony offenses that are based on the severity of the offense; they are presented in order of decreasing seriousness. In general, a particular class can include property and violent crimes. The class of a particular offense depends upon factors such as injury or loss to the victim, weapons use, etc.								
^b Does not include 54 death sentences.								

New York, 1982								
Felony class ^b	Offender classification							
	Youthful		First offender		Repeat ^a		All offenders	
	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated
All felonies	2,722	7.5%	16,987	42.2%	2,578	99.1%	22,287	44.5%
A	2	50.0	439	95.7	25	100.0	466	95.7
B	165	23.0	2,116	94.1	371	99.7	2,652	90.5
C	587	14.3	2,780	77.2	507	99.4	3,874	70.6
D	1,341	5.0	6,686	29.7	937	99.4	8,964	33.3
E	627	2.2	4,966	12.7	738	98.3	6,331	21.6
^a Includes persons classified as second felony offenders, persistent felony offenders, second violent felony offenders, and persistent violent felony offenders.					of the offense; they are presented in order of decreasing seriousness. Violent and property offenses appear in all classes. The class of a particular offense depends upon factors such as injury or loss to the victim, weapons use, etc.			
^b By statute, there are five classes of felony offenses based on severity								

Connecticut, 1979-80 (statewide sample)								
Felony class ^b	Criminal history ^a							
	None		Moderate		Serious		All offenders	
	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated
All felonies	377	45.1%	303	58.1%	327	77.8%	1,007	59.6%
A	1	100.0	2	100.0	3	100.0	6	100.0
B	111	53.2	92	69.6	108	87.0	311	69.8
C	78	48.7	58	62.1	69	79.7	205	62.9
D	95	49.5	104	61.5	95	76.8	294	62.6
Misdemeanor ^c	92	27.2	47	21.3	52	55.8	191	33.5
^a Based on number and seriousness of previous convictions.					property and violent crimes. The class of a particular offense depends upon factors such as injury or loss to the victim, weapons use, etc.			
^b By statute, there are four classes of felony offenses based on severity of the offense; they are presented in order of decreasing seriousness. In general, a particular class can include								
					^c Misdemeanor convictions resulting from plea bargaining where original charge was a felony.			

minate sentences tend to fall between the average minimum and maximum lengths of corresponding indeterminate sentences. This is to be expected, since the latter represented only upper and lower bounds on the time that the convicted persons would serve.

There is a noticeable exception in the case of serious violent crimes as a group. For indeterminate sentences, the average minimum and maximum sentences were 131 months and 277 months; the average determinate sentence was only 102 months. This may be because the crimes in this group for which extremely long sentences are imposed, criminal homicides, take longest to process in the courts. A large percentage of such cases go to trial rather than being settled through guilty pleas, and it often takes considerable time to prepare and conduct the

trials. As a result, a large number of homicide sentences were for offenses that dated back to the era of indeterminate sentencing, while sentencing had not yet occurred for many homicides committed after determinate sentencing was instituted. The tables show that, for serious violent crimes as a group, 25% of the indeterminate sentences were for criminal homicide, in contrast to only 16% of the determinate sentences. This may account for the disproportionately long minimum/maximum indeterminate sentences.

Data for North Carolina show sentence lengths for fixed indeterminate sentencing in 1979 (table 5) and for determinate sentencing in 1981-82 after the enactment of the State's "Fair Sentencing Act" (table 6). The determinate sentences are shorter; this is

Table 2. (Continued)

Minnesota, 1978 and 1980-81

Offense severity*	Criminal history score*						All offenders	
	None/Low		Moderate		High			
	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated
Before the introduction of presumptive sentencing guidelines								
All felonies	3,326	9.9%	732	46.2%	307	70.5%	4,365	20.2%
Low severity	1,872	4.7	385	38.4	162	62.2	2,420	13.9
Moderate severity	1,210	10.5	273	46.7	109	73.1	1,592	21.0
High severity	244	47.4	73	85.5	36	100.0	353	60.6
After the introduction of presumptive sentencing guidelines								
All felonies	4,031	6.5%	1,018	24.3%	451	70.7%	5,500	15.0%
Low severity	2,122	0.6	478	9.6	222	50.4	2,822	6.0
Moderate severity	1,680	4.0	443	24.4	186	88.2	2,309	14.7
High severity	229	79.0	97	95.9	43	100.0	369	85.9

Note: Under Minnesota law, both before and since introduction of sentencing guidelines, a convicted person may have to spend up to a year in jail or workhouse as a condition of a stayed felony sentence. Incarceration rates

shown above do not include such confinement. * The sentencing guidelines in Minnesota use 7 levels of criminal history scores and 10 levels of offense severity, which have been condensed into 3 levels each for this table.

North Carolina, 1979 and 1981-82 (statewide sample)

Offense class	Before Fair Sentencing Act*		After Fair Sentencing Act*	
	Number of convictions	Percent incarcerated	Number of convictions	Percent incarcerated
All felonies	9,752	54.7%	3,034	62.8%
Class 1 (violent felonies)	2,231	79.5	666	84.5
Class 2 (felonious larceny, breaking or entering, receiving stolen goods, etc.)	4,481	55.2	1,452	65.3
Class 3 (fraud, forgery, embezzlement, etc.)	1,061	39.1	336	44.6
Class 4 (drug felonies)	1,642	30.9	515	39.6
Class 5 ("morals" felonies)	117	71.8	25	68.0
Class 6 (other felonies)	220	35.9	40	60.0

* North Carolina's "Fair Sentencing Act" instituted determinate sentencing in July 1981.

Maryland, 1981-82 (entire postguidelines sample)

Type of offense	Prior criminal record								All offenders	
	None		Minor		Moderate		Major			
	No. of convictions	Percent incarcerated	No. of convictions	Percent incarcerated	No. of convictions	Percent incarcerated	No. of convictions	Percent incarcerated	No. of convictions	Percent incarcerated
Total	1,311	39.7%	973	65.2%	443	84.6%	201	89.1%	2,928	58.3%
Person	551	55.9	334	76.6	160	91.3	70	87.1	1,115	69.1
Property	449	35.4	440	68.9	219	83.1	104	91.3	1,212	61.0
Drug	311	17.0	199	37.7	64	73.4	27	85.2	601	32.9

consistent because the earlier indeterminate sentences represented only an upper bound on the amount of time that would be spent in prison.

Offense severity and criminal record.

As would be expected, average sentence lengths are longest for the most severe offenses and for those offenders with the most serious prior criminal records. This is illustrated by the data for Illinois and New York in tables 7 and 8. The offense classes in both States and the offender classifications in New York are defined by statute.

Conclusions

While the most prominent characteristic of the sentencing systems used by the States is their wide diversity, there appears to be a reasonable consistency in the end results produced. The

highest rates of imprisonment and the longest sentences accrue to those who have been convicted of the most severe crimes and to those whose prior criminal histories are most serious. Rates of incarceration and sentence lengths are comparable from State to State for similar crimes committed by persons with similar criminal records, when differences among the sentencing systems are taken into account with regard to the meaning of the sentence in determining how long the offender actually will be imprisoned.

Many States have made fundamental changes in their sentencing systems in recent years, and this trend appears to be accelerating. No fewer than 5 of the 13 States that provided data for this report instituted comprehensive changes in their sentencing laws immediately before, during, or since the

periods covered by the data. Connecticut, Illinois, North Carolina, and Washington went from indeterminate to determinate sentencing, and Minnesota instituted the use of presumptive sentencing guidelines. At least two other States, Maryland and New York, are evaluating the use of sentencing guidelines. The changes from indeterminate to determinate sentencing and the introduction of guidelines appear to signal the intention of the States to make punishment more certain, more consistent, and more in keeping with their perceptions of the basic purposes of imprisonment.

Sources of data

Descriptions of the sentencing systems in the States that provided data for this report and characteristics of the data are critically important to the interpretation of the numerical information in this report. It is imperative that no attempt be made to interpret the numbers or to make comparisons between States without thoroughly considering this information. Different sentencing systems lead to sentence lengths that have widely different practical meanings. For example, a person sentenced to 10 years in California will serve all or nearly all of the 10 years; in Iowa or Maryland, there is a possibility of release after serving only a fraction of a similar 10-year sentence. In addition, there are substantial differences in how offenses are defined and classified in different States, as well as significant differences in the ways that the data from the States have been collected and aggregated.

California. The judge imposes a determinate term based on presumptive sentence lengths that are set by legislation. Three presumptive sentence lengths are specified for each class of offense; the middle one must be imposed unless there are mitigating or aggravating circumstances. The sentence must be served in full minus any "good time" reduction. There is no early parole release.

Data on sentence lengths for a number of offenses were obtained from two reports with the same title, Sentencing Practices under the Determinate Sentencing Law, by the California Board of Prison Terms. The data cover all persons in the State who entered prison from February 1979 through January 1980 (report dated February 11, 1981) and during calendar year 1981 (report dated February 10, 1983). Offenses such as murder, for which life imprisonment or the death penalty can be imposed, are not included. (Some sentences for second degree murder are included in the 1979 data. The penalty for that offense was

Table 3. Oregon: Incarceration rates for persons arrested in 1979

Conviction type	Incarceration rates for persons arrested for					
	Violent Crimes ^a			Property crimes ^b		
	Number of convictions	Percent of convictions	Percent incarcerated	Number of convictions	Percent of convictions	Percent incarcerated
All convictions	858	100.0%		2,815	100.0%	
Percent of all convictions resulting in:						
Any incarceration sentence			62.5%			38.3%
Incarceration sentence of at least one year			51.9			22.2
Convictions where arrest offense and conviction offense are the same	323	37.6		1,650	58.6	
Percent of these convictions resulting in:						
Any incarceration sentence			73.4%			40.5%
Incarceration sentence of at least one year			69.7			27.2
Convictions where arrest offense and conviction offense are different	535	62.4		1,165	41.4	
Percent of these convictions resulting in:						
Any incarceration sentence			55.9%			35.0%
Incarceration sentence of at least one year			41.1			15.2
^a Criminal homicide, rape, robbery, and aggravated assault.			^b Burglary, larceny, auto theft, and arson.			

changed in November 1978; these data are for persons whose offenses were committed before that date, but who entered prison in 1979.)

Connecticut. The data used in this report cover sentences that were imposed during years when the State used minimum/maximum indeterminate sentencing with wide judicial discretion.

Subsequently, in July 1981, legislation was enacted to require the imposition of a determinate prison term. The judge selects the sentence length within wide limits defined by statute for each class of offense. Parole has been abolished; the entire term, less "good time," must be served.

Data were provided by the Connecticut Statistical Analysis Center in a report entitled Sentencing Patterns in Connecticut. The data cover samples of 1,749 persons who were convicted in 1976-77 and 1,011 who were convicted in 1979-80. Each jurisdiction in the State was sampled randomly; in some

Table 4. Minimum/maximum indeterminate sentences, average (mean) sentence length in months

Type of felonies	Connecticut, ^a 1976-77 and 1979-80		Illinois, 1978-82 ^b			New York, 1982			Number of maximum life imprisonment sentences
	Number of incarcerative sentences	Minimum	Number of incarcerative sentences	Minimum	Maximum	Number of incarcerative sentences	Minimum	Maximum	
All felonies	*	*	4,429	80 mos.	173 mos.	9,930	40 mos.	79 mos.	495
Serious violent crimes^c	*	*	2,229	131	277	4,999	53	99	359
Criminal homicide ^d	22	91 mos.	564	346	743	809	130	156	304
Rape	*	*	125	154	356	219	67	156	10
Robbery	337	42	1,292	55	108	3,567	38	91	44
Aggravated assault	125	24	248	29	79	404	28	69	1
Serious property crimes^e	*	*	*	*	*	2,388	25	59	8
Burglary	175	24	1,057	21	60	1,990	25	61	8
Larceny	246	23	370	16	40	306	18	42	
Auto theft	*	*	*	*	*	f	f	f	
Arson	*	*	*	*	*	92	29	81	
Drug crimes	213	22	*	*	*	1,233	26	59	117
	Pennsylvania, ^g 1981			Wyoming, 1981-84					Number of maximum life imprisonment sentences
	Number of incarcerative sentences	Minimum	Maximum	Number of maximum life imprisonment sentences ^h	Number of incarcerative sentences	Minimum	Maximum	Number of minimum life imprisonment sentences	
All felonies	13,004	14 mos.	39 mos.	121	*	*	*	*	*
Serious violent crimes^c	2,813	25	70	121	242	69 mos.	112 mos.	24	31
Criminal homicide ^d	476	42	112	121	64	146	195	23	30
Rape	153	53	136		59	70	127	1	1
Robbery	1,475	24	68		64	56	99		
Aggravated assault	709	13	40		55	29	61		
Serious property crimes^e	4,008	13	38		458	25	55		
Burglary	1,940	19	52		273	28	58		
Larceny	1,815	7	25		107	21	47		
Auto theft	186	7	26 ⁱ		64	22	54		
Arson	67	17	51		14	29	61		
Drug crimes	969	9	26		111	19	43		
Note: Life sentences not included in computing mean maximum and mean minimum sentence lengths.			^c Criminal homicide, rape, robbery, and aggravated assault.						
* Data not available.			^d Includes murder and non-negligent manslaughter.						
^a Maximum-sentence and life-sentence data not available for Connecticut; "criminal homicide" data are for manslaughter only.			^e Burglary, larceny, auto theft, and arson.						
^b Illinois life-sentence data not available.			^f New York's auto theft included with larceny.						
			^g Pennsylvania data include certain misdemeanors that would be classified as felonies in many other States.						
			^h In Pennsylvania, a life sentence has no associated minimum term. Release requires commutation by the Governor.						
			ⁱ Because of statutory changes, many auto thefts in Pennsylvania are included with larceny.						

cases, small jurisdictions were over-sampled. Connecticut law defines four categories of felonies, Class A through Class D, in decreasing order of seriousness. Most of the data are presented in terms of these classes, although information on sentence length is available for certain specific crimes. Some misdemeanor convictions appear in the data; these result from plea bargaining when the initial charge was a felony.

Illinois. The judge sets a determinate term based upon a sentence range prescribed by legislation for each class of offense. There is no early release on parole, but "good time" can be earned.

Incarceration rates for persons convicted of felonies in 1979-81, obtained from the Administrative Office of the Illinois Courts, were provided by the Illinois Statistical Analysis Center. Because of differences in reporting by individual counties, these data are a mix of charge-based and offender-based information. That is, where a person was convicted on more than one charge, in some instances the data include each charge separately, while in other instances the person is represented only once in the data. Sentence lengths are derived from a report, *Statistical Presentation 1982*, published by the Illinois Department of Corrections in April 1983. These data are charge-based; each sentence is included separately where a person was sentenced on more than one charge. The data cover sentences that were imposed from 1978 through 1982. During those years, there was a transition from minimum/maximum indeterminate sentencing to determinate sentencing, and the report shows sentence lengths for both types of sentences. (The determinate sentencing law took effect in February 1978. Because a convicted person is subject to the penalties that were in effect when the crime was committed, however, a number of sentences in the 1978-82 period were imposed under the old indeterminate sentencing laws.)

Illinois law defines six categories of felony offenses. They are, in order of decreasing seriousness: Class M (murder), Class X, and Classes 1 through 4. Although for some specific offenses there is information on average sentence lengths, in most cases the data are broken down by class of felony.

Iowa. A prison sentence, when imposed, is automatically for a fixed indeterminate term prescribed by statute for each class of offense. The actual release date is determined by the parole board, but the prison stay cannot exceed the statutory sentence length.

Table 5. Fixed indeterminate sentences, average (mean) sentence length in months

Crime type	North Carolina, 1979 Statewide sample		Oklahoma, 1978-82			
	Number of incar- cerative sentences	Sentence length (months)	Number of incar- cerative sentences	Sentence length (months)	Number of life sentences	Number of death sentences
Serious violent crimes^a	*	*	4,367	123 mos.	179	24
Murder ^b	160	552 mos.	291	168	150	24
Manslaughter	147	164	177	81		
Rape	*	*	443	168	6	
Robbery	681	224	2,017	157	12	
Aggravated assault	176	63	1,439	57	11	
Serious property crimes^c	*	*	7,591	46	5	
Burglary	1,486	68	4,201	53	2	
Larceny	443	52	2,077	31		
Auto theft	*	*	1,163	49	2	
Arson	*	*	150	55	1	
Drug crimes	178	55	2,405	39		

Note: Life sentences not included in computing mean sentence lengths.
^a Data not available.
^b Murder, manslaughter, rape, robbery, and aggravated assault.
^c North Carolina data are for second degree murder only. Oklahoma data include accessory to murder as well as first and second degree murder.
^d Burglary, larceny, auto theft, and arson.

Data were furnished by the Iowa Statistical Analysis Center and cover incarceration rates for persons convicted in three counties in 1981-83. These counties contain slightly less than 10% of the State's population. "Aggravated misdemeanors" are included as well as felonies; such misdemeanors in Iowa are punishable by incarceration for up to 2 years and would be classified as felonies in most other States.

Maryland. For each offense, an upper limit to the sentence length is prescribed by statute. The judge imposes a fixed indeterminate sentence that may not exceed that limit. For some offenses the statute also prescribes a lower limit, and the imposed sentence may not be less than that amount. Release prior to expiration of the sentence can take place through action

of the parole commission, commutation of the sentence by the Governor, or court order.

Data were provided in a report by the Maryland Statistical Analysis Center.¹¹ The data cover four jurisdictions in which sentencing guidelines have been tested since June 1981. The four jurisdictions (Harford, Montgomery, and Prince George's counties and Baltimore City) account for 60% of the reported serious crimes in the State and 68% of the commitments to prison. The preguidelines sample consists of 339 cases that were selected randomly from those cases that had sentencing dates within an 8 month period in 1980-81, and for which (a) there had been a conviction on only one count and (b) a presentence investigation (PSI) report had been prepared. The postguidelines data set consists of the 2,928 single-

Table 6. Determinate sentences, average (mean) sentence length in months

	California, 1979 and 1981		Illinois, 1978-82		North Carolina, 1981-82 Statewide sample	
	Number of incar- cerative sentences	Sentence length (months)	Number of incar- cerative sentences	Sentence length (months)	Number of incar- cerative sentences	Sentence length (months)
Serious violent crimes^a	8,981	59 mos.	14,641	102 mos.	*	*
Murder ^b	180	91	820	332	165	453 mos.
Attempted murder	107	130	767	161	*	*
Manslaughter	730	60	701	61	144	82
Robbery	5,418	56	8,919	89	544	135
Aggravated assault	1,730	48	2,253	40	114	38
Serious property crimes^c	*	*	*	*	*	*
Burglary	5,973	31	10,494	47	1,352	47
Larceny	1,228	27	6,458	33	350	38
Auto theft	976	26	*	*	*	*
Drug crimes	1,646	36	*	*	157	40

Note: Data on life sentences not available.
^a Data not available.
^b Murder, attempted murder, manslaughter, rape, robbery, and aggravated assault.
^c Includes only second degree murder for California (1979 only) and for North Carolina.
^d Burglary, larceny, auto theft and arson.

Table 7. New York: Average (mean) sentence lengths in months, by class of felony and offender classification, 1982

Felony class ^b	Offender classification						
	Youthful ^a			First offender			
	Number of incar- cerative sentences	Mini- mum (months)	Maxi- mum (months)	Number of incar- cerative sentences	Mini- mum (months)	Maxi- mum (months)	Number of maximum life im- prisonment sentences
All	203	14 mos.	43 mos.	7,171	40 mos.	82 mos.	390
A	1	12	36	420	182	87	390
B	38	14	44	1,991	49	128	
C	84	14	43	2,145	29	79	
D	66	13	41	1,985	19	51	
E	14	14	43	630	15	40	

Felony class ^b	Offender classification							
	Repeat ^c				All offenders			
	Number of incar- cerative sentences	Mini- mum (months)	Maxi- mum (months)	Number of maximum life im- prisonment sentences	Number of incar- cerative sentences	Mini- mum (months)	Maxi- mum (months)	Number of maximum life im- prisonment sentences
All	2,556	42 mos.	76 mos.	105	9,930	40 mos.	79 mos.	495
A	25	243	108	24	446	184	86	414
B	370	91	177	47	2,399	55	133	47
C	504	51	97	19	2,733	33	81	19
D	931	29	58	14	2,982	22	53	14
E	726	19	38	1	1,370	17	39	1

Note: Life sentences not included in computing mean sentence lengths.

^a Persons classified as youthful offenders generally are sentenced as though the offense had been a Class E felony, regardless of the actual offense.

^b By statute, there are five classes of felony offenses based on severity of the offense; they are presented in order of decreasing

seriousness. Violent and property offenses appear in all classes. The class of a particular offense depends upon factors such as injury or loss to the victim, weapons use, etc.

^c Includes persons classified as second felony offenders, persistent felony offenders, second violent felony offenders, and persistent violent felony offenders.

count cases (1,760 with PSI's and 1,168 without) for which conviction and sentencing took place from June 1981 through April 1982.

The data provide information on incarceration rates for certain categories of offenses and offenders. Data from the preguidelines sample have not been used in this report because of the small sample size and the restriction of the sample to cases with PSI's.

Minnesota. The judge sets a determinate prison term based on sentencing guidelines that took effect in May 1980. The guidelines use information about the seriousness of the offense and the offender's criminal history to indicate whether the offender should be incarcerated and, if so, the presumptive range of sentence lengths. These ranges are quite narrow. If the judge departs from the guidelines, written justification must be presented. Parole release has been abolished, but the prison stay can be shortened through "good time." When the offender enters prison, a prescribed amount of "good time" is credited that can be reduced or eliminated as the result of unsatisfactory behavior while incarcerated.

The sentencing guidelines were designed to reflect retribution or "just

deserts" as the primary aim of sentencing. Other objectives were uniformity in sentencing and avoiding an increase in prison population. The guidelines currently measure criminal history in terms of the number of prior felony convictions, but they are being revised to take into account the severity of these prior offenses.

Data were taken from a report that investigates the impact of the sentencing guidelines.¹² The data show incarceration rates, in terms of the offender's criminal history and the seriousness of the offense, for a pre-guidelines group of 4,369 persons and a postguidelines group of 5,500 persons. The preguidelines group includes all persons who were convicted of felonies from July 1977 through June 1978; the data are based on a sampling of approximately 50% of that group. The postguidelines group consists of all persons convicted under the guidelines, from their inception in May 1980 until the fall of 1981.

New York. For most felonies, the judge imposes a minimum/maximum indeterminate sentence within limits that are specified by statute for each class and type of offense. The minimum term must be at least 1 year and not more than one-third of the maximum term.

The minimum for repeat offenders is generally half of the maximum term. The offender can be considered for parole after serving the minimum term.

New York defines five basic classes of felonies, Class A through Class E, in decreasing order of seriousness. Classes B through E are subdivided into violent and nonviolent felonies with different statutory sentence ranges. For a number of relatively serious offenses, imprisonment is mandatory, especially when the offender has a prior record of felony convictions.

Under New York law, there are different sentencing provisions for each of six categories of offenders. For a first offender, no special provisions apply; sentencing is governed only by the offense. A "youthful offender" is subject to relatively mild sentencing provisions under certain circumstances. Generally a youthful offender is sentenced as though the offense had been a Class E felony, regardless of the actual offense. The other four categories cover persons with prior felony convictions (second felony offender, persistent felony offender, second violent felony offender, persistent violent felony offender) and are subject to much harsher penalties.

The data for New York were provided by the New York Statistical Analysis Center and cover 22,287 felony convictions in calendar year 1982 that resulted from 1982 felony indictments. This is a subset of all 29,330 felony convictions in 1982, and could be biased by underrepresentation of cases with long processing times. The data include incarceration rates and sentence lengths broken down by offense, class of felony, and offender category. The unit of count is the indicted defendant; if there were several indictments of the same person, they are included separately in the data.

North Carolina. North Carolina used indeterminate sentencing until July 1981. The judge imposed a maximum sentence that could not exceed an upper limit prescribed by statute for each offense. In many cases, a minimum sentence also was imposed. There was wide parole discretion and generous provision for earning "good time" credit. In most cases, an inmate became eligible for parole after serving either the imposed minimum sentence or a fifth of the statutory upper limit, whichever was less.

Determinate sentencing was instituted by legislation that took effect on July 1, 1981. A presumptive sentence length is provided by statute for each offense. The court must impose a fixed determinate sentence of that length un-

less there are significant mitigating or aggravating circumstances. "Good time" credit can be accumulated but, until July 1984, there was no discretionary parole except for certain youthful offenders. Discretionary parole release was partially reinstated on July 1, 1984. Certain offenders considered to be good risks can be released into rigidly supervised community programs after serving at least half of their sentences.

A report evaluating the change to determinate sentencing provided data on incarceration rates and sentence lengths for a number of offenses, based on statewide samples of several thousand persons each in 1979 and in 1981-82, before and after the determinate sentencing legislation became effective.¹³

Oklahoma. The judge imposes a fixed indeterminate sentence that is the maximum amount of time for which the offender can be imprisoned. The sentence may not exceed an upper limit that is stipulated by statute for each offense. The actual date of release is determined by the parole board, which can release the offender at any time before the expiration of the imposed sentence. The initial parole hearing must take place before a third of the imposed sentence has been served.

Data covering each year from 1978 through 1982 were provided by the Oklahoma Statistical Analysis Center. The data include information on incarceration rates and sentence lengths for specific offenses. The offenses are those for which charges were filed originally; changes due to plea bargaining are not reflected in the data. A case-based system is used; that is, each charge is covered separately in the data, and so a person sentenced on more than one charge will account for several data entries.

Oregon. The judge imposes a fixed indeterminate sentence that may not exceed the maximum prescribed by statute for each class of offense. The sentence is the maximum duration of imprisonment. The parole board sets the actual release date, using guidelines that it has developed.

A report by the Oregon Statistical Analysis Center provided information on incarceration rates in 1979 for certain categories of offenses, broken down by whether or not the most serious conviction offense was the same as the most serious offense for which the person had been arrested.¹⁴

Pennsylvania. The judge imposes a minimum/maximum indeterminate sentence. For sentences with a maximum

Table 8. Illinois: average (mean) sentence length in months, by class of felony, 1978-82

Felony ^a class	Minimum/maximum indeterminate sentences			Determinate sentences	
	Number of incarcerative sentences	Minimum (months)	Maximum (months)	Number of incarcerative sentences	Sentence length (months)
All felonies	4,429	80 mos.	173 mos.	41,317	67 mos.
M (murder)	347	495	1,047	820	332
X	1,111	100	194	8,227	132
1	141	65	156	1,816	83
2	1,723	22	62	15,682	48
3	983	23	55	12,750	34
4	124	16	39	2,022	24

Note: Data on life sentences not available.
^a By statute, there are six classes of felony offenses that are based on the severity of the offense; they are presented in order of decreasing seriousness. In general, a particular class can include property and violent crimes. The class of a particular offense depends upon factors such as injury or loss to the victim, weapons use, etc.

of 2 years or more, the parole board determines the actual date of release, but release cannot occur before the expiration of the minimum sentence. Offenders generally are released at the expiration of the minimum term. When the maximum term is less than 2 years, release by court order may take place prior to the expiration of the minimum term.

The Pennsylvania Statistical Analysis Center provided data in a tabulation entitled Pennsylvania Judicial Sentencing Practices, 1978-1981. Information is given on incarceration for specific offenses. The data for 1981 are used in this report; these data are more complete and are estimated to be more reliable than the data for earlier years.

In addition to felonies, some offenses are included that are classified as misdemeanors under Pennsylvania law, but are punishable by more than 1 year in prison and would be considered felonies in many other States.

The data do not include those cases in which Accelerated Rehabilitative Disposition (ARD) was used. This is a type of probation that can be imposed by the court without a formal finding of guilt. It usually is used with non-violent first offenders. If this option were not available, most ARD cases probably would have resulted in convictions with no incarceration.

Washington. During the period covered by the data in this report, Washington used fixed indeterminate sentencing. The law defined three classes of felonies, each with a prescribed upper limit on sentence length. Where a prison sentence was imposed, it was for a fixed indeterminate term equal to the statutory maximum. The paroling authority determined the actual sentence length and the release date. The only restriction was that period of imprisonment could not exceed the statutory maximum sentence length.

A determinate sentencing law was enacted in July 1984. It provides for judicial consideration of the specific offense characteristics and the offender's prior record in selecting a determinate sentence from within a narrow statutory range.

The Washington Statistical Analysis Center provided data covering incarceration rates for certain offenses in 1971-82.

Wyoming. The judge sets a minimum/maximum indeterminate sentence within limits fixed by statute for each offense. The parole board establishes the actual release date from within the range of the sentence.

Data were furnished by the Wyoming Statistical Analysis Center, covering persons sentenced from January 1, 1981, through June 30, 1984. The data are offender-based; each convicted person is represented once in the data. Where a person was convicted on several charges, the data cover the most serious charge. The data were taken from two independent information systems, one covering probation and the other imprisonment. As a result, any person receiving a sentence other than probation or imprisonment is not covered by the data. Since other types of sentences are rarely used in Wyoming, these omissions are not believed to be significant.

Bureau of Justice Statistics Special Reports are prepared principally by BJS staff and edited by Jeffrey L. Sedgwick, deputy director for data analysis. Marilyn Marbrook, publications unit chief, administers their publication, assisted by Millie J. Baldea and Joyce M. Stanford. This report was written by Herbert Koppel.

October 1984, NCJ-95399

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¹²See footnote 7.

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¹⁴See footnote 10.

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Special Report

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

RECEIVED MAY 15 1986

May 15, 1986

FRANK A. KAUFMAN
United States District Judge
Baltimore, Maryland 21201

Honorable William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 2004

Dear Judge Wilkins:

I have your letter of April 25, 1986 and will try to answer the very difficult questions posed in your letter to the best of my ability. In general, however, standing back from the questions and taking a hard look at them, I guess my gut reaction is that this is indeed "Mission Impossible."

* * *

Question 1: How should the Sentencing Commission define felony and misdemeanor offenses in view of the definitional disparity among states, and between states and the federal system? For guideline purposes, should the determining factor be the nature of the offense, the length of the sentence imposed, the statutory maximum of the offense or some other variable?

For want of a better approach, I would suggest using the federal statutory definition. I would think the most important factor is the nature of the prior offense, although the length of the sentence imposed and the statutory maximum should be factors which are considered.

Question 2: How should prior felony convictions be weighted? Should serious previous offenses count against the offender more in establishing the current sanction than relatively less serious prior offenses? How should seriousness of prior offenses be delineated?

In my view, serious previous offenses should count against the offender more than relatively less serious prior offenses. I should think the seriousness of prior offenses should be delineated by reference to the amount of serious harm such offenses have, or are likely to have, caused to others. I would include, within the concept of serious harm, personal injury or suffering to more than a minor extent, and property or monetary damage which has adverse effect upon the victim.

Question 3: What decay factor, if any, should the Commission build into the guidelines when considering a defendant's prior criminal history. For example, should a prior felony conviction factor into a defendant's possible sentence if his previous conviction occurred 10 years earlier? Should the starting point in a decay period be the conviction date, prison release date or supervision release date?

I believe that the decay factor should be built into the guidelines but that the emphasis should be upon the date when a reasonable person would believe that it is probable that the defendant has reached a point in his life at which it is unlikely that he will repeat the same type of crime in which he engaged previously. As between the three starting points mentioned in your letter, namely, the conviction date, the prison release date or the supervision release date, I think, in genral, I would opt for the last of those three.

Question 4: Should prior juvenile offenses be considered in establishing sentences for adult offenders? Should they be given the same weight as adult convictions? If so, what decay factor, if any, should be built in?

I think that prior juvenile offenses of the type which have serious adverse effect upon victims (see answer to question 2) should be considered in establishing sentences for adult offenders, but should not be given the same weight as adult convictions unless the sentencing judge believes that the defendant, at the time he committed the crime, had reached the stage in his life at which he, despite the fact that he was still a juvenile, had formed certain lifestyle patterns which would be apt to persist as he moved from juvenile status to adult status. As to the decay factor, I would following the same approach indicated in my answer to question 3.

Question 5: How should the Commission handle military convictions? What about foreign convictions or tribal convictions?

I know little about military justice and even less about tribal justice. As to the former, I am told that in recent years military justice is something of which we can be proud. In general, I would handle convictions, whether they be military, tribal or foreign, on the same basis as I would handle convictions within the federal and state court systems to the extent, but only to the extent, that the sentencing judge is convinced that those convictions result from administration of justice on a fair basis as we, as

Americans, define a fair basis. As to foreign convictions, that would, for example, almost surely mean that a conviction in a British court would be viewed far differently than a conviction in a court in the average dictatorship.

Question 6: Should the Commission consider previous arrests or only convictions when determining a defendant's prior criminal record?

While I believe strongly that a sentencing judge should consider a defendant innocent of any prior charge in connection with which he has not been convicted, I believe that a record of prior arrests, particularly if a lengthy one, should be considered as part of the life pattern of the defendant and is relevant for sentencing purposes.

Question 7: Should the fact that a defendant was on probation or parole at the time of the offense of conviction be considered, and if so, how should it be weighted?

I would weight rather heavily against the defendant the fact that he was on probation or parole at the time of the offense, unless there are extenuating circumstances.

Question 8: What level of sentence aggravation should be given for what level of prior record?

I am afraid that I have no specific view as to what exact level of sentence aggravation should be ascribed for a particular level of prior record. However, I would tend to give weight and consideration to the factors suggested in the answer to question 2, supra.

* * *

I hope these views are in some way responsive to the questions which you have stated in your April 25, 1986 letter. I think the task before your Commission is as important as any task which has been assigned to any group of judges, lawyers and citizens in a long time and I certainly will be more than glad to try to be helpful in any way that I can in aiding you and your Commission to perform its very difficult assignment.

Sincerely,


Frank A. Kaufman



RECEIVED MAY 19 1986

**NATIONAL RIFLE ASSOCIATION OF AMERICA
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(202) 828-6320

May 14, 1986

William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

The National Rifle Association's Institute for Legislative Action is pleased to present views on the general topic of "offender characteristics" and sentencing guidelines. Although some of your specific questions (contained in correspondence dated April 25, 1986) lay outside our field of expertise, I will state our views on the issues that are pertinent to NRA.

Clearly, serious previous offense convictions should be weighted heavily in establishing current sanctions. Factors such as the use or threat of violence, real or potential physical injury to an individual victim, and frequency or currency of past offenses are all elements that can be used to delineate the seriousness of prior offenses. We would urge the Commission to expand the generally-recognized classification of violent crimes (murder, assault, rape, and robbery) to include the crime of burglary as a "dangerous crime" that holds the potential for violence. The justification for such a conclusion can be found in Wright and Rossi ("The Armed Criminal in America," 1985). That research indicated a high level of activity on the part of a small group of violent criminals: 22% of the sample of incarcerated felons had accounted for 51% of the total crime reported by the sample. These violent criminals were not only highly active, but they were active in a wide-range of criminal pursuits. Additionally, most of the most violent felons had initiated their criminal career with the "entry level" crimes of robbery or burglary. As Wright and Rossi conclude: "... when we talk about 'controlling crime' in the United States today, we are talking largely about controlling the behavior of these men." One way to control that behavior is to reinforce the idea that actions have consequences, that past behavior (i.e., previous criminal activity) is a valid measure of that individual's threat to the community and a justification for incarceration.

We do recognize the prospects, however slim, for rehabilitation in some cases. Thus, the concept of a "decay factor" is a good one. A single, 10-year-old conviction should not, in most cases, brand the individual concerned as a career criminal. This is especially true if the initial offense was committed during the "crime-prone years" - - - approximately 15 to 25 years of age - - - and the next offense represents minor "backsliding" during middle age. Yet a caveat is in order: it is doubtful that any single formula can be constructed to cover the range of situations or scenarios that could occur. While an individual who has led an exemplary life after earlier conviction of a relatively minor crime clearly deserves treatment as one who has been rehabilitated, there is some criminological evidence to suggest that one conviction on a felony charge

may in reality represent several undetected previous offenses. As a general rule, the starting point for a decay period would most logically be conviction date, but the factors unique to each case must rule the day.

Prior juvenile offenses should be considered in sentencing decisions. Both the Rand survey of California inmates (1980) and the Wright-Rossi survey (1985) confirmed that juvenile criminality was a strong predictor for adult criminal careers. In the words of the Rand study: "The more frequent and serious a respondent's juvenile crime, the more extensive his violent crime as an adult." The Rand study reported that a majority of their inmate respondents had committed a serious crime before the age of 19. The average respondent in the Wright-Rossi survey had already committed a "non-trivial theft" by the age of 15, had been arrested by 16^{1/2}, and had committed a first "pretty serious crime" by the age of 19 as well.

While it is clear that consideration of juvenile offenses may be useful in establishing sentences for adults, it is less clear what weight should be given to those juvenile offenses and how quickly the "decay factor" should operate. Depending on the nature of the crime and its currency with the adult offense, juvenile crime may well be weighted as if it were indeed adult crime. On the other hand, a "decay factor" should lessen the impact of an early, juvenile offense if the individual has demonstrated responsibility and integrity during his or her maturation. Under certain circumstances, a "decay factor" could take effect in as few as five years (the norm in Canada and some European countries for firearms possession by former felons, for example). The decay period should begin with conviction, release from confinement, or release from parole or probation, whichever comes last.

The entire issue of juvenile criminality is receiving a great deal of attention lately. The Commission should monitor the progress of various programs designed to control adult, violent crime by identifying and prosecuting offenders at a young age, before they become involved in a life of crime. One program in particular, the Serious Habitual Offender with Drug Involvement (SHO/DI), can offer a model for both prosecutorial and sentencing policy.

NRA-ILA also recommends that it be previous convictions, and not arrests, that determine a defendant's prior criminal record. Through our involvement with redressing violations of civil liberties that occur under many firearms permit systems, we have become distressingly familiar with the inaccuracy of many criminal records systems. The National Crime Information Center (NCIC) is a notable example. Although all convictions are by no means equal, they offer a more reliable yardstick of an individual's criminality than do mere arrest records.

The fact that a defendant committed a crime while under supervision of some kind, whether probation or parole, should be considered and weighted as a highly aggravating circumstance. When we consider that almost one quarter of those individuals believed responsible for murdering law enforcement officers were on probation or parole at the time, we sympathize with the anger felt by the American public in the face of a seemingly inefficient and uncaring criminal justice system. We recommend that a

William W. Wilkins, Jr.
May 14, 1986
Page 3

reverse "decay factor" take effect if a defendant is being sentenced for a crime committed while on probation or parole for a different offense.

In general, the tenor of our beliefs on this issue is that means must be developed to target, prosecute, and incarcerate those individuals who pose the greatest threat to society. Those hard-core, violent criminals who have no respect for, or stake in society must be dealt with more effectively by our criminal justice system. Sentencing decisions can be made based on the characteristics that these repeat, violent offenders share; that those decisions must be made is a moral imperative inherent in the duties of a criminal justice system. The law-abiding, peaceful public deserves nothing less.

Thank you, once again, for the opportunity to have input into your deliberations. We look forward to a continued dialogue with this Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Warren Cassidy", written in a cursive style.

J. Warren Cassidy
Executive Director

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

ALVIN B. RUBIN
CIRCUIT JUDGE
SUITE 2440 ONE AMERICAN PLACE
BATON ROUGE, LOUISIANA 70825

May 7, 1986

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

Dear Mr. Wilkins:

In response to your letter of April 25, I offer comment on the issues raised by you as follows:

1. Felonies and misdemeanors can most readily be defined by the maximum statutory penalty--one year being the dividing time. The "nature of the offense" is too amorphous to be readily applicable. The length of sentence imposed obviously will vary depending on many factors, and including the past record of the offender. The statutory maximum is not a reliable guide because it may vary erratically.

2. Prior felony convictions should be weighted. Serious previous offenses should count against the offender more than relatively less serious prior offenses. Seriousness of prior offenses may be determined in the first instance by the sentence actually imposed. While this is to some extent inconsistent with my answer to the first question, it seems to me that the seriousness of the offense can best be determined not by the abstract nature of the crime (its statutory name) or by the potential maximum but by the view taken by the sentencing judge as to the "real" seriousness of the offense--a matter most readily measured by the prior sentence.

3. The Commission should take into account the "decay factor" with regard to prior offenses. I would suggest that the decay factor of 20% a year, beginning on prison release date (and not supervision release date) for misdemeanors and "minor" felonies (say, sentences of three years or less) and 10% a year for more serious felonies.

4. Prior juvenile offenses should be considered in establishing sentences for adult offenders. They should be given

the same weight as adult convictions, but the decay factor should be much higher, say 33 1/3% a year for misdemeanors and "less serious" felonies and 20% a year for "more serious" felonies.

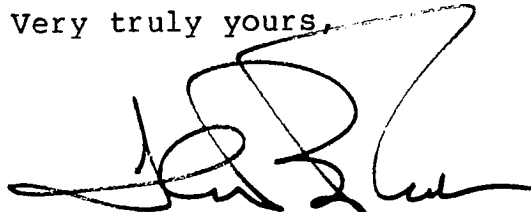
5. Military convictions, foreign convictions, and other convictions should be handled in exactly the same way as judicial convictions. The Commission should not consider previous arrests in determining defendant's prior criminal record, but only convictions.

6. The fact that a defendant is on probation or parole at the time of the offense should be given the same weight as a prior felony conviction.

7. The level of sentence aggravation for prior record should be objectively determinable even though such objective determinations are, of course, to some extent arbitrary. For starters, try a table such as the following:

Each prior misdemeanor	10%
Each prior "full" felony	20%
Each prior "minor" felony (See above)	20%

Very truly yours,

A handwritten signature in black ink, appearing to be "J. B. L.", written in a cursive style.

ABR/mr

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PAUL H. RONEY
CIRCUIT JUDGE
FEDERAL OFFICE BUILDING
ST. PETERSBURG, FLORIDA 33701

May 7, 1986

Mr. William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue N.W.
Suite 1400
Washington, DC 20004

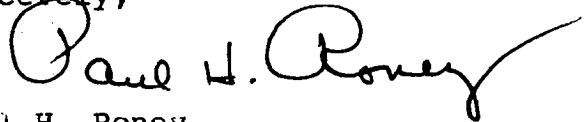
Dear Mr. Wilkins:

Thank you very much for your letter of April 25, 1986, soliciting my views on certain problems in connection with sentencing criminal defendants.

I regret that I have no expertise or experience in this field that would qualify me to express any view in connection with the questions propounded without a great deal of study and consideration. Inasmuch as the time for answer set forth in your letter does not permit such a study, I must decline to attempt to set forth any views on these issues.

Thank you very much for your invitation and the invitation to attend the Thursday, May 22, hearing in Washington. I am sorry I cannot be of any more help to you.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul H. Roney", with a long, sweeping flourish extending to the right.

Paul H. Roney

PHR:ehs

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN
PROBATION OFFICE

TED O. WISNER
CHIEF PROBATION OFFICER

U. S. COURT HOUSE
GRAND RAPIDS 49503
616-456-2364

May 9, 1986

William W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

This letter is written in response to your April 25, 1986, correspondence requesting my thoughts on the topic of prior record and other offender characteristics.

Having previously submitted a list of offender characteristics which might be considered in arriving at a sentencing decision, I will comment briefly on the issue of offender characteristics. While unwarranted disparity is of concern to all of us, it is my feeling that the freedom of the court to sentence defendants on an individual basis allows for the humane and meaningful administration of justice. The social mores of a community and the consideration of individual differences seem to be important factors for the courts to consider in sentencing. Hopefully, the guidelines will not shift judicial discretion into the hands of the prosecutor.

The prior record of a defendant appears to be one of the major considerations in determining a sentence. I will respond to the issues presented in your recent correspondence.

* While the definitions of felony and misdemeanor offenses certainly vary among states and between state and federal systems, it seems that the only reasonable way to define them is to use the definition provided by the court in which they were adjudicated. These definitions certainly reflect the social mores of the community and to translate them into one system in a totally equitable fashion would seem to be unduly complicated. It seems that the reflection of community value contributes to rather than detracts from a meaningful administration of justice. The nature of the actual offense seems to be a more important consideration than the length of sentence or the statutory maximum.

* In weighing felony convictions, it seems that previous offenses which resulted in personal injury might generally be considered more significant than property offenses. If the present conviction is for the same offense as a prior conviction, it may also represent a more deeply ingrained pattern of criminal behavior.

* Utilizing a decay factor in considering a defendant's prior criminal history seems like an attempt to rewrite history. Certainly, a substantial period of crime-free behavior is pertinent. However, I am not sure this factor should be reduced to a numerical consideration. If it is utilized, it seems that the decay period should begin at the point where the defendant began to function in society. Institutional adjustment often does not accurately reflect an individual's ability to remain crime free in a free environment.

* Juvenile, military, foreign or tribal convictions should all be considered when the convicting offense represents criminal behavior which has a civilian/adult counterpart provided the information is verifiable and meets other legal requirements for a countable conviction such as defined in the salient factor score. Status offenses such as truancy, AWOL, or foreign conviction which are not considered crimes in American society should not be considered. The same concerns mentioned with reference to the decay factor in the above paragraph apply.

* Criminal convictions certainly have greater significance than arrests which did not result in conviction. Considering arrests which did not result in conviction seems to contradict one of the basic principles of the American Judicial System which has established the principle that a defendant is "innocent until proven guilty."

* A defendant who commits a new offense while on probation or parole supervision generally represents a greater threat to society than a defendant not under supervision. Perhaps a review of the research conducted in the development of the salient factor score would assist in granting proper weight to this factor.

* The number of prior convictions, the period of time in which they occurred, and the degree of threat each represents to the safety of the community has always been a significant consideration in sentencing. It is my opinion that these factors are important in determining the severity of a sentence. Translating these factors into a numerical assessment is a delicate matter. The research conducted on the salient factor score may be of assistance.

It has again been a pleasure to provide input on the thought-provoking questions and concerns of the Sentencing Commission. Be assured of my continuing interest in your work.

Very truly yours,



Carol D. Erichsen
Supervising U. S. Probation Officer

CDE/sb

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

PROBATION OFFICE

Minneapolis

GLENN BASKFIELD
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638 FEDERAL COURTS BLDG.
ST. PAUL 55101
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May 6, 1986

William W. Wilkins, Jr., Chairman
U.S. Sentencing Commission
1331 Pennsylvania Ave. No.
Suite #1400
Washington, DC 20004

Dear Chairman Wilkins,

I am responding to your letter of April 25, 1986 and submitting my views on how a defendant's prior record should impact sentencing. I numbered the questions and responded to each one.

- 1.) It seems the Commission should establish a clear definition of what a felony is, so there cannot be any disparity when reviewing offenses occurring in states and in the Federal system. The statutory maximum for the offense may be the clearest way to determine what constitutes a felony versus a misdemeanor.
- 2.) Prior felony offenses should be weighted equally. It would be difficult to determine which prior felony convictions should be weighed more or less when comparing them to a specific current offense.
- 3.) If a defendant can establish a long term criminal free history, he should be given some credit for those years when he did not commit a new crime. For prior felony convictions, 10 years from the date of supervised release would be appropriate. This allows the defendant to serve his complete sentence on the prior felony before he is given any credit for decay purposes, if he should re-offend years later.
- 4.) Prior juvenile offenses should be considered if they would be felony offenses if adults committed the same crime. Since juveniles are at a stage in life where they make immature, irrational decisions, their prior felonies should not be weighed as heavily as a felony for adults. The same decay factor of 10 years for these felonies should be used. If the defendant continues to offend into the adult years, this shows a behavioral pattern that is significant in sentencing.

5.) If possible, military, foreign or tribal convictions should be defined as felonies or misdemeanors, depending on the nature of the crime and used as any other crime in determining sentencing.

6.) The Commission should consider only convictions when determining a defendant's prior record. Often defendant's are arrested and the charges are later dropped or dismissed. These charges should not be considered in sentencing. A conviction is the standard way all jurisdictions determine if a defendant committed the crime.

7.) The fact that a defendant was on probation or parole at the time of a new offense indicates there may be several things happening; the defendant is a habitual criminal and supervision has no effect, he has little regard for the seriousness of his past offense and its sanction. In light of these facts, a defendant on probation or parole should have some influence on guidelines. It should be weighed equal to having a prior felony.

8.) Sentence aggravation should be based on the number of prior offenses and the seriousness of those offenses, possibly looking at the prior offenses in terms of property versus person offender crimes to determine how much a sentence should be aggravated.

I hope these thoughts on prior records can be of some benefit to the Commission in their task ahead. If I can provide any additional information in the future, please do not hesitate to contact me.

Sincerely,



Connie M. Roehrich
U.S. Probation Officer

CMR/nmm

United States District Court
Federal Building - H. S. Courthouse
Springfield, Massachusetts 01103

CHAMBERS OF
FRANK H. FREEDMAN
DISTRICT JUDGE

May 7, 1986

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

Dear Judge Wilkins:

I am in receipt of your April 25, 1986 letter which includes a number of difficult questions and I am pleased to respond in an effort to help you with your task. I have taken the liberty of numbering your particular questions in paragraph form one through eight and accordingly answer as follows:

1. In my opinion, certain minor offenses in the state system should not be considered at all in defining felony and misdemeanor offenses. For example, in offenses such as drunkenness, adultery (although a felony in Massachusetts), vagabond and so forth, the nature of these crimes speak to a person's privacy and the acts therein should not be construed as criminal. No harm results to the community as a result of these offenses except on a moral plane. With respect to adultery, it appears to be grounds for divorce rather than for prosecution. Certain other minor offenses need to be assessed on an individual basis. When looking at convictions for disorderly conduct, breach of the peace, gaming, prostitution and so forth, it would be necessary to examine the details surrounding the individual offense. Would there have been a more serious offense had plea bargaining not lowered the offense to that particular charge for example? Could the behavior have been potentially detrimental to others? Absent details of the offense, examination of the disposition might be helpful. If the offense resulted in a jail sentence or a long period of probation, it should be considered. Because of the great disparity among states, statutory maximums should not be a factor used in considering prior offenses.

2. There probably needs to be an offense severity scale drawn up that applies points to the instant offense, with more weight applied if the same offense behavior occurred before. The amount of weight should be scaled depending on the number of instances. If different, but less serious behavior occurred before, then that too should be weighted, but not as greatly as the previous similar behavior. The issue in delineating seriousness of prior offenses is a

William W. Wilkins Jr., Chairman
May 7, 1986
Page 2

complicated one and it is difficult to reduce it to a rather simple level of computation. I do believe an offense severity scale, if properly worked out, can be helpful in this regard.

3. I believe decay (10 years seems reasonable) should be left to the discretion of the trial court in each case with the court giving its reasons on the record for its consideration. For example, a defendant with a long and serious early record of alcohol and related car thefts, joins AA, gets married and stops stealing cars. Ten years later, he begins drinking, gets a divorce and resumes his criminal behavior. The court may, justifiably feel that no decay factor should be considered. On the other hand, if a prior record involved a relatively minor act such as possession of marijuana and the present behavior is a new set of unrelated circumstances such as bank embezzlement, then a good case could be made for not considering the ancient offenses. In deciding when to begin the decay period, consideration should be given to the total time in the community including periods of parole and probation.

4. I do not believe juvenile offenses that would not be considered crimes if they were committed by adults (for example: stubborn child, runaway) should be considered at all in establishing sentences for adult offenders. Other crimes should be weighted the same as adult offenses using the same criteria as indicated in Paragraph 3.

5. Military convictions for conduct that is strictly military (such as AWOL) should not be considered in my opinion. Offenses that are generally prohibited by civilian criminal law should be considered.

Foreign offenses should also be considered if they would be offenses in this country if committed here.

Tribal court convictions should be given the same consideration as other convictions.

6. Usually, the court should only consider convictions where the defendant was represented by counsel. However, there are some exceptions. There are many instances when a long history of arrests for assault and battery result in dismissals. These dismissals can often be attributed to fear on the part of witnesses to testify with a resultant lack of evidence. In such cases, the court must use its discretion in considering those arrests. The weight of the numbers of

William W. Wilkins Jr., Chairman
May 7, 1986
Page 3

arrests can provide a basis for concluding clearly and convincingly that the defendant is criminally responsible. The court could state its findings on the record.

7. When a crime is committed while a defendant is on parole or probation, it becomes a far more serious matter. All sentences imposed for the current behavior should be consecutive to any meted out in that fashion. To do otherwise would depreciate the seriousness of the instant offense and the offense for which the defendant violated probation or parole.

8. I believe a prior record is the most serious factor to take into account in aggravating a sentence. Numbers of convictions, amount of time spent in jail, seriousness of the offenses and age of the defendant should all be correspondingly weighted in developing a plan for aggravating sentences.

I trust the foregoing will be helpful in your difficult work that lies ahead. I hope, however, that there always will be some discretion left in the decision-making process of the trial judge. In other words, there should be some sort of balance between the disposition assigned to a particular criminal offense and the thought process of a trial judge making a decision on the day of disposition.

I wish you well in your toilsome task.

Sincerely yours,



Frank H. Freedman
United States District Judge



May 9, 1986

William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

This is in response to your letter to Vita Ostrander, President of AARP, requesting AARP's comments on sentencing policy and the relative seriousness of various crimes. Mrs. Ostrander has passed your letter on to me.

Although your request for AARP's input is much appreciated, AARP is unable to respond directly to your questionnaire. Nonetheless, the Association would like to comment on factors that should be considered when setting sentences and related policy, particularly with regard to the types of crimes frequently committed against older victims. Critical among AARP's comments is its belief that the victim must receive more consideration and play a greater role in the criminal law process in general.

AARP reiterates its request that older Americans be specifically represented on the U.S. Sentencing Commission. The appointment of an older American as such a representative would insure that the Commission is able to competently address the unique problems faced by older persons vulnerable to crime and the criminal process.

Older persons are the favored and hence principal victims of criminal fraud, strong-arm robbery, purse snatching, theft of checks from mailboxes, vandalism and harassing phone calls. The fear generated by these crimes has a unique and exaggerated effect upon the lifestyles and emotional well-being of older victims. Crime has been consistently cited by the older Americans as being one of their major concerns. Among the urban elderly, it is ranked first.

Being old not only increases the chance of being a victim of certain crimes, it can magnify the consequences. Pervasive fear is generated and spread to those who have not been directly involved. Recognizing their vulnerability, many older persons make drastic and unreasonable changes in their lifestyles to avoid what they believe are threatening situations. They may become virtual prisoners in their own homes, blocking social interaction critical to their emotional and physical well-being and subjecting them to other life threatening situations.

Law enforcement authorities and the courts must take into consideration the special physiological, psychological, sociological

American Association of Retired Persons 1909 K Street, N.W., Washington, D.C. 20006 (202) 638-2600

Vita R. Ostrander President Cyril F. Bruckfield Executive Director

and economic impacts of crime on older victims and their communities. AARP conducts a criminal justice services program aimed at the prevention and analysis of crime, the education of law enforcement offices and assisting potential victims and persons interested in community efforts to reduce crime. Private initiatives, however, cannot supplant federal financial and technical support and encouragement to state and local agencies to, for example, compile detailed and uniform crime statistics, including victim age, so as to better identify those crimes to which older persons are disproportionately subject.

With this in mind, AARP offers the following specific comments on sentencing policy:

1) The first and greatest priority should be serious, habitual offenders who commit stranger-to-stranger violence. Older persons are the ideal marks for these crimes, which are especially frightening. Stiff sentences act as a meaningful deterrent to such crimes. Federal funding of community prevention programs, such as neighborhood watches and education programs, can also help to reduce common and "opportunistic" crimes without detracting from state and local police efforts.

2) AARP believes that victims of crimes must be allowed meaningful participation in the criminal process. Consideration must be given to the nature of the victim, the specific consequences of the crime for that victim, and the hardships imposed by the judicial process itself upon the victim. Older persons in particular find the trial process to be an economic and physical burden with few rewards for victims. The victim must no longer be the forgotten element in the criminal justice system.

3) AARP supports examination of alternative mechanisms for dealing with offenders, including work or other forms of restitution. Even unskilled common street criminals may "earn" \$40,000 to \$70,000 per year. The ill-gotten gains and assets of offenders should be seized and used to compensate victims. Older victims in particular are frequently people living at or below the poverty line who can ill-afford the loss of a Social Security check or the move to a "safer" neighborhood.

Nonviolent juvenile offenders can make restitution through public service. This can take many forms, such as assisting in-home public service agencies and community organizations, cleaning public parks, and restoring buildings and structures damaged by vandalism, etc. Such programs might have the added benefit of diverting a juvenile offender from becoming involved in more serious criminal activity.

4) The Sentencing Commission must take a fresh and more serious look at the crime of elder abuse. Like much domestic violence, elder abuse is a hidden phenomenon affecting hundreds of thousands of older Americans. In 1981, an estimated one million older Americans (or over 4% of the nation's older population) were victims of abuse; that

figure has increased by approximately 100,000 new cases in each succeeding year. Incredibly, neglect of a dependent parent that results in death may not even result in criminal or civil liability, as is true with other forms of abuse. Although 37 states and the District of Columbia have passed adult protective laws that require mandatory reporting of abuse, there is little consistency among these statutes. Among other remedies, states should be encouraged to enact laws making it a criminal offense to abuse any family member and to provide victims with an opportunity to seek civil redress. Similarly, institutions and their employees should be liable for criminal and civil penalties for victimization of those in their care.

The staff of AARP is available to cooperate with you in developing remedies to the problems set forth in this letter. AARP appreciates this opportunity to comment on sentencing policy and look forward to working with the Commission to develop a fair and effective national sentencing policy.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Rother".

John Rother
Director,
Legislation, Research and Public Policy

JR/paw

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA
PROBATION OFFICE

JOHN R. BOWDEN
CHIEF PROBATION OFFICER
118 UNITED STATES COURT HOUSE
P. O. BOX 1645
MUSKOGEE 74402
(918) 687-2366

May 9, 1986

U. S. PROBATION OFFICER
P. O. BOX 1484
DURANT 74702
(405) 924-0864

REPLY TO Muskogee

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

Dear Judge Wilkins:

I am pleased to submit the following response to your most recent correspondence on the issue of how offender characteristics should affect sentencing:

1. HOW SHOULD THE SENTENCING COMMISSION DEFINE FELONY AND MISDEMEANOR OFFENSES IN VIEW OF THE DEFINITIONAL DISPARITY AMONG STATES, AND BETWEEN STATES AND THE FEDERAL SYSTEM? FOR GUIDELINE PURPOSES, SHOULD THE DETERMINING FACTOR BE THE NATURE OF THE OFFENSE, THE LENGTH OF THE SENTENCE IMPOSED, THE STATUTORY MAXIMUM OF THE OFFENSE OR SOME OTHER VARIABLE?

The distinction between felony and misdemeanor violations should be determined by using the statutory maximum definitions as now shown in Title 18 USC 1 for Federal offenses, and by recognizing each of the States' Jurisdictional Prerogatives.

2. HOW SHOULD PRIOR FELONY CONVICTIONS BE WEIGHED? SHOULD SERIOUS PREVIOUS OFFENSES COUNT AGAINST THE OFFENDER MORE IN ESTABLISHING THE CURRENT SANCTION THAN RELATIVELY LESS SERIOUS PRIOR OFFENSES? HOW SHOULD SERIOUSNESS OF PRIOR OFFENSES BE DELINEATED?

All prior felony convictions which are of a nature similar to the instant offense, or were of an equal severity, and in particular, those prior offenses were of a frequency that would indicate that no deterrent effect has occurred, should be considered as aggravating circumstances in assessing penalty of the instant offense.

Offense seriousness could be identified as (1) those that resulted in actual or threatened physical harm or mental impairment; (2) those which produced primarily property losses; or (3) those resulting in both physical/mental harm and property loss. Most offenses do result in some type of harm to an identifiable victim, and some type of "psychological" (mental/emotional) effect is unavoidable.

3. WHAT DECAY FACTOR, IF ANY, SHOULD THE COMMISSION BUILD INTO THE GUIDELINES WHEN CONSIDERING A DEFENDANT'S PRIOR CRIMINAL HISTORY? FOR EXAMPLE, SHOULD A PRIOR FELONY CONVICTION FACTOR INTO A DEFENDANT'S POSSIBLE SENTENCE IF HIS PREVIOUS CONVICTION OCCURRED 10 YEARS EARLIER? SHOULD THE STARTING POINT IN A DECAY PERIOD BE THE CONVICTION DATE, PRISON RELEASE DATE OR SUPERVISION RELEASE DATE?

Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
May 9, 1986
Page Two

Beginning with the offender's last date of conviction, a crime-free period of ten (10) years or more would be a reasonable "decay factor" in considering prior history for a current offense (i.e., a crime-free period of ten (10) years or more would be considered mitigating in considering the penalty for the instant offense).

4. SHOULD PRIOR JUVENILE OFFENSES BE CONSIDERED IN ESTABLISHING SENTENCES FOR ADULT OFFENDERS? SHOULD THEY BE GIVEN THE SAME WEIGHT AS ADULT CONVICTIONS? IF SO, WHAT DECAY FACTOR, IF ANY, SHOULD BE BUILT IN?

Juvenile offenses should be equally considered if those offenses were of a nature (i.e., severity) similar to that of the adult offense. Again, a crime-free period between the last juvenile offense date and the adult offense date of at least ten (10) years would be mitigating.

5. HOW SHOULD THE COMMISSION HANDLE MILITARY CONVICTIONS? WHAT ABOUT FOREIGN CONVICTIONS OR TRIBAL CONVICTIONS?

Military convictions, foreign and tribal convictions should be considered in any current punishment as aggravating if it is ascertained that the defendant was duly processed and afforded the opportunity for attorney representation.

6. SHOULD THE COMMISSION CONSIDER PREVIOUS ARRESTS OR ONLY CONVICTIONS WHEN DETERMINING A DEFENDANT'S PRIOR CRIMINAL RECORD?

Only convictions should be considered in determining a defendant's prior record; i.e., an arrest may have resulted in no charges, a dismissal or a verdict of not guilty.

7. SHOULD THE FACT THAT A DEFENDANT WAS ON PROBATION OR PAROLE AT THE TIME OF THE OFFENSE OF CONVICTION BE CONSIDERED, AND IF SO, HOW SHOULD IT BE WEIGHED?

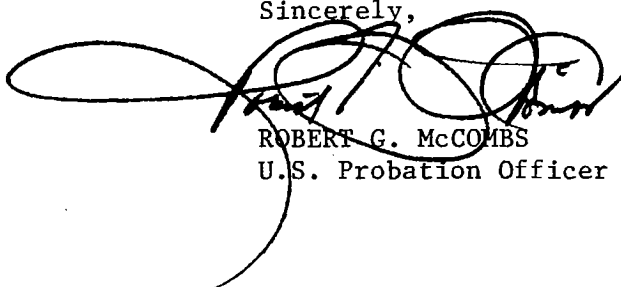
Yes, if a defendant were on probation or parole at the time of the offense of conviction, that status should be considered as it would strongly indicate that no deterrent effect existed from the previously imposed penalty, and thus, should be considered aggravating.

8. WHAT LEVEL OF SENTENCE AGGRAVATION SHOULD BE GIVEN FOR WHAT LEVEL OF PRIOR RECORD?

The level of sentence aggravation should be far greater for those prior criminal offenses that resulted or threatened physical harm, national security, or violation of public trust.

I sincerely appreciate the opportunity to submit the views of this office, and look forward to continued cooperation and involvement with the Commission.

Sincerely,



ROBERT G. McCOMBS
U.S. Probation Officer

lsa

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
PROBATION OFFICE

GEORGE BECOUVARAKIS
CHIEF PROBATION OFFICER

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(804) 441-6673
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ROBERT B. AULT
DEPUTY CHIEF PROBATION OFFICER

May 9, 1986

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

Dear Chairman Wilkins:

In response to your inquiry concerning what offender characteristics and prior criminal record should affect one's sentencing, my thoughts are as follows:

The definition of a felony should be based on the nature and severity of the offense involved which would include the amount of damage done to the victim(s). This damage, of course, could be actual physical harm inflicted, financial loss imposed and/or both. Because of the differentiation in state laws, community mores and other variable factors, it is not felt that the length of the sentence imposed in various states should be a weighting factor.

In determining sanctions, a history of serious prior offenses should be weighted more heavily than those of a less serious nature. There should, however, be the latitude of considering a history of repeated minor offenses where one can discern a pattern suggesting a disregard for the law. Again, the seriousness of the prior offenses should be delineated based on the nature and severity of the offense and the amount of damage done to the victim(s).

As far as a decay factor is concerned, one must not look at the date of one's last conviction without considering what has transpired in the years following that conviction. If a decay factor is utilized, it should be calculated from the final date of release from supervision. Further, if one's adjustment to supervision was marginal albeit the date of termination from supervision was ten years prior to the current charge, a provision for consideration of marginal adjustment should be available.

As far as juvenile offenses are concerned, they definitely should be considered when establishing sentences for adult offenders. Felony offenses committed by juveniles should be given the same weight as adult convictions. Status offenses such as truancy or runaway should not have the same weight as adult convictions. The decay factor is not believed to be as significant as the nature of the offense committed as a juvenile compared to that for which a defendant has been currently charged. If, for example, a juvenile committed a robbery and fifteen years later another robbery is committed, that should not be negated based simply on the number of years that separate the two offenses.

The Honorable William W. Wilkins, Jr, Chairman
May 9, 1986
Page 2

Military convictions for offenses which are punishable by civilian law should be treated no differently than prior offenses tried in civilian courts. The same is true of foreign or tribal convictions. What should be considered is the behavior of the individual and his transgression against the rules and/or laws of the society and the nature of the offense.

It is felt previous arrests as well as convictions should be considered, particularly in situations where the cases were nolle prossed. Arrests should not be considered if the charges were dismissed or the defendant was acquitted based on a factual finding.

If a defendant was on probation or parole at the time the current offense was committed, definite weight should be given to that item as it reflects a disregard for the privilege of being on probation or parole. In fact, if numerical figures were used, a double penalty should be employed in assessing the individual's criminal history (one consideration for a prior criminal conviction and one consideration for being on probation or parole at the time of the current offense).

Repeat offenders (prior felony conviction and/or a history of numerous misdemeanor offenses) should affect sentencing levels. Again, it is in the pattern of behavior and one's willingness to transgress against the laws of society which must be considered.

While an individual's past arrest history (juvenile and adult) is believed to be one of the most significant weighting devices for determining sentencing, the nature of the current offense, the damage done to the victim(s) and individual's dependence on criminal activity for a livelihood should be weighted most heavily. Certainly individual factors such as limited mentality, poor educational and/or vocational skills, and limited family and/or community ties must be considered but to a far lesser extent when imposing sentence.

In conclusion, punishment for crimes committed should be proportionate to the offense involved, the damage done to the victim(s), and demonstration of a behavioral pattern of violating the law, and, to a lesser extent, on the individual resources available to the defendant. Punishment should be uniform with allowances for deviations because of mitigating or aggravating circumstances. It is the pattern of behavior that should be observed most closely with the ultimate goal of extinguishing that behavior through behavioral change or removal from society.

Sincerely,



Mrs. P. S. Hale, Supervising
U. S. Probation Officer

PSH:kc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PROBATION OFFICE

CARLOS JUENKE
CHIEF PROBATION OFFICER

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KEY WEST, FLORIDA 33040-1736

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May 9, 1986

REPLY TO: MIAMI, FL

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

Dear Judge Wilkins:

Pursuant to your letter of April 25, 1986, the following comments and suggestions are submitted as pertains to the issues and topics that will affect The Sentencing Commission's decisions for appropriate guidelines.

1. DEFINITION OF FELONY AND MISDEMEANOR OFFENSES:

Initially, this issue would appear to be a relatively simple one in that the generally accepted definition of a felony is a crime which may be punishable by more than one year incarceration. Ancillary to this definition, a misdemeanor has been defined as a crime punishable by one year or less of incarceration. However, the Comprehensive Crime Control Act of 1984 (H. J. R. es. 648-155) (Section 3559) imposes a new classification for federal offenses. This classification, as you know delineates five categories of felonies, three categories of misdeameanors and a new offense to be known as an infraction.

In proposing sentencing guidelines it would appear that the most reasonable and expeditious method of approaching consideration of a defendant's prior record would be through the presentence investigation. Perhaps the Sentencing Commission could consider a mandate requiring Probation Officers to "translate" local and state convictions as well as pre-C.C.A. federal convictions into the new federal classification system. This translation could be based upon the statutory maximum penalty of incarceration for the offense in question.

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In addition there would be little likelihood of confusion as to the nomenclature of as to different offenses. This often can be the case in terms of relatively serious offenses (e.g. New York State Penal Code-Criminal Trespass Second Degree) which suggest a relatively minor act. In fact this is an offense punishable by a year in jail and is often a category utilized for purposes of plea bargaining for more serious burglary charges.

In summary, this "translation" via the presentence investigation would permit greatest possible consideration by the Court in sentencing as well as provide an opportunity for the Sentencing Commission to consider the prior record of the defendant in a nationally and universally accepted methodology without chance of misinterpretation by the Court.

2. WEIGHING OF PRIOR FELONY CONVICTIONS:

If the Sentencing Commission considered the above described method of defining misdemeanor and felony convictions, a more consistent posture could be maintained as to determining the weight to be placed on prior felony convictions. Clearly an offender with one prior conviction for a "Class E Felony" standing before a federal judge for sentencing should be treated more leniently than an offender who has a prior conviction for a "Class B Felony".

As noted in your letter, the issue of how to consider a felony conviction in and of itself is most crucial. It may be appropriate for the federal system to adopt a mandatory minimum sentence which is the law in many states. The effect of this system is that offenders convicted of a second felony in their criminal careers face the prospect of serving a mandatory (in several states, half of the maximum) prison term. In addition many states prohibit the imposition of a probationary sentence for a second felony conviction. I would suggest that both of these procedures (1. a graduated sanction for previous felony and misdemeanor convictions. 2. mandatory minimum terms of incarceration based upon previous felony convictions) would be the most fair and appropriate manner to impose sentencing guidelines. Also, the various classes of felonies and misdemeanors could be weighted, perhaps on a point scale. In this manner, the total accumulation of "points" could be correlated to a percentage of the maximum term of incarceration to be imposed. These procedures would not of course be totally applicable to those offenses involving crimes of violence, felons with multiple convictions and offenses involving violations of section 401 of the Controlled Substances Act (H.J. Res. 648-185)(\$994(h) and (1)) where more severe penalties are mandated.

3. DECAY FACTOR:

Certainly a "decay" factor should be brought into consideration in terms of considering a defendant's prior criminal history. As suggested, the time frame of ten years would appear to be appropriate. However, the starting point in the decay period should be the defendant's release from criminal justice jurisdiction for the felony conviction. Although a defendant may have been convicted of a felony ten years ago, the subject could have possibly spent a minimal amount of time in prison and a considerable amount of time under parole supervision. Under state and federal parole release guidelines, a defendant could enjoy five years of community supervision for a relatively serious offense. Certainly if a defendant spent two years in custody and five years under community supervision, he should not be given the benefit of a ten year decay period if he chooses to enter into felonious behavior only three years after his release from parole supervision.

4. JUVENILE CONVICTIONS:

The matter of juvenile convictions is a serious consideration. The unfortunate and sad reality is that many career offenders have selected their respective avocations at a relatively early age. Many offenders have stood before a sentencing judge, both in federal and state courts, awaiting imposition of sentence on their "first or second" conviction. The true facts of the matter are that some of these individuals have enjoyed the largesse of juvenile courts where criminal and violent behavior is often treated as merely a symptom of adolescent adjustment problems. In this respect it would appear that such juvenile convictions (perhaps beyond the age of ten) be considered in adult sentencing.

If the Sentencing Commission chooses to consider juvenile convictions, the obvious and very real problem is to how these convictions will be brought to the attention of the Court. In many localities family or juvenile courts require the permission of a defendant to release information from their files to probation officers conducting presentence investigations. In other instances there is simply a matter of time consuming bureaucratic mandates that must be met before this vital information is released for purposes of the presentence investigation.

In summary, although the Sentencing Commission may mandate this information to be included and considered for purposes of sentencing, the reality is that the information may simply not be available. In this respect, the Sentencing Commission, if permissible by law, may suggest that the use of subpoenas be made a procedural portion of the presentence report for obtaining information.

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5. MILITARY - FOREIGN - TRIBAL CONVICTIONS:

These types of convictions, like juvenile convictions, should be considered in developing the appropriate guidelines for an offender. The obvious and justifiable exceptions would include behavior that would not be defined as criminal in a state or federal court of law.

6. PREVIOUS ARRESTS:

The issue of whether or not to consider previous arrests without convictions pits reality against legal constraints. An offender may be standing before the Court on a check forging charge. The matter at hand may be the defendant's first "conviction". However, the same offender with only one conviction may have a history of multiple arrests for check related charges. Due to overcrowding in both the state and federal courts, many defendants escape prosecution due to dismissals based upon a lack of information, repeated adjournments granted by the Court at the request of defense attorneys, restitution without prosecution and the failure of prosecution witnesses to appear (due to the often incredible inconvenience of being a prosecution witness). For one to assume that this defendant is before the Court for his first entry into criminal behavior would be foolish. However, the legal reality is that such matters may not be considered.

7. PROBATION - PAROLE:

Of all matters brought forth in your letter of April 25, 1986, this would be one of the most serious. The pathetic but factual situation is that probationers and parolees who are convicted of new offenses while under supervision many times suffer little or no enhanced penalty. In more instances than not, probationers are sentenced to concurrent terms of incarceration for violating their probation by entering into new offense behavior while under supervision. The U. S. Parole Commission provides for a somewhat more enhanced penalty via re-incarceration and a loss of "street time". Although this gesture on the part of the U.S. Parole Commission is admirable, many more individuals are under probation supervision than parole supervision. As a result, it is suggested in the strongest term possible that those individuals convicted of a criminal offense while under probation or parole supervision be required to serve an enhanced term of incarceration.

8. SENTENCE AGGRAVATION:

In conjunction with those comments suggested in Item 2 (Weighing of Prior Felony Convictions) perhaps the U. S. Sentencing Commission could develop a system of graduated

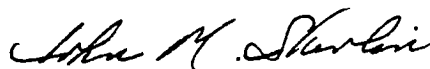
May 9, 1986
Page Five

penalties based upon prior felony convictions. Such a system would meet all of the criterea for sentencing as described in U.S. Code, Section 3553(H.J.R.E.S. 648-153).

The present system of salient factor scoring for offense behavior utilized by the U.S. Parole Commission is woefully inadequate. An individual, on his very first conviction, convicted of a category three offense may be incarcerated for up to ten (10) months. Another individual, convicted for the same type of offense, on his fifth felony conviction loses only three points in the salient factor system presently utilized by the U. S. Parole Commission. As a result, after five felony convictions the same defendant faces an enhanced penalty of only two (2) to six (6) months more incarceration (salient factor score 7, customary total time to be served before release 12-16 months). Clearly the disparity is evident.

I appreciate any consideration that may be given to the above comments. Thank you.

Sincerely,



John M. Shevlin, Supervising
U. S. Probation Officer

JMS/mds

cc: Mr. L. Russell Burress
U. S. Probation Officer
The United States Sentencing Commission

Mr. Carlos Juenke, Chief
U. S. Probation Officer
Miami, Florida

The United States Sentencing Commission
1331 Pennsylvania Ave. N.W.
Washington, DC 20004

May 7, 1986

Attn: Wm. W. Wilkins, Jr.:

Dear Mr. Wilkins:

I am writing to offer some opinions on your recent request concerning the use of prior offence history in the sentencing of federal prisoners. This came to me via the good people at CURE, Charles & Pauline Sullivan. Due to the short notice I have taken the liberty of sending these ideas directly to you with a copy to CURE. I am one of the inmates in Ohio who offered some of the comments in the offender characteristics request and appreciated the opportunity to have some input. I hope you think these worthy of your consideration.

- * felony/misdemeanor definitions: I feel that the elements of the various crimes should be cataloged and compared so that there is a minimum of confusion as to similar crimes being defined in various fashions by the several states.
- * I do not feel that the length of the sentence imposed is a proper criteria due to the various personalities involved in the separate courts. Some judges may be lenient, others harsh etc. and this will not be apparent to those on the sentencing commission. To use this as a factor may lead to a harsher/more lenient sentence based on the biases of a judge some years removed.
- * On the use of the seriousness of the prior offence, I think that a comparison of offences should be first order of business. Is this a repeat offence or an unrelated one? Also is the underlying cause in the personality or in the environment and if indications are that the causes would respond to treatment and was that offered or available.

If the prison system could have offered the rehabilitation that had a probability of reducing the chance of re-offence and did not make that available then why increase penalty rather than make that treatment available now?

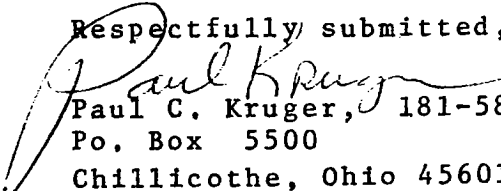
On the other hand, if treatment was available and the offender refused to take advantage of it then this should also be considered.
- * On the Decay factor issue, I think you might look at the recidivism rate statistics and determine the point at which a small portion, say 5% of the felons are all that remain without reoffence. It might be safe to say that those few who may offend after this time have learned to deal well with their problems and deserve some credit if they do relaps. Those who fail sooner are probably those most likely to continue to fail early.

- * The starting point for the decay should probably be at the end of the final release from state control, such as expiration of sentence or parole, which ever occurs first.
- * Prior juvenile offences should not be considered unless they are directly related and form a continuing pattern leading to present offence. If there has been a pattern of failure of past juvenile agencies to deal with the problems when their nature was less serious this should also be given some consideration, perhaps leading to the placement where therapy may be helpful.
- * Military/Tribal convictions. If the offence is of a felony nature and the due process has been maintained intact then I see no reason to treat them any different than others.
- * Commission should only consider convictions. There are too many cases of prosecutors over-charging in order to attempt plea bargains by offering to drop additional charges. If a man is presumed innocent and is not convicted then this should never be an issue again.
- * Also, since not all agencies report arrests without convictions this could lead to disparity in some cases. More just and consistent sentences would result from using only convictions.
- * Offences occurring while on parole/probation should be looked at seriously, especially if the prior conviction is related to the current one. But look into the conditions of the parolee/parole officer to some extent also. Was there the proper support to assist the offender re-adjust?
- * Sentence Aggravation. I am not very familiar with the range of sentences available but I would think that after the mitigation has been taken into account that some sort of formula could guide you based on both the number of priors as well as relatedness and time lapse between them. It should be fairly easy to provide a simple work-sheet to plot these items leading to a % of increase of sentence.

I hope these comments provide you with some new ideas. I realize there may well be some bias due to my own situation as a prison inmate, however I do try to remain objective. It is much easier to see some areas of need from this vantage point and there are many. I appreciate any small opportunity to be able to participate in the process and welcome any inquiries.

Let me thank you for taking the time to read this and I wish you a good day.

Respectfully submitted,


Paul C. Kruger, 181-582
Po. Box 5500

Chillicothe, Ohio 45601-0990

May 9, 1986

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

Dear Mr. Wilkins:

In reference to your letter of April 25, 1986, the Association appreciates the serious efforts that are being made by the Commission on this very important and complicated subject. We have recognized over a long period of time the need for thoughtful inquiries into these complex issues relating to the Criminal Justice System.

AARP has no official position on the matters presented in your letter. We are unable at this time to offer recommendations, but our interest is high and we would greatly appreciate being informed of your progress so that we might be helpful in future stages of this important work.

Sincerely,

A handwritten signature in dark ink, appearing to read "Vita R. Ostrander". The signature is fluid and cursive, with the first name "Vita" being particularly prominent.

Vita Ostrander
President

UNITED STATES DISTRICT COURT
OFFICE OF THE PROBATION OFFICER

RECEIVED MAY 13, 1986

MILTON SIMMONS
CHIEF PROBATION OFFICER

WESTERN DISTRICT OF LOUISIANA

4A08 FEDERAL BLDG.
500 FANNIN STREET
SHREVEPORT, LA (71101)

May 9, 1986

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POST OFFICE BOX 889
ALEXANDRIA, LA. (71301)

POST OFFICE BOX 3284
MONROE, LA. (71201)

POST OFFICE BOX 1101
LAKE CHARLES, LA. (70602)

PLEASE REPLY TO:
Shreveport

The Honorable William W. Wilkins, Jr.
United States District Judge
Chairman, United States Sentencing Commission
Washington, D. C. 20530

Dear Judge Wilkins:

As per your request, attached please find my response to the information contained in your letter of April 25, 1986.

Sincerely,



Billy D. Maples
Supervising Probation Officer

BDM:dh

Enclosure

1. How should the Sentencing Commission define felony and misdemeanor offenses in view of the definitional disparity among states, and between states and the federal system? For guideline purposes, should the determining factor be the nature of the offense, the length of the sentence imposed, the statutory maximum of the offense or some other variable?

For guideline purposes in comparing all federal offenses versus state offenses, it seems that the only equitable way would be to use the present definition for federal felony and misdemeanor offenses. That is, being offenses punishable by death or imprisonment exceeding one year would be a felony and any other offense would be a misdemeanor.

For example, if one was trying to determine if a state offense should be graded as a felony or misdemeanor, the determining factor should be the term of imprisonment that particular state law calls for. If in that state the penalty of imprisonment exceeds one year, then it should be classified from the federal viewpoint as a felony.

2. How should prior felony convictions be weighted? Should serious previous offenses count against the offender more in establishing the current sanction than relatively less serious prior offenses? How should seriousness of prior offenses be delineated?

I feel that when an offender classification is being figured for any offender that all prior felony convictions should be weighted the same provided there has been created an appropriate means of comparing state (all state) felonies versus federal felonies. Also whatever grading system is adopted in determining an offender classification, that system should allow for more weight under "prior record" than other factors such as age at criminal offense, etc.

Seriousness of prior offenses should be delineated either as felony or misdemeanor.

3. What decay factor, if any, should the Commission build into the guidelines when considering a defendant's prior criminal history? For example, should a prior felony conviction factor into a defendant's possible sentence if his previous conviction occurred 10 years earlier? Should the starting point in a decay period be the conviction date, prison release date or supervision release date?

In my opinion, the only decay factor that should be built into the guidelines is a ten year limit for misdemeanors only. For

example, if an offender's prior conviction (s) is a misdemeanor and the offender has gone ten years crime-free prior to the instant offense, then the previous misdemeanor (s) should not be counted against the offender in determining an offender classification. However, I do not think there should be any decay period for those who come before the Court for sentencing who have recorded a prior felony conviction (s).

The starting point should be the date of conviction. That way the sentencing court could consider how a person adjusted under parole/probation supervision in determining a sentence for the instant offense.

Also, keeping in tune with current practice under the sixth ammendment that only those convictions where counsel for the defendant was had should be counted as a valid prior conviction.

4. Should prior juvenile offenses be considered in establishing sentences for adult offenders? Should they be given the same weight as adult convictions? If so, what decay factor, if any, should be built in?

Only if (1) the defendant was adjudicated as an adult when he was a juvenile, (2) only if the defendant had counsel and (3) only if the offense was a felony. That would allow the same weight as adult convictions.

With regard to decay factor, I think this issue should be treated similar to my response under #3 and there should be a ten year decay factor with some variances. For example, if a juvenile was prosecuted and convicted as an adult, that conviction should be counted regardless of when the conviction occurred. However, if the conviction was a misdemeanor, it should not be counted at all. Also, even if the conviction was found to have been expunged it should be counted as a prior conviction. Even though expungment and setting aside of prior convictions give an individual relief in other areas, it should not hinder in the determination of prior criminal behavior.

5. How should the Commission handle military convictions? What about foreign convictions or tribal convictions?

I feel military convictions should be considered as they are now, and that if the military offense has a "civilian counterpart" it should be cross-referenced into the prior criminal record evaluations and graded as a misdemeanor or a felony accordingly. This should also apply to foreign convictions or tribal convictions when a comparison can be made.

6. Should the Commission consider previous arrests or only convictions when determining a defendant's prior criminal record?

Only convictions and when there was attorney representation.

7. Should the fact that a defendant was on probation or parole at the time of the offense of conviction be considered, and if so, how should it be weighted?

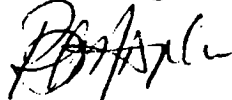
Yes, and should be integrated into whatever procedure that is used in determining offender classification.

8. What level of sentence aggravation should be given for what level of prior record?

I think it would be the general consensus that the prior record of any offender should be weighed heavy in the sentencing process.

In determining sentence aggravation, there should be in the offender classification process a means whereby an individual's prior record is divided into felony and misdemeanor categories. For example, under the present system all prior convictions are lumped into one category when figuring an offender's salient factor score. Future guidelines should call for independent grading of misdemeanors and felonies.

Sincerely,



Billy D. Maples

Supervising U.S. Probation Officer

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

FRANK S. GILBERT
CHIEF PROBATION OFFICER

PROBATION OFFICE

U.S. COURTHOUSE
620 S.W. MAIN, RM 433
PORTLAND, OREGON 97205-3088
503-221-2117

May 5, 1986

William W. Wilkins, Jr., Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Thank you for your letter of April 25th and the resultant opportunity to express my views concerning how a prior criminal record should effect the sentencing decision and, more generally, how offender characteristics should impact upon that decision as well.

Initially, I shall attempt to answer your specific questions concerning the prior criminal record in the order in which they are posed as follows:

1) While I am unaware of the extent of definitional disparity among the various jurisdictions concerning what constitutes a felony or a misdemeanor, I would respectfully suggest that any effort to legally redefine prior criminal conduct creates potential for a great deal of litigation and, in fact, may be an insurmountable task. Further, while the criminal codes in some jurisdictions may be woefully out of date, the particular crimes which they have chosen to classify as felonies may, at least to some extent, reflect that community's view of the gravity of that type of offense. Thus, my initial suggestion would be that the Commission not attempt to re-write history and, instead, simply accept prior convictions as they are classified by the various jurisdictions.

If, however, the Commission holds the view that such an approach would create undue disparity within its own guidelines, I would then suggest that the offense behavior involving prior criminal conduct be ranked and weighted in terms of the offense severity categories which are to be promulgated by the Commission. For example, if Offender A had two prior convictions for robbery, each such conviction might be rated in the "high" offense severity category and each would add "x" number of months to his/her guideline range. If Offender B had two prior convictions for car theft (whether they were classified as felonies or misdemeanors), each such conviction might be rated in the "low moderate" offense severity category and each would add "y" number of months to his/her guideline range. (Needless to say, "x" number of months would be greater than "y" number of months.) In this manner, the more serious prior offenses would appropriately result in the offender serving a longer sentence for the instant crime and, concurrently, it would be immaterial as to whether the less serious crimes had previously been defined as felonies or misdemeanors.

William W. Wilkins
May 5, 1986
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2) I believe my response to question #1 also addresses how prior felony convictions might be weighted.

3) In my view, the absence of a criminal conviction for a substantial period of time reflects an offender's capacity to lead a law abiding life and should therefore serve in some form of mitigation. I would therefore disregard any criminal history that occurred more than ten years prior to the instant crime provided, of course, that the defendant was in the free community and had the opportunity to commit additional offenses. Accordingly, the starting point in a "decay period" should commence when sentence was imposed if the sanction was one of probation, and upon the defendant's physical release from custody if a period of incarceration was imposed.

4) While I recognize that the availability of juvenile records varies among the many jurisdictions, I also believe juvenile offenses are significant and cannot be disregarded. It has been my experience that offenders with significant juvenile records more frequently tend to display the character deficiencies we attribute to the sociopathic personality who, of course, compromises the recidivist offender group. Thus, if public safety is to be a real sentencing purpose, we must utilize all available resources in our efforts to identify those offenders who pose the greatest danger.

From a more pragmatic point of view, I suggest that any juvenile offense, which if committed by an adult would constitute a crime, be weighted in terms of the same offense severity categories which are to be promulgated by the Commission. I would further suggest that the same "decay" policy be applicable as well. That is, the absence of any new conviction for a ten year period following the juvenile conviction would result in the latter being disregarded in the guideline scheme.

5) The manner in which military, foreign and/or tribal convictions should be handled poses a slightly different type of problem. As you are well aware, the Tucker decision (404 U.S. 443 (1972)) precludes consideration of prior felony convictions in which the defendant was not represented by counsel and did not waive such representation. This test may well preclude consideration of many offenses in the aforementioned categories, particularly those involving tribal courts.

Nonetheless, if these prior convictions withstand the legal requirements of Tucker, I suggest that they too be treated in the same manner as suggested in response to questions #1 and #4.

6) Again as you are undoubtedly aware, the only other restriction concerning what may be considered for sentencing purposes is contained in Townsend v Burke (334, U.S. 736 (1948)). I would defer to the legal experts as to whether or not this decision effectively precludes the Commission from including prior arrests which did not result in convictions

William W. Wilkins, Jr.
May 5, 1986
Page 3

into its guideline scheme. (For presentence purposes, we do not include any arrest in which we cannot determine the disposition of those charges.)

I would hasten to add, however, that my reluctance to consider prior arrests which did not result in a conviction involves a considerably different set of circumstances than considering counts in the instant crime which are plea bargained away. Indeed, I sincerely believe that the concept of fundamental fairness requires the Commission to consider total offense behavior, as to do otherwise will surely result in the undue sentencing disparity it was created to diminish. In this particular regard, may I respectfully call your attention to U.S. v Weston, 448 F2d 626, 9th Circuit 1971, which is quoted in part as follows: "...the Court may not rely upon the information contained in the presentence report unless it is amplified by information as to be persuasive of the validity of the charges there made." (While this particular case took issue with a District Court judge who considered unsubstantiated heresay, we have concluded from this opinion that information may be considered which is amplified by substantive facts, including unadjudicated counts.) Existing caselaw has also upheld the Parole Commission's policy to consider total offense behavior as well.

7) The fact that a defendant was on probation or parole at the time of the instant offense may lead one to reasonably conclude that community supervision, per se, has not been sufficient to address the concerns of the community or the needs of the individual offender. Therefore, if a defendant was under supervision at the time of the instant offense and the guidelines promulgated by the Commission for the new crime again dictate a sentence of probation, I would suggest a mandatory special condition of that probation to require him/her to reside in a community treatment center or serve some form of jail term.

If, however, the guidelines promulgated by the Commission for the new crime dictate a period of incarceration, the offense that resulted in the earlier probation or parole would have already been weighted as suggested previously herein. Therefore, it should not be considered in aggravation again.

8) Please refer to my response to question #1 as to what level of sentence aggravation should be given for what level of prior record. It further occurs to me, however, that the law in its present form which limits the maximum of the guideline range to no more than 25% more of the minimum, tends to preclude more than token consideration of the prior criminal history, particularly when the instant offense is of a less serious nature.

In regard to the eleven specific offender characteristics set forth by the statute, I suggested in response to one of your earlier inquiries that the purpose of the sentence to be imposed will dictate what offender characteristics must be considered. That is, when the primary sentencing purposes to be achieved are either the seriousness of the offense/just

William W. Wilkins, Jr.
May 5, 1986
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punishment goal or general deterrence, offender characteristics are of little relevance. (As to the former, perhaps the sanction could be enhanced based upon a prior criminal history.) On the other hand, if the primary sentencing purposes to be achieved are specific deterrence, public safety or correctional treatment, the offender characteristics warrant careful consideration. What characteristics identify offenders who are and/or can be deterred by some modest sanction? Which offenders require a more onerous sanction, and which offenders cannot be deterred at all? Similarly, what characteristics serve to identify the offender who poses a continuing threat to the community and, of course, what characteristics identify those who need correctional treatment?

As a significant aside, I respectfully suggest that this is one area in which the Commission is faced with a most perplexing dilemma. That is, in what types of cases is the "just desserts" model to prevail, and in what types of cases are the utilitarian purposes of sentencing to take precedence? Is punishment of criminal offenders its own justification or is our primary goal to prevent further criminal behavior? This philosophical debate has been ongoing for many, many years and it would appear that the new criminal code has simply ignored the conflict rather than attempting to resolve it.

To return to the eleven specific offender characteristics at hand, the prior criminal history, including prior periods of confinement and performance while under probation/parole supervision, and the mental and emotional condition (when supported by past observable behavior) are perhaps the best indicators of an offender's potential dangerousness to the community. I further suggest that there are combinations of the factors described therein which will serve to identify relatively "normal" offenders who have the capacity to associate cause-and-effect and, therefore, for whom specific deterrence is both a desirable and achievable purpose. Most of the characteristics described therein, however, simply serve to assist us in identifying offenders who are in need of some correctional treatment and, more specifically, what types of treatment will be necessary.

I purposely omitted drug dependence in the preceding paragraph as I believe it warrants some additional discussion. Subjectively, I believe that an offender who is convicted of selling drugs should receive an aggravated sentence if he/she is not a drug dependent person. Indeed, the motivating factor then becomes simply one of greed at the expense of a great deal of human misery. Conversely, if a drug dependent person is convicted of a crime and it can be determined that his/her addiction is the primary motivating factor in the commission of that offense, I suggest the drug dependence should serve in mitigation. Finally, if an offender is drug dependent primarily because it is incidental to his/her ongoing involvement in the criminal sub-culture, this combination of circumstances should also serve in aggravation. (A criminally oriented individual's threat to the community is clearly enhanced by his/her drug dependence.)

William W. Wilkins, Jr.
May 5, 1986
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Needless to say, the foregoing suggests that the defendant's motivation for his/her criminal conduct is a significant factor in the sentencing decision, and this factor will not fit neatly into any guideline scheme. This is an area in which some form of judicial discretion must be retained.

Again, I appreciate this opportunity to express my views and sincerely hope that at least some portion of my response will be useful for your purposes.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank S. Gilbert", with a long horizontal stroke extending to the right.

Frank S. Gilbert

FSG:dj

United States District Court
Eastern District of Kentucky

William O. Bertelsman
Judge
Covington, Kentucky 41012

May 8, 1986

P. O. Box 1012
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FTS 778-3189
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William W. Wilkins, Jr., Chairman
The United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Judge Wilkins:

In response to your letter of April 25, 1986, please be advised as follows:

- *1. I would favor using the traditional method of defining a felony, i.e., an offense for which the possible penalty is in excess of one year. Everyone is used to this and to try to change it would cause confusion.
- *2. More serious offenses should be counted more heavily. The most workable way to delineate would be to have categories, such as violent crimes, drugs, breach of trusts, theft in subcategories according to amount.
- *3. There should be a decay factor. Prison release date should be used.
- *4. I would not consider juvenile offenses.
- *5. Military status offenses (e.g., AWOL) should not be considered. Military offenses that would also be offenses in civilian life should be treated like civil offenses. I am not familiar with tribal offenses.
- *6. Only convictions should be considered.
- *7. An offense committed while on probation or parole should be doubly weighted against the defendant.
- *8. I believe there should be a persistent felony offender offense. There should be a mandatory 25 year non-parolable sentence upon conviction of a third felony, state or federal. Short of that, each previous felony should increase mandatory penalty 25%.

William W. Wilkins, Jr., Chairman
The United States Sentencing Commission
May 8, 1986
Page 2

I believe that mental and social factors and youth should be considered as mitigating circumstances only for the first felony. After that, the protection of society becomes paramount.

I hope these comments will be helpful to the Commission.

Sincerely yours,

William O. Bertelsman
William O. Bertelsman

WOB/ph

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE
PROBATION OFFICE

BARRY W. POLSKY
CHIEF PROBATION OFFICER

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May 8, 1986

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

Dear Chairman Wilkins:

I have found it very difficult to answer your letter of April 25th, 1986. More specifically, the issues raised in your letter are very complex and I question not only my ability to analyze them but also to formulate an intelligent/informed answer. With this in mind, I nevertheless offer the following views.

I urge the Commission to keep the guidelines as simple as possible and to rely most heavily on recent data about an offender. From my point of view, which is that of a practitioner, the older the data the more difficult it is to obtain the information. More and more criminal justice agencies are only retaining a complete file for several years. The time and effort required to reconstruct a complete and accurate accounting of a lengthy prior criminal record has increased significantly. Given the time restraints and the need for accurate information, I feel the guidelines should place the greatest emphasis on recent history (i.e. - ten years).

In regards to your first series of questions, I believe the most simple, practical and accurate method of rating an offender's prior record is length of sentence imposed. I also believe in light of the definitional disparities that the categories of felony, misdemeanor are meaningless, for sentencing guidelines. In addition, in light of plea bargains, and a host of other factors that impinge most heavily when a defendant pleads guilty, I feel the sentence actually imposed is the most accurate/reliable indicator of the seriousness of an offense.

*

I do not believe the guidelines should refer to felony/misdemeanor, particularly if sentence imposed is the determining factor. I believe an offender with a serious prior record should receive a greater sanction than an offender with a less serious prior record. As stated previously I believe the relative determination of seriousness is most accurately determined from the sentences that have been imposed.

I agree with a decay factor being employed for the previously stated reason (in-accessibility of records). I also question whether or not an ancient conviction is a reliable indicator of a person's current ability to function as a law-abiding citizen. I would recommend however, that if an individual has a lengthy and continuous criminal record that the guidelines rate that offender's record more seriously.

In regard to the starting point for the decay factor, I feel it should be the conviction date unless a prison sentence was imposed, in which case it should be the prison release date.

In regard to your third series of questions I believe a juvenile record should be counted if the offenses are not status offenses (i.e. - runaway, truancy, uncontrolled) and weighted in the same manner (length of sentence imposed). I also believe if an offender has a period of ten years or more without a conviction, than the juvenile record should not be counted.

I feel military, foreign and tribal convictions should be counted if the acts are prohibited by civilian criminal law and weighted in the same manner (length of sentence imposed).

In regard to prior record I believe only convictions should be counted. In this regard I also believe the prior record section of a presentence report should only indicate arrests which resulted in a conviction, rather than a complete listing of all arrests regardless of disposition.

In regard to your sixth question, I feel the guidelines should take into consideration whether or not an individual was on probation/parole when they committed the new offense. If a point system is utilized, such as the one utilized by the U.S. Parole Commission than an individual who was on probation/parole should lose a point.

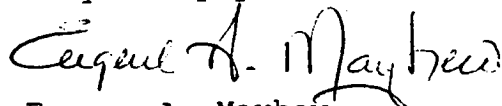
May 8, 1986

I have considerable difficulty providing a specific answer to the question of sentence aggravation. I'm sure most people feel an offender with a significant, serious or, substantial prior record should receive a greater sentence for a given offense than one who has an insignificant prior record. Without knowing how the Commission intends to formulate the guidelines, (what shape they will take) I agree with the Parole Commission's four categories (very good, good, fair, poor). I assume the Commission multiplied the time range for the category very good by some factor to arrive at the time range for the other categories. I don't know what this multiple should be but I feel the range should not be any greater than the range reflected in the parole guidelines. (In this regard I feel, if anything, the parole guideline range is too great between categories).

In regard to the question of the relevance of offender characteristics, I believe the Commission must first decide what the primary purpose of sentencing, is or which of the numerous purposes of sentencing often discussed, it wishes to emphasize before this question can be answered (punishment, retribution, incapacitation, deterrence, social order/justice, rehabilitation). From my point of view I am concerned that the guidelines will be rigid and/or stress incarceration to the virtual exclusion of probation. I would recommend that the guidelines incorporate offender characteristics as a rationale for a sentencing judge to suspend a sentence. Of the ones specified in your letter, I feel all but community ties should be considered. I would also combine education, vocational skills into one category. In regard to age, I feel it should be considered but perhaps like the Parole Commission, the younger the offender, the greater the sanction, if this is not his or her first offense.

In conclusion, I wish to thank you for this opportunity to express my views.

Very truly yours,



Eugene A. Mayhew
U. S. Probation Officer

EAM:l

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
JOSEPH H. YOUNG
JUDGE
BALTIMORE, MARYLAND 21201

May 8, 1986

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

Dear Judge Wilkins:

I submit the following comments on the several issues raised in your letter dated April 25, 1986.

1. Disparity in the definitions of felony between states and between states and the federal courts will probably continue. Guidelines, therefore, become important and I think the nature of the offense should be the controlling factor.

2. Conviction(s) for serious previous offenses should be weighted most heavily with more weight given to crimes against the person vis-a-vis crimes against property.

3. The decay factor should be considered in weighing a prior conviction. Subsequent convictions should be considered geometrically and the starting point should be the conviction date, not the release date.

4. If prior juvenile offenses continue uninterrupted into adult offenses, they should be considered. However, if prior juvenile offenses are unrelated to adult criminal conduct, they should not be considered.

5. Military convictions should be considered in the same light as juvenile convictions.

6. The Commission should consider only previous convictions when determining a prior criminal record.

7. The fact that a defendant was on probation/parole at the time of a subsequent offense should be considered. If the subsequent conviction is for the continuation of prior similar criminal activity, it

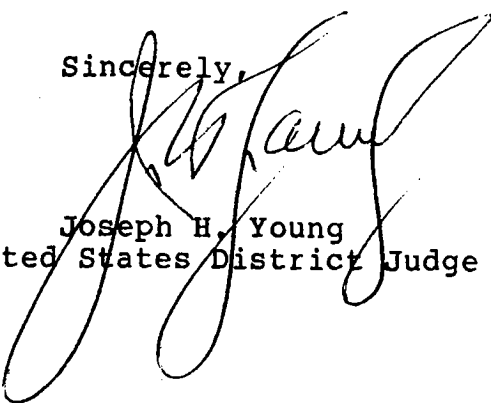
should be given heavy weight; if for a different, and less serious, crime it should receive less weight.

8. A prior record of similar criminal activity should be given a geometric progression of weight.

I do not mean to give simplistic answers to your various questions and, obviously, there are other complicating factors that I have not referred to. However, I am sure you will have detailed comments from many members of the judiciary, and I have attempted to hit the high points only.

Best wishes in your continued activity in this most important endeavor, and I trust you will have time off for the Greenbrier.

Sincerely,


Joseph H. Young
United States District Judge

United States District Court

Southern District of Texas

Hilmon B. Hela

Judge

P. O. Box 1072

Brownsville, Texas 78520

April 30, 1986

Hon. William W. Wilkins, Jr.,
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1200-A
Washington, D.C. 20004

Dear Judge Wilkins:

Please continue to accept my views in response to your inquiries as observations, for that is my sincere submission. My impression is that your most recent letter of April 25, 1986 invites Judges to codify their philosophy of sentencing as would regard the factors of prior convictions. I do not suggest that my ideas are the most adequate as like all of us, I never know whether I have the correct answer.

There is a distinction between felony and misdemeanor offenses but there is also a feature which is relevant as would pertain to the matter of the offense. Regardless of the classification, a conviction for an offense involving moral turpitude is a fact that should be considered. I fully appreciate that it necessitates a review of the particulars surrounding the conviction, for at all levels aggravating and non-aggravating circumstances play a role in assessing the weight to be given the conviction. A pre-meditated homicide is different than a voluntary manslaughter committed in the heat of passion or while under intoxication. Convictions for controlled substances differ if it is a matter of personal use as opposed to distributing. A misdemeanor conviction for theft or possession of drugs is something that should be acknowledged more so when the individual faces a felony charge for the same type of offense.

There used to be laws which precluded the granting of probation where the defendant had been convicted of a felony. Those laws have been changed but as a rule of thumb it may be well to follow the same standard. It would be then that the decay factor would bear upon the sanction. Of course, the time element, the nature of the offense(s) and specifics play a role. If a prior

Hon. William W. Wilkins, Jr.
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offense was committed when a person is under 20 years old and he is now 30, 40 or 50 or you have the interchangeable factors all should affect the guideline.

The thrust of the governing law appears to be that offenses committed when a person is a juvenile are not convictions. It would seem that such offenses and records would be most valuable if used as references to pattern an appropriate rehabilitation program whether in confinement or on conditional release.

Military convictions and foreign convictions do not carry the same attributes as those of our courts' system from the standpoint of Rules of Procedure and Evidence. Notwithstanding, they are legal judgments and subject to investigatory pursuit. Full faith and credit might be appropriate. Serving on the American-Mexican Border it is interesting that I have experienced little difficulty from defendants as they relate their participation in the foreign convictions. Reliance on the foreign convictions is then generally supported with a full opportunity given to the defendant to explain fully the circumstances of the offense. Obviously, the fact that a different legal system is involved should not warrant full acceptance or rejection.

Arrests and referrals are not convictions and they cannot be considered as such. However, they are valuable in assessing a person's contact with the system and certainly reveal that the individual became aware that there are consequences attendant to violating laws. Further, such information can be very helpful to determine recommendations regarding particular problems the accused is experiencing which should be addressed in structuring the sentence.

Probation and Parole are privileges. These should not be given as a matter of right. Conditions imposed during these periods of release should be strictly applied. The fact that a person is convicted while Probation or Parole is in vigor surely should reflect adversely upon the offender.

If there is a prominent factor that should be considered in structuring sentencing guidelines certainly at the forefront the matter of prior record has its place. In reviewing the afore-stated it was the writer's hope that therein is continued the response for the inquiry dealing with the effect of a level of prior records and sentencing aggravation. To concretize the

Hon. William W. Wilkins, Jr.
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impact that prior convictions should have in sentencing by devoiding a look at the particulars of the conviction(s) would simply ignore the fact that there are as many variables in convictions for like offenses as there are in human beings.

Kindly advise me if I can be of further service.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Filemon B. Vela', with a long horizontal flourish extending to the right.

Filemon B. Vela

FBV:mfg

UNITED STATES DISTRICT COURT

LEWIS D. FRAZIER
CHIEF PROBATION OFFICER

WESTERN DISTRICT OF MISSOURI
PROBATION OFFICE

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May 9, 1986

REPLY TO: Springfield

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

RE: How Defendant's Criminal
Record Should Affect
Sentencing

Dear Chairman Wilkins:

Thank you for your letter of April 25, 1986, requesting my views in writing concerning the impact a defendant's prior criminal record should have on sentencing. I also appreciated your invitation to attend the May 22nd hearing on this matter, but due to lack of travel authorization, I regret that I will not be in attendance.

The following sets forth the combined views of this writer and of Senior U. S. Probation Officer David F. Sanders of our Kansas City office concerning the prior criminal record issues the Commission will be considering at the hearing:

1. How should the Sentencing Commission define felony and misdemeanor offenses in view of the definitional disparity among states, and between states and the federal system? For guideline purposes, should the determining factor be the nature of the offense, the length of the sentence imposed, the statutory maximum of the offense or some other variable?
 - 1A. The Sentencing Commission should rely upon the maximum term of imprisonment authorized by statute in defining felony and misdemeanor offenses. A felony should be defined as any offense which is punishable by more than one year imprisonment. A misdemeanor should be defined as any offense which is punishable by one year imprisonment or less. To be consistent, these definitions should be used, even if they conflict with a particular state's definition.

2. How should prior felony convictions be weighted? Should serious previous offenses count against the offender more in establishing the current sanction than relatively less serious prior offenses? How should seriousness of prior offenses be delineated?

2A. Prior felony convictions should be weighted as "serious" offenses if they involve crimes against persons and/or involve the use of firearms or other dangerous weapons and/or the distribution of controlled substances. Prior convictions for offenses which are similar to the instant offense should also be weighted as "serious." With that exception, prior crimes against property should be graded as "less serious." A "serious" prior offense should be double-weighted as compared to a "less serious" prior offense and should count against the offender more in imposing the current sanction than a "less serious" prior offense.

3. What decay factor, if any, should the Commission build into the guidelines when considering a defendant's prior criminal history? For example, should a prior felony conviction factor into a defendant's possible sentence if his previous conviction occurred 10 years earlier? Should the starting point in a decay period be the conviction date, prison release date, or supervision release date?

3A. There should not be a decay factor built into the guidelines. A defendant who has a prior conviction dating back 10 or 15 years has not necessarily led a law-abiding life between the date of the previous conviction and present offense behavior. He/she may have simply learned to become a "better criminal" and avoided detection of criminal activity. Had the defendant truly changed his/her ways, the criminal justice system would not be dealing with the defendant again. By disregarding ancient prior record, we are often rewarding sophisticated career criminals with less severe sanctions.

If the Commission elects to utilize a decay factor in the guidelines, the starting point should be the supervision release date as opposed to the conviction date or prison release date.

Honorable William W. Wilkins, Jr.
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4. Should prior juvenile offenses be considered in establishing sentences for adult offenders? Should they be given the same weight as adult convictions? If so, what decay factor, if any, should be built in?
 - 4A. Juvenile adjudications should not be considered in the guidelines. For the most part, Courts have not considered juvenile adjudications which often result from reasons other than the defendant's criminality (parental neglect; physical, sexual, or mental abuse; learning disorders; hyperactivity; etc.) Access to juvenile records varies from one jurisdiction to another, and it would be unfair to punish those whose juvenile records are available more than those whose juvenile records have been sealed or destroyed.
5. How should the Commission handle military convictions? What about foreign convictions or tribal convictions?
 - 5A. Military convictions by general or special court-martial for acts which are generally prohibited by civilian criminal law should be handled as any other prior conviction is handled by the Commission. Tribal convictions and foreign court convictions for acts which are criminal in the United States should be handled by the Commission as any other prior conviction.
6. Should the Commission consider previous arrests or only convictions when determining a defendant's prior criminal record?
 - 6A. Only prior convictions should be considered by the Commission when determining a defendant's prior criminal record. Further, only convictions in which the defendant either waived representation by counsel or was represented by counsel should be considered.
7. Should the fact that a defendant was on probation or parole at the time of the offense of conviction be considered, and if so, how should it be weighted?

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- 7A. The fact that a defendant was on probation or parole at the time of the offense of conviction should be weighted against the defendant in terms of imposing a more lengthy period of imprisonment.
8. What level of sentence aggravation should be given for what level of prior record?

8A. In writer's opinion, within the statutory penalty provisions, the nature and circumstances of the instant offense coupled with the nature and extent of the defendant's prior criminal record are the two most important factors in the sentencing decision-making process. These two factors probably account for over 90% of the variance in sentencing decisions when the outcome is measured in terms of custody or probation.

The problem becomes more difficult when one attempts to classify prior criminal record into levels and assign levels of sentence aggravation. One possible classification system could be patterned after the existing categories in Item A of the Salient Factor Score (SFS 81).

No prior conviction
One prior conviction
Two or Three prior convictions
Four or more prior convictions

(Prior Convictions)

0	1	2 or 3	4 or More
Lower End of Guideline			Upper End of Guideline

(Sentence Aggravation Level)

Regardless of the classification system used for prior record level and sentence aggravation level, the sentencing Court should have discretion to impose any sentence up to the maximum. Quoting from Robert O. Dawson's 1969 Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States entitled Sentencing:

Honorable William W. Wilkins
May 9, 1986
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The Decision as to Type, Length, and Conditions of Sentence,
"Legislative attempts at control through enactments that preclude discretion are almost certain not to be fully implemented. The administrative pressures resulting from the necessity for handling large numbers of cases with inadequate manpower and the very strong need felt by judges and correctional professionals to reflect individual circumstances in their decisions lead, almost inevitably, to circumvention of such limitations upon discretion" (p. 381).

Thank you again for the invitation to provide input to the Commission in the development of the sentencing guidelines.

Sincerely,

Charles L. Clark

Charles L. Clark, Ph.D.
Senior U. S. Probation Officer

CLC:csd
(Typed 05/09/86)

cc: Lewis D. Frazier, Chief U. S. Probation Officer,
Kansas City, MO
David F. Sanders, Senior U. S. Probation Officer,
Kansas City, MO

United States District Court

United States Courthouse

Foley Square

New York, N. Y. 10007

Chambers of
Judge Gerard T. Goettel

April 29, 1986

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

Dear Judge Wilkins:

The following is in response to your inquiry of April 25, 1986.

The definition of felony and misdemeanor should be based on the statutory maximum of the offense since otherwise determinations would be extremely difficult.

Seriousness of prior offenses should be delineated by the nature of the crime and the sentence received which may account as a surrogate for that.

Using the decay factors will complicate things enormously. It is much easier to simply take the prior convictions into account from the standpoint of the defendant's age (e.g., a young person with two felony convictions would appear to be a much worse prospect than an old person with two convictions, assuming that the older person did not spend a lot of that time incarcerated.) If you are to have a decay factor, the period should start with the prison release date.

With respect to the juvenile offenses, there is reason to consider them albeit with somewhat less weight than adult convictions, except for very young persons, but in many states you cannot learn about them.

Military convictions should be considered. As to foreign convictions or tribal convictions, I have not had any experience on which to base any opinion.

As a general proposition, only convictions, and not arrests, should be considered. There would be exceptions, however, such as states that adjourn in contemplation of dismissal (an informal pretrial probation) and persons having a great number of arrests with no convictions (which might imply something untoward in the functioning of the criminal justice system in the person's area).

The fact that a defendant was on probation or parole at the time of the conviction offense should be considered, particularly if the alternative of probation is a possibility.

It is difficult to equate sentence aggravation on levels of prior convictions. If the prior convictions are numerous and significant, it might require considering the defendant to be a habitual criminal and administering a very long sentence. It is not merely the number of prior convictions but their seriousness that has to be determined, and, consequently, it is impossible to formularize this type of consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gerard L. Goettel".

Gerard L. Goettel
U.S. District Judge

GLG:ekd

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
PROBATION OFFICE

WILLIAM T. FOSTER
CHIEF PROBATION OFFICER

U. S. COURT HOUSE
219 S. DEARBORN STREET
CHICAGO 60604
312-435-5700

May 8, 1986

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

Dear Judge Wilkins:

In responding to your request of April 25, 1986, pertaining to the defendants criminal record and offender characteristics, I solicited the opinions of selected probation officers in the Chicago office. Therefore, the response which follows includes my own assessments as well as my colleagues.

As a preface to my response, a general framework on sentencing is presented. In preparation of the presentence investigation we are often struck by the realization that although defendants may be equally culpable, their personal characteristics are sometimes so different that when these characteristics are examined, the appropriateness of different sentences present what makes our criminal justice system humanistic, purposeful and rational. We therefore tend to conclude that it is unfortunate that the concept of sentence disparity has become analogous to irresponsible behavior and bias among judges. The limited information available to the general public has prevented them from understanding that there is justified disparity in sentencing that reflects a rational system that is quite apart from "unwarranted disparity." Our experience suggest that this "unwarranted disparity" appears to flourish in jurisdictions where the judicial officers lack consensus of what the goal of criminal justice system or what their policy on sentencing should be.

Defining Felony and Misdemeanor

After considering the disparity among states and the fact that an offender may be convicted of an offense which is a felony in one state but a misdemeanor or not an offense at all in another, we concluded that the nature of the offense may be the best estimate in determining the felony/misdemeanor categories. It appears that in order to use the offense characteristics, the Commission may have to establish some general categories which could be used in the definition of whether a prior record should be classified as a misdemeanor or a felony.

How Should Prior Felony Convictions be Weighted?

In considering the general importance of evaluating the offender's prior record, we believe the prior record is predictive. It is predictive in the sense that to the extent that the offender has offended in the past, it increases the probability that the offender may offend again. Therefore, the greater reason for heavier sanctions against the

offender as a deterrence. We also believe that the offender with a prior record gives some indications that he has continued to commit crimes in spite of previous punishment, or previous mechanisms to reduce the incident of his criminal activities, and therefore, he requires greater sanction to decrease the probability of further criminal activity. We believe that a more serious prior record should count heavier in establishing the sentence than less serious prior offenses. A history of one or two minor convictions (for example, disorderly conduct) is not comparable to a major felony conviction (for bank robbery). We therefore believe that the seriousness level of prior offenses should be taken into consideration. To do this, the Commission may establish broad categories of seriousness level that may have a corresponding impact on sentencing. For example, crime against person, crime against property, drug-related crime, etc.

Age of Prior Criminal History

We believe that the amount of time that has passed since the previous conviction should be taken into consideration. The greater the time between the preceding offense and the current offense, the more difficult it becomes to establish the link between the two. The closer the time between the two offenses, the more it becomes likely that criminal activity has been continuous rather than sporadic. We therefore recommend that the Commission should make some provision for the "decay" of the offender's criminal record with convictions in the distant past carrying very little weight or be disregarded. The starting point in calculating the period of decay should be the date on which the offender was released from prison or when supervision began. To begin counting on the conviction date would produce some distortion for offenders who receive extensive incarceration, since much of their crime-free period should be credited to their custody status rather than their own efforts.

Juvenile Record

Taking into consideration the difficulty in obtaining juvenile record on a consistent basis, we believe that when it is available that it should be considered, and in selective cases, be taken into consideration in determining adult sentences. However, based on current theories on juvenile delinquency, particularly the lack of uniformity and substantial due process in the prosecution of juveniles, we believe considering juvenile record should be done on a case by case basis and not on a systematic basis. Our experience suggests that environmental factors (disorganized home, lack of parental supervision, and other factors) sometimes contribute to juvenile offenses. These types of offenses should be discriminated against some of the more predatory juvenile crimes, including gang activity which have shown a strong link towards adult criminal activities. We believe juvenile offenses therefore should not be weighted on the same basis as adult offenses but should (1) be selectively weighted and (2) be given less weight than prior adult offenses.

We do not believe that a decay factor would be relevant for juvenile crimes.

Military/Foreign/Tribal Convictions

We believe these convictions should be taken into consideration but only to the extent that it can be determined that the particular offense if committed in the general community would also be regarded as criminal. This takes into consideration that military, tribal and foreign jurisdictions may place greater standards on the individual's conduct which may make the offender subject to more law than he would be in the general

population.

Considering Previous Arrests or Convictions Only

We find this question most interesting and challenging. Our experience in the preparation of the presentence investigation which involves reviewing arrests and convictions has led us to believe that in many instances there is no consistent differences between arrests and convictions, except a legal one. Based on our justice system which places the burden of proof on the state, we observe that a large percentage of arrest involves valid violation of law but the offenders were acquitted based on legal technicalities or the system's failure execute a trial within specific guidelines or requirements. The following cases illustrate this point:

- (1) Defendant John was arrested for child molestation. After a preliminary hearing and psychiatric evaluation, it was recommended that prosecution be terminated because the victim, a seven year-old child is experiencing ongoing psychological reaction from the events. It is the psychiatrist's recommendation that further emotional trauma that could be anticipated during a trial would do irreparable harm to the youngster. Reluctantly, the state's attorney had to move for a dismissal due to the problem of the child testifying.
- (2) Offender Bob was arrested for rape on three occasions. In each instance, the victims refused to press charges. During the presentence investigation the probation officer's investigation disclosed that defendant made explicit threats to the victims in each instance.

We are therefore inclined to recommend that for selected serious offenses (rape, murder, racketeering, arson, etc.) that a mechanism for evaluating their validity whereby some weight could be attributed to an offense, if after an evaluation it is clear that there was a violation of law although there is absence of a guilty verdict. Nevertheless, even when such a finding is made, we believe it should not carry the same weight as a legally guilty verdict.

Being on Probation or Parole

There is consensus that should the offender be on supervision at the time of the offense, this should be a major consideration. Firstly, we believe this should preclude a supervision sentencing. Secondly, we believe that this indicates that present supervision activities were not sufficient to deter the offender, or in general, help him avoid criminal activities. With respect to the amount of weight this should carry, except under substantial mitigating circumstances, it should preclude a supervision sentence and mandate incarcerative sentence consideration.

Level of Sentence Aggravation and Level of Prior Record

Based on the assumption that the major goal of the criminal justice system is the protection of society and that the offender's prior record is a good estimate of his future criminal behavior, the Commission should consider establishing levels of aggravation for different types of criminal records. We recommend three categories: Category I would involve certain types of arrest without convictions whereby if the information is available to make a determination that the offender did commit the crime but was

not convicted due to specific failure of the system, that this could constitute a small level of aggravation. Category II would involve prior record that led to a conviction whereby the offender receive a non-incarcerative sentence. Category III would involve a prior record that led to a conviction whereby the offender received an incarcerative sentence.

Offender Characteristics to be Considered in Sentencing

Age

We find the current configuration by the Parole Commission with respect to age somewhat troublesome. This configuration suggests that the lower the age at the commencement of the current offense the greater risk the offender presents. On the contrary, we are inclined to believe that youth may be associated with success, since there is less time for the offender to develop bad habits, and his chances of rehabilitation are increased. It may be that age may not be an important factor but an early pattern of criminal behavior which has persisted inspite of constructive community efforts to alter it, may suggest the need for a substantial criminal sanctions to induce change.

Education

We do not consider education a significantly relevant characteristic for consideration in sentencing except where the lack of, or presence of, is related to the commission of the offense.

Vocational Skills: We do not consider the presence or absence of vocational skills as a significant factor to be considered in sentencing on a systematic basis.

Mental and Emotional Condition

We believe the mental/emotional condition of the offender should be taken into consideration in so far that we believe that a defendant who is mentally ill to the point where he is unable to control his conduct should not bear criminal responsibility but should be subjected to appropriate medical treatment. If such a condition mitigates the defendant's culpability or is relevant to his criminal conduct, we believe this should be a factor to be taken into consideration. We must emphasize however, that the mere judgment of a personality disorder alone should not necessarily be a mitigation factor. Our experience is that confidence men and professional thieves are particularly experienced in presenting themselves as emotionally deficient individuals and therefore seek consideration for their deficiencies.

Physical Dependence - Including Drug Dependence

We believe the defendant's physical condition should have some relevance to the sentencing decision particularly if a physical defect precludes him from specific activities, makes him ineligible for employment or makes extensive medical or surgical attention necessary. In our opinion, a drug dependent defendant presents a special health problem unlike other physical problems. Established drug dependent offenders are more likely to continue their criminal activity to support their habit. A special rehabilitation program for drug dependent offenders should be encouraged and as a general policy, we believe the Commission should recognize the criminal problem for drug dependent offenders as subordinate to the health problem. We believe most drug dependent offenders have psychological problems which they are unable to deal with.

Previous Employment Record

While we believe a history of stable employment usually indicates a good social adjustment, we do not believe employment should be a major consideration in sentencing. We believe employment cannot be used as a criteria because the opportunity for participation in legitimate employment activities is not always open to all and some individuals have never had an opportunity to develop a work record because of age, physical limitation and other characteristics.

Family Ties

We do not believe the defendant's family ties, specifically the fact that defendant comes from a respectful family or that criminal sanction will provide hardship to members of his family, that this should be a major consideration. While this position may seem callous, we believe criminal sanction (incarceration) is one of the most unfortunate reality that his shared almost universally by the families of prisoners and it would therefore be unfair to defendant's without families, or other defendant's similarly situated, to provide consideration in a systematic way.

Role in the Offense, Criminal History and Dependence on Criminal Activity for a Livelihood

There was a consensus that the defendant's role in the offense, his criminal history and the degree to which he depended on criminal activity for a livelihood, are characteristics that are extremely relevant in sentencing.

I hope the above information will assist the Commission.

Sincerely,



G. Frederick Allen, PhD.
U. S. Probation Officer
FTS: 387-5726

GFA/sdc



NATIONAL NETWORK FOR VICTIMS OF SEXUAL ASSAULT

May 12, 1986

William W. Wilkins, Jr., Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W. - Suite 1200A
Washington, D.C. 20004

Dear Mr. Chairman:

In response to your letter of April 25, 1986, the following comments are offered for consideration pending the May 22nd hearing. They should be taken in reference to sentencing only as it applies to convicted sex offenders.

Our primary concern in sentencing is that, to the extent possible, it serve as a deterrent to the offense; and, that society be protected from habitual or dangerous offenders. We believe that sex offenses should be treated as a most serious offense with prior conviction records and severity of the offense given more weight in sentencing decisions than the social and personal characteristics of a defendant. However, we do recognize that prior criminal records, alone, are not a totally reliable indicator of a defendant's propensity to commit sexual assault.

To elaborate, much of a person's prior sex offense history may not be evident in criminal conviction records. Among the many reasons for this is the well-documented under-reporting of sex crimes. Underreporting may produce a record which does not reflect the actual degree of commission of the crime. Still another reason is that under the common law offense of rape, plea bargaining options are severely limited. As a result, plea bargaining all too often produces conviction records not reflecting the sexual nature of the offense committed. Therefore, we would suggest that where past criminal records do not reflect a propensity toward the commission of rape, or other violent crime, the possibility should not be ignored. The length of a criminal record alone may indicate a propensity toward anti-social behavior which, when culminating in the more severe instant offense, provides some indication of dangerousness.

In considering prior convictions, we feel both juvenile and adult criminal records should be considered. Juvenile records may reflect a propensity toward sex offenses which has not yet appeared in adult records. Or, in the more likely event that juvenile records conceal the commission of sex offenses, they may nonetheless demonstrate a significant propensity to anti-social behavior which should not be disregarded.

Similarly, misdemeanor as well as felony records should be considered. Misdemeanor convictions, while far less reliable than felony convictions as an indication of dangerousness, should nonetheless be considered when such convictions are repetitive and extend over a significant portion of the defendant's life.

Where prior convictions are weighed for purposes of enhanced sentences, we would strongly suggest that arrest records also be considered. As formal charges filed by prosecutors all too frequently involve a lesser offense, an arrest charge may be the only indication of the actual nature of the offense committed. This is particularly important in sex offenses where community safety may be a risk.

Consideration of prior convictions should probably not be based on whether or not a sentence for a sex offense has been served. The proven commission of such an offense is of greater significance in assessing future threat to society than the arbitrary factors which may have gone into decisions to suspend or otherwise not impose incarceration.

Finally, because rape is a crime of aggression, convictions for an offense committed during some form of community release (i.e., bail, recognizance, probation, parole, etc.) should be given utmost consideration for enhanced sentence. Similarly, crimes committed during the commission of another felony (i.e., armed robbery, burglary, etc.) should be weighed in favor of enhanced sentence. The actions of an offender in either of these cases displays a propensity for extreme aggression which increases the risk to society. And, commission of an offense while on release clearly marks an offender as a threat to society when not incarcerated.

To illustrate a number of the points which we have raised, we are taking the liberty of enclosing a sample of sentencing orders from one Florida court. We feel they exemplify the types of sex offense cases now coming before the nation's courts; and, illustrate the problems with prior records as indicators of a propensity toward sexual aggression.

In closing, we would suggest that the Commission review H.R. 4745, The Sexual Abuse Act of 1986. This bill, which seeks major change in federal rape law, has been reported out of the Judiciary Committee of the U.S. House of Representatives. House vote is anticipated today.

Thank you for the opportunity to express our views.

Sincerely,



Mary Ann Largen
Policy Analyst

Enclosures



NATIONAL NETWORK FOR VICTIMS OF SEXUAL ASSAULT

May 12, 1986

William W. Wilkins, Jr., Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W. - Suite 1200A
Washington, D.C. 20004

Dear Mr. Chairman:

This is to supplement the letter to your Sentencing Commission submitted by policy analyst Mary Ann Largen. I would like to refer to my own case as an example of how sentencing does not always reflect the chronically dangerous nature of a sexual assault defendant.

In 1975 in Washington, D.C., I was kidnapped at gun-point, driven around the city for about forty-five minutes, robbed, beaten half-unconscious, and raped. When the suspect was arrested four months later, he faced rape charges for five victims in Maryland and three in the District. The police believe he attacked more victims than that. One of the three victims' cases could not be prosecuted since she had at first told police that the suspect had not raped her. They believed that he did. Later she said he did. However, because of this conflict in her reporting, the prosecution felt they could not obtain a conviction for her case. Charges for the other two victims were pursued because the evidence was excellent. In addition, the prosecution told me, we were very articulate. I wondered what happens to victims who are not. It is the nature of the crime that not all victims can respond immediately in a way that helps the law enforcement and criminal justice systems obtain convictions.

The defendant was tried in Maryland first, where he was found "Not Guilty by reason of insanity" in four of the five rapes. He then came to the District where the trial began, one year and nine months after my assault. If I had not had the strength to stay involved with the case that long, the eight charges for my case (abduction, robbery, assault and battery, and rape, plus those again with a deadly weapon), would have been dropped. The second victim's case had similar charges. In addition, this had been the second time in a year that she had been raped (the first time was by a different assailant).

The trial in the District ended in conviction for all counts; however, the convictions were overturned by the Court of Appeals because of a procedural error which the judge made. As it happened, the prosecution was very dedicated and determined to convict this defendant, and pursued the case through a number of continuations. On two occasions the trial was continued. It was terrifying to come to court expecting to face my assailant again; it was exhausting to find the case was continued. Finally, five years after his arrest, the defendant accepted a plea-bargain and was sentenced. He pleaded guilty to "Assault with intent to commit rape" for one of the two victims, and the rest of the charges resulted in "Not Guilty by reason of insanity." He was sentenced to twelve years, first in St. Elizabeth's and the remainder (if any) at Lorton. The sentence in the District was to be served after his term in Maryland.

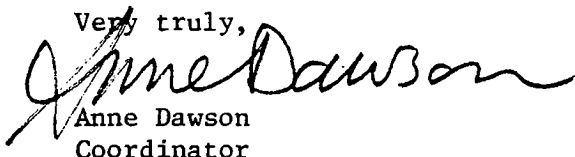
Neither the police, the prosecution nor myself liked this outcome. But the prosecution explained that the longer a re-trial goes on, the smaller the chance of winning another conviction. The defense will ask the victim, for example, "How can you remember what happened five years ago?" This is outrageous maneuvering, but it apparently works with juries. There was also the consideration of the other victim who had been assaulted twice in one year; another trial was less tolerable than a plea-bargain. This outcome of the process was horrible, to me, though. I needed society, in the form of the criminal justice system, to declare that something unacceptable and intolerable had happened. However, I also could not have accepted going through a second trial and having jurors - strangers I had never seen before - acquit the defendant, which apparently was a real possibility had we done it.

The defendant's crimes against me resulted in four and one-half years of emotional trauma, overwhelming depression, severe phobias, nightmares, fear of things that reminded me of the attack, and general disruption to my life. The other victims of this rapist included a mother of a two-month old child, a nurse walking to her car, a 16-year old, not to mention the woman who had already been attacked earlier that year.

Because of the effect on victims of a sexual assault, and because of the nature of the criminal justice system, the criminal record of a sex offender does not necessarily reflect the dangerous nature of the defendant. I support the considerations for enhancing sentences of sex offenders, as outlined in Ms. Lagen's letter, in order to obtain justice for victims and to ensure safety for the community.

I appreciate your consideration of this letter.

Very truly,

A handwritten signature in cursive script, appearing to read "Anne Dawson".

Anne Dawson
Coordinator

(703) 892-0200x201



U.S. Department of Justice

Federal Bureau of Prisons

Washington, D.C. 20534

May 9, 1986

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

Dear Judge Wilkins:

Thank you for your letter of April 25 in which you requested the Bureau of Prisons' comments about the influence of offender characteristics on sentencing. It is our general opinion that an offender's prior record can influence sentences for subsequent crimes. Below, our opinions are stated in the broadest terms. This is with the understanding that the prior work of the U.S. Parole Commission on the Salient Factor Score instruments is available for consultation.

Felonies and Misdemeanors: The distinction between felonies and misdemeanors seems to be unimportant. The U.S. Parole Commission does not distinguish felonies from misdemeanors for current offenses. For prior state misdemeanors they use a formula which reflects the crime's seriousness. Ideally, the distinction would be based upon the nature of the offense (its seriousness). Length of sentence imposed, number of prior commitments, and prior convictions seem to be reasonable proxies for offense seriousness.

Prior Felony Convictions: As a general rule, the Bureau of Prisons believes that judges should be permitted to use prior criminal records when available. Previous arrests can be considered unless an offender was tried and found innocent. Previous convictions deserve a much greater weight than previous arrests, and serious previous offenses would seem to deserve a heavier weight than relatively less serious prior offenses. The Sentencing Commission might want to weight prior offenses according to the statutory classification of offenses found in the Criminal Code Revision of 1984, or to consider using the offense seriousness ratings they are developing.

Crimes Committed While on Probation or Parole: An offender who commits a crime while on probation or parole has not only violated a trust, he has also given further indication of a commitment to a criminal life style. The Bureau of Prisons believes he warrants additional sanctioning.

Decay Factors: Some crimes are so serious that a decay factor is inadvisable while for less serious crimes a decay factor seems appropriate. As a general principle, a decay period can be proportional to the seriousness of

the crime -- with more serious crimes decaying at a slower rate than less serious crimes. It seems that if the offender was not incarcerated, the decay period should begin at the time of conviction, but if the offender had been incarcerated, release from prison would be a good starting point for a decay period.

Juveniles: Juvenile offenses can be given consideration when establishing sentences for adult offenders and at the same weight, and decay gradient as adult sentences.

Military, Foreign and Tribal Convictions: As a rule, information about these crimes should be useful. The reliability of the information can be assessed when deciding how much weight to assign. Less serious crimes (like A.W.O.L. in the military, or crimes that constitute "status" offenses) are seemingly less important for determining what sentence to assign, but serious crimes, such as crimes resulting in General Court Marshal, warrant consideration.

Sentence Aggravation: Presumably an offender who continually violates the law -- such as a repetitively assaultive person, or a forger who persists after numerous arrests and convictions deserves greater sanctioning. Extra penalties for frequent, repetitive criminal behavior can be applied with the amount of penalty proportional to the frequency and severity of the offenses.

Other Offender Characteristics: Offender characteristics which appear to be relevant are: reliance on criminal activity; criminal history; role in the offense; and, mental or emotional condition. Age and drug abuse could be aggravating characteristics since they predict subsequent involvement in criminal activities. Offender characteristics which are related to race are basically discriminatory and we cannot recommend their usage.

I hope this information will be of some use to you and would add in closing that we appreciate this opportunity to comment on the development of the guidelines. I regret that I will be unable to attend the hearing on May 22, but want to thank you for asking us to participate.

Sincerely,

A handwritten signature in black ink, appearing to read "Norman A. Carlson". The signature is fluid and cursive, with the first name "Norman" being more prominent.

NORMAN A. CARLSON
Director

United States District Court
District of South Carolina
Post Office Box 2147
Anderson, South Carolina 29622

G. Ross Anderson, Jr.
U. S. District Judge

April 29, 1986

(803) 226-9799

(803) 235-1898

The Honorable William W. Wilkins, Jr.
Chairman, The United States
Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, DC 20004

Dear Billy:

Replying to your letter of April 25, 1986, I will attempt to give you my views on the problems you pose.

1. How should the Sentencing Commission define felony and misdemeanor offenses in view of the definitional disparity among states, and between states and the federal system? For guideline purposes, should the determining factor be the nature of the offense, the length of the sentence imposed, the statutory maximum of the offense or some other variable?

Under the present federal system, any crime wherein a defendant is sentenced to more than one year is considered a felony. This does not and should not take into consideration the state definition of a felony. Frequently, I have been confronted with the problem of a prior offense under state law which was considered a misdemeanor under state law, but under federal law it must be considered a felony. An arbitrary time should be fixed, such as one year or two years, to define a felony. Probably a good definition would be that any sentence where the statutory maximum would be at least two years, provided the crime involves moral turpitude, the length of the prior sentence imposed should not be a factor.

2. How should prior felony convictions be weighted? Should serious previous offenses count against the offender more in establishing the current sanction than relatively less serious prior offenses? How should seriousness of prior offenses be delineated?

Prior felony convictions should be weighted heavily. For one prior felony conviction the guidelines should be considerably higher. More than one prior felony conviction should be graduated on a scale commensurate with the seriousness of the prior offense. Again, the seriousness of the prior offense should be judged on a scale with a built-in factor which takes into consideration moral turpitude.

The Honorable William W. Wilkins, Jr.
Chairman, The United States Sentencing Commission
April 29, 1986
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3. What decay factor, if any, should the Commission build into the guidelines when considering a defendant's prior criminal history? For example, should a prior felony conviction factor into a defendant's possible sentence if his previous conviction occurred 10 years earlier? Should the starting point in a decay period be the conviction date, prison release date or supervision release date?

A prior conviction ten years old or older should not be considered unless the sentencing judge articulates his reason for taking into consideration an offense committed ten years previously. The starting point should be the conviction date of the prior offense.

4. Should prior juvenile offenses be considered in establishing sentences for adult offenders? Should they be given the same weight as adult convictions? If so, what decay factor, if any, should be built in?

Most states prohibit the publication of prior juvenile offenses. In fact, I have found it extremely difficult to even obtain a juvenile record of a juvenile who has since become an adult and commits an offense. As a practical matter, a juvenile offense may consist of nothing more than a child failing to attend school. In South Carolina all juvenile offenders are tried without a jury and this is one of the reasons that prior juvenile offenses should not be considered.

5. How should the Commission handle military convictions? What about foreign convictions or tribal convictions?

Military convictions should be considered as any other conviction. However, a foreign or tribal conviction should be examined for the underlying elements necessary for a foreign or tribal conviction. For instance, it is a felony in some countries for failure to pay rent. There being no comparable criminal offense under United States law, such foreign conviction should be disregarded. If, however, the foreign or tribal conviction has a counterpart under United States law, then it should be treated as any other conviction.

6. Should the Commission consider previous arrests or only convictions when determining a defendant's prior criminal record?

Arrests should never be considered; only convictions in determining a defendant's prior criminal record.

The Honorable William W. Wilkins, Jr.
Chairman, The United States Sentencing Commission
April 29, 1986
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7. Should the fact that a defendant was on probation or parole at the time of the offense or conviction be considered, and if so, how should it be weighted?

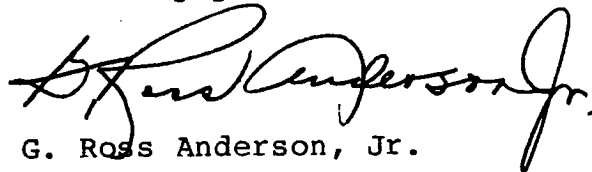
If a defendant was on probation or parole at the time of the offense being considered, it should be considered. However, a sentencing judge would be faced with the fact that his prior conviction would be a factor. The mere fact that he had not served out his probationary or parole sentence would be an added weighted factor which would work to the detriment of the defendant.

8. What level of sentence aggravation should be given for what level of prior record?

The level of sentence aggravation should be in direct ratio to the number of prior convictions. For example, for one previous felony conviction add ten percent more to the sentence for which the defendant is currently being considered; for two prior convictions, add twenty percent to the conviction for which the defendant is being sentenced.

In addition to the above, some consideration should be given to the classification of the prior conviction as it relates to the sentence under consideration. In other words, if the defendant is a habitual forger and all of his prior convictions relate to forgery, this factor should be weighted more heavily than someone being sentenced for forgery with a prior record of violation of the food stamp law. The relationship of the prior offense to the current conviction should receive some additional weighted factor.

Sincerely yours,


G. Ross Anderson, Jr.

GRA,jr/dh

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
PROBATION OFFICE

HENRY RAWLS, JR.
CHIEF PROBATION OFFICER

May 2, 1986

P. O. BOX 39
MONTGOMERY, AL 36101
FTS 534-7301

U. S. COURTHOUSE
15 LEE STREET
MONTGOMERY, AL
(205) 832-7301

Mr. William W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

Thank you for your letter of April 25, 1986, inviting comment on matters presently being considered by the Sentencing Commission.

It is felt that based on the wide variety of sentencing options available in State and local jurisdictions relating to felony and misdemeanor offenses that the Commission should define these charges based on a comparable Federal offense. If such a comparison is not appropriate then it is felt that the sentence imposed should be the determining factor. This recommendation is based on the fact that this is the information which will be available to the Court at the time of sentencing through the presentence investigation.

It is my personal feeling that prior felony convictions involving crimes against a person should be viewed as a more significant criteria for incarceration than a property offense. It is felt that in the event the offense for which the sentence is to be imposed, also constitutes a crime against a person, that this fact should be strongly considered by the Sentencing authority.

The seriousness of prior offenses involving crimes of profit should be considered in terms of loss to the victim or gain to the perpetrator. This recommendation is based on my personal opinion that individuals who have elected to operate outside the laws of this country for the purpose of substantial financial gain should be placed in the position of bearing a more substantial risk than

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May 2, 1986

the individual whose prior offenses have been situational in nature and involved relatively minor financial loss or gain.

A "decay factor" on prior convictions would appear to be appropriate under certain circumstances. It is felt that any such decay factor should begin upon the expiration of a punishment imposed by any Court. This expiration would be either release from prison upon maximum expiration, termination of parole, probation or other adjudication. It is felt that the decay factor should be a substantial period of time. The validity of a decay factor is lost somewhat simply by the fact that the individual is before a sentencing authority on a subsequent offense. However it is felt that a 15 year decay factor would be appropriate.

Juvenile offenses should be considered if they involve a crime which would result in prosecution had the offense occurred when the subject had reached adult status. Meeting qualifications for an adult conviction they should then be given the same consideration. The decay factor for offenses taken into consideration as outlined above would be the same as those given adult convictions. Military convictions, foreign convictions and tribal convictions should be handled in much the same manner as indicated above for juvenile offenses. They should all be required to meet the test of a comparable Federal violation, legal representation, and decay factor.

In spite of the temptation to recommend otherwise, it is felt that the Commission in establishing guidelines should consider only previous convictions. It is also felt that the offense of conviction should be the charge considered as opposed to the arrest offense.

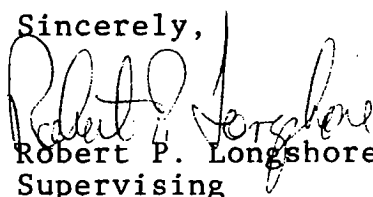
The fact that someone was on probation, parole, bond, escape, or incarcerated at the time of the commission of an offense should be seriously considered in establishing guidelines. These factors indicate an attitude of complete disregard for not only the laws in the United States but all rules and regulations concerning the behavior of a person under supervision. It is felt that a individual under any of the above circumstances should have an additional period of incarceration added to the guidelines in the range of 6 to 12 months.

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Mr. William W. Wilkins, Jr.
May 2, 1986

It is felt that guidelines for sentence aggravation should be based on the combination of factors including prior offense, property or personal crime, number of prior offenses and reliance upon criminality as a way of life.

It is a pleasure to participate in this information gathering phase of the Sentencing Commission's work. Please feel free to contact me for whatever assistance I may provide.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert P. Longshore".

Robert P. Longshore
Supervising
U. S. Probation Officer

RPL:csm

JOHN J. CLEARY
CHARLES M. SEVILLA

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5 May 1986

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

Dear Judge Wilkins:

Thank you for your letter dated 25 April 1986 requesting my views on "offender characteristics," specifically "prior criminal record." The "criminal history" of the defendant to be considered by the Sentencing Commission (28 U.S.C. 994(d)(10)) should be narrow and clearly defined.

* The Sentencing Commission should focus on the nature and actual punishment for a prior offense rather than trying to characterize it as a felony or misdemeanor. If the individual received probation conditional liberty was appropriate no matter how the offense was characterized, even though there may have been a 20-year maximum. If you used the maximum or other guideline, you would be second-guessing what the previous court did and would make your evaluation even more arbitrary.

* Rather than "weighing" all prior felonies, stick to the categories Congress set out for you: near the maximum term and substantial term of confinement (28 U.S.C. 994 (h) and (i)). These will be hard enough to classify. If the defendant illegally enters the United States but has a prior state burglary conviction should he be given a harsher sentence than another illegal entrant who crossed with him. Let the trial judge consider the "criminal history" in determining whether or not to grant probation or not, but it seems egregious that a federal sentencing scheme would be built upon prior offenses. We would be punishing the person for who they were rather than for the wrong done. In the sense of uniformity for crimes done, this would provide a supplemental procedure to "up the ante" for those who had already "paid the debt."

* Any offense for which the defendant received probation or it has been more than five years since he or

she served of confinement, should not be considered at all by the federal court or Sentencing Commission. Except for the categories enumerated by Congress, the guidelines should not consider them all.

* Juvenile offenses should not be considered, for the records are allegedly sealed to give a fresh start as an adult. If the young adult in federal court was charged with theft on a military reservation, should he be punished greater because he had a juvenile adjudication for theft of a car? In most states for juveniles 16-18-years there is a transfer proceeding to adult court so that it could be considered as an adult conviction if the offense is sufficiently serious. Juvenile offenses should not be considered at all by the Sentencing Commission in the classification of punishment. To do so makes a mockery of the system that will give the youth a chance as an adult.

* Military convictions are federal convictions. Tribal convictions are for minor offenses and should not be considered by the Sentencing Commission. Foreign convictions entail all sorts of due process considerations that from a cost/benefit analysis would make their use suspect. Congress uses the language "Federal, State, or local felony," but does not use "foreign" felony.

* Congress spelled out a substantial term of imprisonment for categories of defendants where the defendant is now being convicted of a certain federal crime or had "a history of two or more prior federal, state or local felony convictions." Congress has stated that only convictions would be considered. Use of arrests could go beyond the Congressional Charter.

* If the defendant was on probation or parole, the guidelines should first require that input be given to the sentencing court as to what happened as a result of the federal conviction.^{1/} If there was a federal conviction, then probation or parole would be revoked, and sentence is imposed by either the federal or other jurisdictions. These facts should be best left to the District Court Judge's

^{1/} The Bail Reform Act of 1984 has a similar mechanism for bail purposes. 18 U.S.C. 3142(d).

William W. Wilkins, Jr.
5 May 1986
Page 3

discretion in determining the existing range of sentence, but the District Judge should be able to take into consideration as grounds for reducing the federal sentence what happened on the parole or probation revocation.

Sentence aggravation should be limited narrowly to those situations defined by Congress in 28 U.S.C. 994(h) and (i). Rather than aggravating the sentence for priors, there would be a positive approach to provide additional discretion to grant substantial reduction if the criminal history is non-existent or minor.^{2/}

Congress sought uniformity for punishment of similar offenses, because judicial discretion allegedly produced great sentence disparities for the same offenses. Punishment should fit the crime. Rehabilitation is considered passe', so it would be anomalous that lack of rehabilitation potential requires greater punishment than the wrong done.

Many of us in the defense community fear that the Sentencing Commission will provide such a prison-oriented system that the existing prison facilities will be taxed beyond belief. Given that the Commission should consider the sentences now being imposed as well as the existing federal prison facilities, the Commission should try to limit incarceration as the "sanction of choice."

The Commission is not bound to follow the average sentences, but Congress suggested for the survey of the terms of imprisonment and then length of terms actually served be ascertained by the Commission (28 U.S.C. 994(m)). The better starting point than these abstract discussions about ones "prior criminal record" would be better aided if a survey was done of the existing federal population and the criminal history of each inmate

^{2/} The guidelines are to reflect non-imprisonment sentences for "a first offender who has not been convicted of a crime of violence or an otherwise serious offense." (28 U.S.C. 994(j)). If a person is a "first offender" even with non-violent, non-serious convictions, how can the Sentencing Commission be "weighing" such priors?

William W. Wilkins, Jr.
5 May 1986
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ascertained to determine how it impacted on his or her sentence.
The empirical "track record" might provide some guidance in
"charting" new directions.

Sincerely,


JOHN J. CLEARY
Attorney at Law

JJC:dd

cc: Alan Ellis



RECEIVED MAY 16 1986

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, New York, N.Y. 10013 • (212) 219-1900

May 13, 1986

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

Dear Chairman Wilkins:

Thank you very much for your letter of April 25, 1986, addressed to Barry Goldstein of our Washington office, inviting the NAACP Legal Defense & Educational Fund, Inc., to respond to specific questions concerning the proper role of a defendant's prior record in federal sentencing determinations. Although LDF has both past experience and a continuing interest in a range of criminal sentencing issues, we have not studied and therefore have no organizational position on the appropriate significance of a defendant's prior record.

We appreciate, however, the receipt of this invitation and would be grateful if you would keep us abreast of hearings on other sentencing topics to which the Commission turns its attention in the future.

Best regards.

Sincerely,



John Charles Boger

JCB:agf

Contributions are deductible for U.S. income tax purposes

The NAACP LEGAL DEFENSE & EDUCATIONAL FUND is not part of the National Association for the Advancement of Colored People although it was founded by it and shares its commitment to equal rights. LDF has had for over 25 years a separate Board, program, staff, office and budget.

United States District Court
Eastern and Western District
of Kentucky

RECEIVED MAY 16 1986

May 9, 1986

Phone: (606) 878-6822

Eugene F. Siler, Jr.
Chief Judge, Eastern District
Room 207, U.S. Courthouse
London, Kentucky 40741

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

Dear Judge Wilkins:

In response to your letter of April 25, 1986, I am submitting my views on the impact that a defendant's prior criminal record should have on sentencing.

The definition of felony and misdemeanor offenses should be based upon the federal definition. That is, the Commission should consider any crime which is punishable by imprisonment for a term exceeding one year as a felony and anything else a misdemeanor. That would greatly simplify the disparity between the states and the state and federal systems. As an alternative, I would suggest the felony definition from 18 U.S.C. App. § 1202(c)(2). To follow our precedent in the federal system, I believe that we should consider what the statutory maximum of the offense was at the time of conviction.

Serious previous offenses should count more against the offender than relatively less serious prior offenses, even if they are all felonies. The most serious prior offenses should be acts of violence or felony sexual offenses, but there are many others, such as the ones which you outlined in your previous questionnaire, which might be given equal weight. Examples of those would be serious drug offenses or some type of organized crime offenses.

The Commission should give some decay factor on prior convictions. I suggest that the starting point in a decay period be the prison release date. I do not believe that the conviction date should be used, because many offenders will not commit any further crimes while incarcerated. If an offender has been released from prison for a period of at least ten years, it is my belief that the prior felony conviction should not be considered as serious.

Prior juvenile offenses should be considered in establishing sentences for adult offenders only if they are violent. However, perhaps they should be considered if the offense involved the same type of crime for which the adult is

charged. For instance, theft as a juvenile would probably not be significant for many adult charges, but would be significant if the adult were charged in some larceny type of offense.

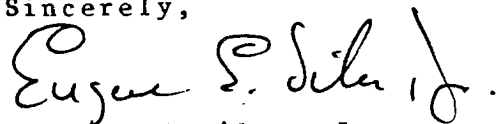
If military convictions are equivalent to a felony (punishable by a term of more than one year) or involve a dishonorable discharge, they should be considered. Otherwise, they should not apply. Likewise, foreign convictions should be considered, if they involve an offense which is a violation in this country. I do not know enough about tribal convictions to even comment about them.

Previous arrests which do not result in convictions should not be considered in determining a defendant's prior criminal record. I realize that a long string of arrests might indicate problems with the law, but if there is no disposition against the offender, I do not see how it can be used against him.

Most definitely, if a defendant was on probation or parole at the time of the offense, it should be given great weight. That is probably as significant a factor as anything else, in my opinion.

It is difficult to determine the level of sentence aggravation for certain levels of prior record. However, it seems that perhaps a person with a prior criminal conviction in the last ten years should be given a factor of 1.5. If the prior felony conviction during that time period was a violent crime or another more serious offense, perhaps the sentence aggravation should be about five times the usual sentence for that type of offense. If the offender has three or more felony convictions in the past ten years and at least one of those was a violent crime, the sentence aggravation factor should be at least six and perhaps more. Persons who fit into the category of dangerous special offenders now can generally be given a sentence of six times the normal penalty for that offense, as approved by the appellate courts.

Sincerely,


Eugene E. Siler, Jr.

RECEIVED MAY 10 1986

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

WARREN K. URBOM
UNITED STATES DISTRICT JUDGE
888 FEDERAL BUILDING
100 CENTENNIAL MALL NORTH
15TH AND O STREETS
LINCOLN, NEBRASKA 68508

May 9, 1986

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

Dear Judge Wilkins:

Thank you for your letter of April 25. This letter will contain the thoughts I have regarding the impact of a defendant's prior criminal record on sentencing.

It seems to me that definitions of felony and misdemeanor should be a combination of the nature of the offense and the length of the sentence imposed. The statutory maximum of the offense seems to have only distant relevancy on the question of the seriousness of the prior crime. The nature of the offense and the length of the sentence imposed give the judge a fair idea of how the previous judge, at least, evaluated the defendant's involvement in that offense.

The serious offense should count against the offender more than a less serious offense. The seriousness should be delineated in accordance with the nature of the offense and the length of the sentence imposed.

A decay factor should be built in. I doubt that a felony conviction that occurred more than ten years earlier should be given any weight. I would suggest a decay factor of, say, ten percent a year, so that by the end of the tenth year there would be a disregarding of the previous conviction.

Prior juvenile offenses should be considered, because they may indicate a pattern. They should not be given the same weight as adult convictions and I would suggest a decay factor for them of, say, 20 percent a year. If "juvenile" were to be defined as anything under 18 years, as I think is about right, there would be no weight thus given to convictions under age 12.

Military, foreign and tribal convictions should be counted the same as any other conviction. Otherwise, we are drawing some arbitrary judgment about the validity of those convictions, which I think we cannot do.

The Honorable William W. Wilkins, Jr.

May 9, 1986

Page 2

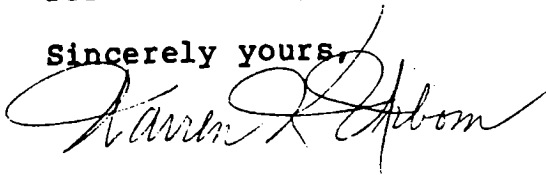
Convictions, rather than arrests, should be considered. I grant that many arrests raise a suspicion, but that is all.

The fact that a defendant was on probation or parole at the time of the offense should be weighted about twice as heavily as others.

Considering a recent conviction of a serious crime to be of a weight of 10, it seems to me that 10 points should increase what otherwise would be the sentence to a presumption of a need for incarceration for at least several months; that a weight of 20 should increase the sentence by about two years of incarceration; and a weight of 30 should increase the sentence by imprisonment of about five years.

Thank you for asking for my thoughts. I wish you and the rest of the commission success in a monumental undertaking.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Warren E. Spohn". The signature is written in dark ink and is positioned below the typed name "Sincerely yours,".

RECEIVED MAY 12 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
PROBATION OFFICE

JOHN W. SISSON, JR.
CHIEF PROBATION OFFICER

May 9, 1986

846 U. S. COURTHOUSE
POST OFFICE BOX 25790
RALEIGH 27611

Mr. William W. Wilkins, Jr.
Chairman, US Sentencing Commission
1331 Pennsylvania Avenue, NW - Suite 1400
Washington, DC 20004

Dear Mr. Wilkins:

In response to your April 25, 1986, letter regarding the extent to which a defendant's criminal record should impact upon sentencing, I offer the following views:

I believe the nature of the offense should be the controlling factor in deciding to what degree an offense will affect sentencing, but that the numerical value assigned to an offense should vary to some degree depending upon how recently the crime was committed and whether it is part of a pattern of similar behavior. The salient factor score sheet now in use allows a maximum positive score of only 10 and needs to be redrawn to permit a much higher score, perhaps even as high as 100, with the lowest score representing a positive condition. Rather than regarding "four or more" prior convictions the same as several dozen, I believe the sentence should be more severe for an offender with ten as compared to one with five. Some will argue that such a scheme would be too complex, but such simply is not the case in the computer age. I hope I will have an opportunity to share more details on this idea soon.

The data you have gathered with reference to the offense severity issue could be used both to determine seriousness of the current offense and the weight to be applied for prior offense behavior. While unusual local offenses might not be catalogued initially, the list could be updated as necessary and general guidelines could cover exceptions. The offense severity chart should contain several tiers, as does the one used by the Parole Commission, and each tier should be weighted differently.

As noted earlier, there should be a decay factor which could be accounted for in a severity chart (i.e., deduct one point for each conviction more than ten years old and two points for each more than twenty years old) or in some other fashion. In no case should a prior conviction not affect the score, but repetitive and recent offenses should have more impact than old ones. As an alternative, credit could be given on the basis of points for each recent consecutive crime-free year. Obviously, no credit should be given for years spent in prison and limited credit should be applied for supervised release.

Juvenile offenses that would have been crimes should be weighted the same as the corresponding offenses, but points should be deducted in proportion to the youth of the offender in such a way that some impact on the final negative score would remain. Likewise, military, tribal and foreign convictions should be equated with similar criminal offenses and taken into account.

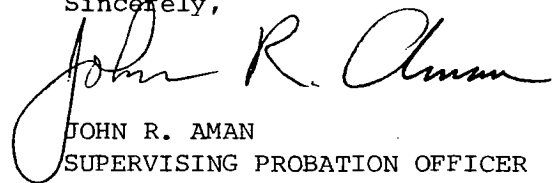
What to do about arrests that do not result in convictions will always present a dilemma. Certainly many arrests are made for crimes perpetrated by the party arrested, but for multiple reasons, including plea bargaining, surrender to other jurisdictions, bond jumping, vanishing witnesses, and legal technicalities, do not result in convictions. Where evidence exists to suggest a disposition other than an acquittal, arrests should be counted, but perhaps at a value of only one-half that of convictions. Since this item can lead to endless debate, it may have to be resolved by stating that arrests should be counted only if in the judgment of the assessor the defendant committed the crime charged.

If a defendant was on parole or probation, or even under a suspended sentence, at the time a new crime was committed, the weight for the new crime should be doubled, or some other factor should be applied for such violations, even if revocation did not follow. Likewise, non-criminal violations of probation, parole, and bail, as well as escape, should influence a salient factor score adversely.

Again, I would like to emphasize the need for a salient factor score that approaches 100 points to allow for enough refinement to account for significant differences between defendants. This does not mean that a defendant with a score of 49 should be treated differently from one with 46, since ten to twenty sentencing levels should suffice, but a salient factor score range is necessary if all appropriate differences are to be accounted for.

Thank you for giving me the opportunity to share these thoughts with you.

Sincerely,



JOHN R. AMAN
SUPERVISING PROBATION OFFICER

JRA:alw

RECEIVED MAY 13 1986

FEDERAL PROBATION OFFICERS ASSOCIATION

National Officers 1986

President/Editor
Robert L. Thomas
Phoenix, AZ

Vice President
Charles L. Stearns
W. Covina, CA

Secretary
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Ft. Lauderdale, FL

Treasurer
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Grand Rapids, MI

May 9, 1986

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

Dear Judge Wilkins:

Reference is made to your letter dated April 25, 1986, requesting a written response relative not only to "offender characteristics" but also the impact a defendant's prior criminal record should have on sentencing. Although I am writing this letter on behalf of the Federal Probation Officers Association, the time available for response was not sufficient to consider thoroughly divergent views held by the membership.

Before responding specifically to the questions posed, it seems important to suggest to the Commission that the tone of the questions causes one to believe that the Commission is embarking on a task of reinventing the wheel. There seems to be a penchant for establishing precise cubbyholes in which to place all behavior. Sentencing has not been and never will be a precise science. Disparity is not necessarily a "bad" word but allows for regional or personal deviations from the norm. By confining discretion too tightly, the Commission will merely be transferring that discretion from the judiciary to the prosecution. Discretion is very much like air in a balloon. If you squeeze it in one place the air simply shifts to another. I would much prefer to see discretion remain with the judiciary.

Next, it is recommended that the Commission strive to keep it simple. Precise weighting of each and every factor will result in volumes of instructions which will serve only to magnify the opportunity of error. The federal system already

Regional Officers

Northeast
Tommaso D. Rendino
Burlington, VT

Mid Atlantic
Susan I. Smith
Richmond, VA

Southeast
Larry J. Burris
Jacksonville, FL

Central States
Gilbert Montoya
Albuquerque, NM

Great Lakes
James D. Sager
Belleville, IL

Western
Craig R. Fenwick
Boise, ID

has in place an adequately constituted system nominally identified as Salient Factor Score. Already there is familiarity with interpreting prior record data and it is sufficiently sophisticated to meet the requirements of our criminal justice system.

Now to move on to the specific questions. Regarding the definition of felony and misdemeanor in view of the definitional disparity among states and the federal system, the logical conclusion is that the determination of felony or misdemeanor ought to rest with the jurisdiction in which that offense was committed. If the offense was determined in that jurisdiction to be a felony, it should be a felony for all purposes. It would be foolhardy for the Commission to try to fix the entire criminal justice system and it would be an unwieldy burden on whomever is doing the scoring.

The second question regarding the weighting of prior felony convictions, it is suggested that a weighting factor not be ascribed to felony convictions. Instead, all felonies should be counted alike. To attempt to weight felonies introduces divergent value systems and simply confuses the issue. There is little question but that prior felony convictions will be considered subtly and not so subtly in the final disposition by the court.

I am not a supporter of the decay factor. I am a firm believer that decay ought to be left to the dentist for treatment. Although it is important to give credit for satisfactory deportment over a period of time, it is inappropriate to eliminate from consideration historical factors that have occurred in the life of someone before the court. Instead, it seems more appropriate that the issue of ancient record utilization remain a discretionary consideration on the part of the judge. Should the Commission opt to consider a decay period, it is suggested that the decay period begin at the point the individual is released from custody.

Regarding the consideration of juvenile offenses and their relative weight to adult convictions, Salient Factor Score configurations already have dealt with that issue sufficiently. One of the problems is that it is becoming increasingly difficult to secure juvenile records either due to their sealing or erasing and therefore, a disparity would exist for those individuals from jurisdictions where juvenile records were maintained and available.

Regarding the handling of military convictions, foreign convictions or tribal convictions, it is suggested that the Commission adopt the Salient Factor Score delineation for those offenses.

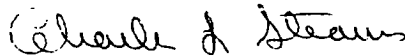
Next, in determining whether to consider previous arrests or only convictions, it is recommended that the Commission consider only convictions when determining a defendant's prior criminal record.

It is believed that if a defendant was on probation or parole at the time of the offense, that issue should be considered by the sentencing judge, but it is suggested that a numerical weight not be attached to it. If the Commission persists in wanting to weight every element, the Commission will simply be creating a gargantuan system that will die by its own weight.

The Commission's final question regarding the level of sentence aggravation to be given to level of prior record is confusing. If the Commission intends that question to mean how much time should be added for each prior conviction, it would be simple enough to do. It is suggested, however, that sentence aggravation should apply only to prior felony convictions.

It is hoped that the foregoing information will be of some assistance to the Sentencing Commission. Let me assert again that the observations contained herein do not represent the views of the total membership of the Federal Probation Officers Association since time did not permit a thorough exploration of the issues. However, it remains clear that the Commission should be cautious and simple in its approach and it should use what already is in place and workable.

Very truly yours,



CHARLES L. STEARNS

Vice President

Federal Probation Officers Association

RECEIVED MAY 13 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

746 U. S. POST OFFICE
AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202

May 7, 1986

Honorable William W. Wilkins, Jr.
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

RE: Prior Criminal Record Impact on Sentencing

Dear Judge Wilkins:

This is in reference to your letter of April 25, 1986 wherein you asked for input on a number of questions regarding the impact of a defendant's prior criminal record on sentencing. I will give you my views of these issues in the order in which they were raised in your letter.

The Comprehensive Crime Control Act of 1984 established five classes of felony offenses, three classes of misdemeanors, and infractions. I understand that one of the tasks of the Sentencing Commission is to categorize all offenses into those nine classifications. I think the Sentencing Commission should utilize the same classification system when considering prior criminal behavior. In other words, the nature of the offense should be the determining factor, and the offenses in the prior record can be graded by the standards set up for federal crimes, with the interpretation of state crimes, done with the use of the same yardstick as the Commission has for grading federal offenses. This would create the most fair system in my view, as it considers offense behavior in various parts of the country where certain behaviors may be treated more severely than others with equality. Under this scheme, the probation officer, through the presentence investigation process, would be charged with the responsibility of learning enough about the behavior in prior convictions to be able to place it in the appropriate federal category. Any dispute relative to the judgement of the probation officer on the severity of a particular prior criminal offense would be settled by the Court.

Prior convictions of all types can be weighted again according to the classification of offenses established by the Comprehensive Crime Control Act. There are Class A, B, C, D, and E felony offenses, Class A, B, and C misdemeanors, and infractions. These various classes of offenses can be weighted numerically in decreasing order, so that less consideration can be given to the least serious prior convictions.

RE: Prior Criminal Record Impact on Sentencing
May 7, 1986

2.

In discussing what your letter termed the "decay factor", I contend that all prior convictions should be counted on a defendant's prior criminal record, but that less emphasis should be placed on the older convictions. In my original letter to you of February 12, 1986, regarding offender characteristics, I proposed the idea that the length of time since last conviction behavior was a relevant offender characteristic. Four categories were suggested, which are: five years since the last conviction; ten years; fifteen years; and twenty years or longer. Prior convictions occurring within a five year period of time should be weighted more heavily than those with ten, fifteen or twenty years or longer, unless the prior criminal history of a defendant reflects no break or time lapse between convictions. In that event they should be treated equally. In my estimation, the starting point in any decay period should be the defendant's final release from the sentence imposed on that particular conviction (i.e. his termination of probation or parole, or the date he leaves prison in a maximum expiration case). If the date of his final release from the sentence is unavailable, then the conviction date should be used.

Prior juvenile offenses should be considered if the behavior would have been an offense had the person been an adult, and unless the juvenile convictions were expunged. The decay factor should be the same for these offenses as indicated previously.

Military, foreign or tribal convictions should be handled in the same way as juvenile convictions.

In calculating sentencing guidelines, I believe that the Commission should only directly consider prior convictions. However, large numbers of prior arrests are often indicative of a persistent problem with the defendant, a lack of respect for the laws of society, a disregard for authority, or perhaps convictions were not had because witnesses were intimidated. In instances of this nature perhaps the Commission could draft a policy statement, or use these large number of arrests to enhance or aggravate the score the defendant would otherwise merit.

If a defendant presently before the Court was on probation, parole, or some other criminal justice system status at the time of a new offense behavior, then I think this increases his personal culpability and should be taken into account by the Sentencing Commission. Again, I refer back to the classification of the various offenses and believe that it would be consistent to apply these same standards in a weighting process, so that a defendant on probation for a Class A type felony offense, when he committed the new federal offense, would be looked upon more severely than a defendant on probation for a traffic offense or infraction.

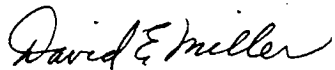
RE: Prior Criminal Record Impact on Sentencing
May 7, 1986

3.

The last question raised in your letter deals with the level of sentence aggravation which should be given for varying levels of prior record. If the Commission were to utilize a system where it classified the severity of prior record offenses, according to the nine categories of federal offenses under the Comprehensive Crime Control Act, I would imagine that certain numerical weights would be placed on each category of offenses committed by a defendant previously. Just for the sake of discussion, let us assume a one to nine numerical scale, with one representing an infraction and nine representing a Class A felony. Under this scheme, after reviewing the prior record of a defendant, a certain numerical score would be derived. The Commission should develop some categories based on these numerical scores, which would be indicative of various levels of severity of prior records. Those might include: no prior record; an infraction record only; a minor prior record including several misdemeanor offenses; a serious prior criminal record including at least one felony conviction and other convictions; a very serious prior record, including multiple felony convictions and other convictions; and, a persistent prior record which might be indicative of a career criminal.

If there are any questions about the contents of this letter, or if I can be of further assistance, please do not hesitate to contact me. Thank you!

Sincerely,



David E. Miller, Supervising
U.S. Probation Officer

DEM:nn

RECEIVED

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

POST OFFICE BOX 27504

RALEIGH, NORTH CAROLINA 27611

W. EARL BRITT
CHIEF JUDGE

9 May 1986

TELEPHONE: (919) 755-4050

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

Dear Judge Wilkins:

In response to your letter of 25 April 1986 the following are my views with regard to the specific questions asked concerning the effect of the defendant's criminal record on his sentence:

1. I feel that the determining factor in defining felony and misdemeanor offenses should be the nature of the offense because of the great disparity in classification of and punishment for crimes among the several states.
2. It is my feeling that the seriousness of a previous offense should be weighted in some fashion, as I definitely feel that a prior offense of distribution of drugs should weigh more heavily than for misapplication of funds. The seriousness could be delineated by using the federal sentence as a guideline for those crimes which constitute a federal offense. Otherwise, and as pointed out in paragraph 1 above, it would seem that the nature of the offense should be determinative.
3. I feel that a ten-year "decay factor" would be appropriate for a defendant who has a clean record for the past ten years. However, for a defendant whose record for the past ten years is not clean, I think that his entire record should be considered. In other words, I don't feel that we should completely ignore convictions beyond ten years in age unless that defendant has shown his ability to abide by the rules of society for at least the past ten years. I feel that the conviction date would be the best and easiest to use.
4. Prior juvenile offenses should be considered, depending on their seriousness. In my view, less serious juvenile offenses probably should not be used against a now-adult defendant. For those that are considered, however, I think the same weight should be used as for an adult. My views on the decay factor for juvenile offenses would be the same as set forth above in paragraph 3.

Honorable William W. Wilkins, Jr.

Page 2

9 May 1986

5. Not being very familiar with military, foreign or tribal convictions, I have no opinion as to their use.

6. Whether to consider previous arrests is really troubling to me. In the first instance, if a person has been arrested, charged with a crime and acquitted after trial I don't think that should be used against him in any fashion. On the other hand, I recognize that there is a distinct possibility that defendants are able to manipulate the system and have charges dismissed or otherwise disposed of. Yet, those dismissals, when the prosecutor genuinely feels that he does not have a sufficient case to go forward, should not be counted against a defendant any more than should an acquittal after trial. I, therefore, feel that some possibility should be given to a consideration of repeated arrests without convictions. If this did not prove to be workable, I feel that no arrest should be counted against a defendant lest he be punished for something for which he was not guilty.

7. I definitely feel that the fact that a defendant was on probation or parole at the time of the conviction of the current offense should be considered. To me this definitely shows a disregard and disdain for the law when obedience to the law should be foremost in his mind. I'm sorry but I do not at this time have any suggestion as to how this should be weighted.

8. I am also sorry that I do not have any suggestions as to the level of sentence aggravation that should be given for any particular level of prior record.

Thank you for allowing me to express my views.

Sincerely,

A handwritten signature in dark ink, appearing to read "W. Earl Britt", written in a cursive style.

W. EARL BRITT

WEB/rwf

RECEIVED MAY 15 1986

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
PROBATION OFFICER

ROBERT K. SIBILLE
CHIEF PROBATION OFFICER

May 12, 1986

647 MAIN STREET
BATON ROUGE 70801-1996
AREA CODE 504 389-0494
FTS: 687-0494

Honorable William W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

I sincerely appreciate the invitation you have given to probation officers to input into the processes of the Sentencing Commission. I feel confident you are getting many suggestions from the field. I would like to limit myself to one such suggestion.

It is my recommendation, and fondest hope, that the Sentencing Commission, in fashioning guidelines, will give utmost flexibility by allowing for and promoting innovation in sentencing. Currently it seems the area of greatest hope involves community corrections, including contract facilities, such as, halfway houses, restitution centers and community service centers. My hope is that the guidelines will allow for use of these as true alternatives for imprisonment which separates the offender from the community. Obviously, we will always need the ability to separate certain offenders from the community, but many persons sent to prison could receive as much punishment, be less burdensome to the government, and could maintain their stability by being placed in a local facility that has programs, allowing for continued employment and support of family and community.

I have specified one area that should be taken into consideration; however, I want to repeat the goal of allowance for innovation. I am confident there are many ideas which will be forthcoming if the guidelines are flexible enough to allow for unforeseen sentencing solutions. I fear that if the guidelines do not specifically indicate that allowance should be made for innovation, the Courts, and particularly the Appeals Courts, will interpret those guidelines very narrowly.

I also respectfully recommend that you invite the members of "C.U.R.E." Citizens United for Rehabilitation

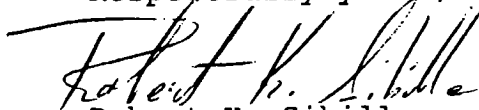
Honorable William W. Wilkins, Jr.
May 12, 1986
Page 2

of Errants, 11 15th Street, N.E., #6, Washington, D.C., 20002, telephone number (202) 543-8399, to participate in the Sentencing Commission's work by offering suggestions. The attached presentation by Congressman John Bryant in the Congressional Records is good reference to their experience.

I met the Directors, Charlie and Pauline Sullivan, at the Catholic Life Center in Baton Rouge, Louisiana as they made their way to Washington last year. They spoke to a representative number of corrections reform minded persons that were impressed with their sober realism and reasonableness as I was with their zeal to help solve corrections problems using Christian standards. Please call on them or invite them to speak with you. They have a lot to offer our country in the area of corrections.

I also enclose a copy of written thoughts by Mr. John B. Jocks on the future of community corrections. John currently is Coordinator of Community Corrections with the Texas Division of the Salvation Army. He is best known to the Chief Probation Officers of the three Louisiana districts because of his former employment as a Community Programs Manager of the Bureau of Prisons for the State of Louisiana. We believe that John too could be a wonderful contributor to the Sentencing Commission processes and would be willing to give you his time. His address is P. O. Box 2608, Dallas, Texas 75221, telephone number (214) 353-2731.

Respectfully yours,



Robert K. Sibille
Chief U. S. Probation Officer

RKS:jj

CHARLES AND PAULINE SULLIVAN: HEROES OF THE PEOPLE

HON. JOHN BRYANT

OF TEXAS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, February 19, 1986

Mr. BRYANT. Mr. Speaker, Charles and Pauline Sullivan are very unusual people. Democrats and Republicans alike in the Texas Legislature, whose halls the Sullivans inhabited before transferring their labors to the Halls of the U.S. Capitol late last year, admired the idealism, the dedication, and the remarkable effectiveness of this quiet, unselfish couple. Even those who disagreed with what they were attempting to do in the field of criminal justice reform and assisting the families of those serving in prison praise the Sullivans for their incredible persistence, their understanding of political and personal realities, and their kind humanity. They are very unusual lobbyists.

The success of the Sullivans in Texas is a tribute to what their talents, grassroots organization, shoestring financing, tireless energy, and big hearts can accomplish. The Texas Observer recently recognized Charles and Pauline Sullivan with a profile and its annual "Hero of the People" award. Because we will all be seeing Charles and Pauline around the U.S. Capitol, I want to share the Observer's report with my colleagues.

HEROES OF THE PEOPLE

The Heroes of the People for 1985 are Pauline and Charlie Sullivan, founders of CURE (Citizens United for the Rehabilitation of Errants), who through sheer persistence and determination have changed the way we treat criminal offenders in this state. The Sullivans, a former nun and priest, have been working in Texas for criminal justice reform since the early 1970s, when they began organizing bus trips to prisons from San Antonio for relatives of those imprisoned.

Excerpts from an interview with the Sullivans, conducted recently by our Washington correspondent Vera Titunik, illuminate their soft-spoken dedication to populist organizing for democratic ideals. The interview took place in the Sullivan's living room, under a photograph of Dorothy Day, founder of the Catholic Worker Movement.

PAULINE SULLIVAN. "We just felt very strongly that if we were going to do something with our lives . . . it should be something that was going to really be for the people at the bottom. . . . We both felt that the people in prison were people that did not have a voice, were really unorganized, and were very often there because of economics. We used to say, 'You're guilty 'til proven rich.' . . . 'No [other prison reform organization] bases it on families and prisoners. . . . What you do is you subsidize it. When we started in Texas we always took part-time jobs. . . . The major funding should come from the people who are concerned, we shouldn't decide it's needed and go out and seek big grant money. It's based on the people.'"

CHARLIE SULLIVAN. "If you have a grant, why would you need to develop a constituency? We want to turn out numbers . . . it always had a tremendous impact. . . . An organization has to flex its muscle periodically."

PAULINE SULLIVAN. "Many of the families never belonged to an organization in their

start talking about changing it for everybody. . . . I think we both see that [it will take a long time to affect national policy]. In fact, we say thirty years up here [Washington, D.C.]. . . . The only way you get things changed is to stick with it a long time."

In the halls of the Texas legislature, Pauline and Charlie Sullivan were familiar sights for more than a decade. As Molly Ivins once wrote: "But they stick out a little—your normal lobbyists wear suits that cost around \$400, French cuffs, gold links, big pinky rings. There's Charlie in his wash-and-wear, drip-dry, skinny tie, earnest expression and usually a bunch of papers clutched in one hand, hoping to buttonhole Rep. Dim from Bugle Butte and to lay a few facts about crime and punishment on him."

And because they persisted, when the legislature found itself confronted with budget problems and federal ruling on Texas prisons, Charlie and Pauline were there and ready to help the legislators sort it out, providing sentencing alternatives, and new concepts of prison housing, restitution, and rehabilitation. They provided direction to aid the State in its crawl out of the 19th century.

The Sullivans are now carrying the battle to Washington, D.C., as chronicled in the following story. But Texas owes them a debt of gratitude for their persistence and their charm. Watching the Sullivans calmly work the legislative lobby, in the midst of all the gladhanders and good ol' boys, something written by another disciple of Dorothy Day, Father Daniel Berrigan, comes to mind: "Don't just do something, Buddha said, stand there."

TOWARD NATIONWIDE PRISON REFORM (By Vera Titunik)

WASHINGTON, D.C.—At night, Charlie and Pauline Sullivan can see the illuminated Capitol building from their bedroom window in a low-rent district of Washington, D.C. The juxtaposition of that electrically charged symbol of political power and the modesty of the one-bedroom, cinder-block apartment in which this couple lives and works seems particularly appropriate for two people who have devoted themselves to creating a political voice for some of the most disenfranchised people in the country.

The Sullivans, who for eleven years lobbied in Austin for criminal justice reform on behalf of prisoners, moved to Washington last August to spread the prison reform movement to a national level. The couple founded CURE (Citizens United for the Rehabilitation of Errants), a membership organization made up of prisoners and their families, that has pressured the Texas legislature to improve conditions in prisons and has educated the general public on a difficult and unpopular issue. While the Sullivans left the Texas CURE chapter behind, they have brought with them the knowhow and determination that made them successful lobbyists in Texas.

Where most Washington lobbyists have the institutional support of massive national associations to pay their substantial salaries and provide downtown office space, the Sullivans have nothing but their own resources. They appear to make little distinction between their work and their home life. Their apartment serves as both home and office, and it is not unusual for them to be found studying up on prison issues or Congressional legislation on nights and weekends. Meticulously arranged files, a computer terminal, and a desk piled with stamped envelopes ready to be sent out for their membership drive stand cheek-by-jowl with

In Texas, the Sullivans built a 3000-member organization that lobbied successfully for such reforms as banning the use of inmates as guards, increasing the use of halfway houses for parolees, and increasing "good time" for educational accomplishments of prisoners. Texas CURE gained one-third of the members of the Texas legislature as official public sponsors. (Their national organization so far has three Congressional sponsors: Reps. Mickey Leland, D-Houston, John Bryant, D-Dallas, and Albert Bustamante, D-San Antonio.)

Their new objective are to bring prison reform to the attention of federal legislators and to establish a network of state CURE chapters across the country. For now, they venture to Capitol Hill two or three days a week, concentrating their efforts on immediate issues, including opposing legislation that would lead to a federal death penalty and lobbying for a "targeted jobs tax credit"—giving credit to employers who hire persons from specific groups. Including ex-offenders—in the tax reform package. They have been monitoring legislation to fund prison programs and are listening closely to the proceedings of a presidential commission to set sentencing guidelines. They also plan to keep a close watch on the Senate confirmation hearings of federal judges appointed by the Reagan administration.

Among their long-term goals for criminal justice reform are Social Security coverage for prisoners and institutionalized persons and the increased involvement of private industry in providing jobs and job training for prisoners. "Factories behind the walls," (as distinct from private industry's running prisons for a profit—an idea which they oppose) allow prisons to provide a "meaningful job situation where they [prisoners] would be learning skills working on a job on the inside that would carry over to a job in the free world," said Pauline. Working with businesses to set up these kinds of programs and organizing families of prisoners to buy from these companies is the kind of positive approach to improving the lot of prisoners that the Sullivans favor.

The only way to get the political strength to achieve these reforms is by building a nationwide movement from the grassroots up—to duplicate their Texas experience in the other 49 states, they said. According to Charlie, there are approximately half a million people in prisons and some 200,000 in jails. The families of these prisoners form a natural constituency that could influence legislators to make prison reform a top priority. "We have to get those families out there to vote and to show some political clout," he said. "If we can only get these people together and get them focused in on something we might be able to do it."

Creating a membership organization is an arduous task that requires one to "build brick upon brick to really set a good foundation," as Charlie put it. Interest has already been expressed in establishing state chapters of CURE in eleven states. But Charlie and Pauline readily admit that the project is only in the talking stages; there is still a long way to go. The task is made all the more difficult by the fact that many of the families of prisoners have never belonged to an organization nor have they had any lobbying experience.

The Sullivans say they are just as concerned with bringing families of prisoners together and allowing them to create a political voice for themselves as they are with the ultimate goals of criminal justice reform.

"WHATS HAPPENIN MAN?", A QUESTION ASKED WITH NO EXPECTATION OF AN INDEPTH ANSWER. WELL, THERE ARE OPINIONS MANY ARE RELUCTANT TO DECLARE FOR FEAR OF APPEARING A FOOL. SOME OF US HAVE BEEN THERE AND, POSSIBLY BECAUSE OF TENACITY AND/OR IGNORANCE, WILL FORGE ON, REGARDLESS.

FOR YEARS EXPERTS HAVE CLAIMED A NEED/OR ALTERNATIVES TO EXPENSIVE AND SOMETIMES DAMAGING IMPRISONMENT. MANY ACCEPT THE CRITICISM, CAUSTIC COMMENTS, AND OUTRIGHT HOSTILITY OF PEERS, FELLOW PRACTITIONERS, ACADEMICIANS AND SELF APPOINTED EXPERTS BUT IMPLEMENT NEW AND PROGRESSIVE PROCEDURES. MOST OF US IN THE CORRECTIONS DISCIPLINE KNOW OF A NATIONAL FIGURE, ASSERTIVE MALE, BLOND, CREW CUT, ADVENTURESOME KID IN THE 1960'S AND LATER WHO DREAMED UP FEDERAL CTCs WORK RELEASE, LATER APPROVED A WARDEN TO ESTABLISH A CO-CORRECTIONAL FACILITY, FURLOUGHS, LEVELS OF INSTITUTIONS AND ON AND ON. HE'S STILL ENCOURAGING CHANGES. FOR TWENTY SOME YEARS I'VE WATCHED TRENDS COME ABOUT AND CURRENTLY IT APPEARS FEDERAL COMMUNITY BASED CORRECTIONS INCREASED USE AS ALTERNATIVES TO PRISONS WILL BE PROVIDED BY U.S. PROBATION OFFICERS. YOU MIGHT NOT AGREE - AND IF SO - PLEASE VOICE YOUR OPINIONS TO BAT ABOUT. LIKE THE OLD ARMY GAME "DO SOMETHING - EVEN IF ITS WRONG", THIS, BASED ON THE CONCEPT THAT YOU CAN CHANGE DIRECTION IF YOUR MOVING - BUT IF YOU ARE STANDING STILL YOU ARE DYING.

THIS IS ONLY AN OPINION OF THE DIRECTION OF FEDERAL COMMUNITY CORRECTIONS. IT POINTS HEAVILY AT THE U.S. PROBATION OFFICERS AND THEIR INNOVATIONS FOR ALTERNATIVES TO PRISON.

(CTCs ARE COMMUNITY TREATMENT CENTERS OR CONTRACT RESIDENTIAL FACILITIES.)

(CPMs ARE BUREAU OF PRISONS' COMMUNITY PROGRAMS MANAGERS - COMMUNITY LIAISON AGENTS OF THE B.O.P.)

(BOP IS THE FEDERAL BUREAU OF PRISONS)

(USPOs ARE UNITED STATES PROBATION OFFICERS, WHO FUNCTION AT THE PLEASURE OF THE U.S. COURTS (UNITED STATES DISTRICT COURT JUDGES, AND U.S. MAGISTRATES. THEY ALSO WORK IN CONJUNCTION WITH THE U.S. PAROLE COMMISSION - THERE BY WEAR TWO HATS.)

1960s COMMUNITY CORRECTIONS PROGRAMS WERE IMPLEMENTED BY THE FEDERAL PRISON SYSTEM THROUGH "WORK RELEASE" AND "CTCs". EMPLOYMENT PLACEMENT OFFICERS WERE DESIGNATED IN SOME METROPOLITAN AREAS BUT THEY WERE FEW AND FAR BETWEEN AND U.S. PROBATION OFFICERS WERE MUCH MORE IN TOUCH WITH THE COMMUNITY SO EMPLOYMENT CONCERNS WERE RELINGUISHED TO THE U.S.P.O. MANY MORE LOCATIONS RECEIVED ATTENTION FROM MANY MORE OFFICERS.

1970s BOP BECAME EXTREMELY CONCERNED AND INVOLVED IN THE NEED FOR AND DEVELOPMENT OF DRUG AFTERCARE COUNSELING AND PROGRAMS, WHICH WAS ALSO EVENTUALLY RELINGUISHED IN MOST PART TO THE U.S. PROBATION OFFICERS FOR THE SAME REASONS AS EMPLOYMENT PLACEMENT. BOP REMOVED THEMSELVES FROM OPERATING THEIR OWN CTCs AND WENT COMPLETELY INTO CONTRACTING WITH PRIVATE NON PROFIT AND FOR PROFIT AGENCIES. AT APPROXIMATELY THE SAME TIME CONTRACT FACILITIES IN SMALLER CITIES WERE MADE MORE AVAILABLE FOR PROBATION AND PAROLE CASES UNDER THE SUPERVISION OF THE U.S.P.O.s (MANY MORE LOCATIONS WERE RECEIVING MORE ATTENTION FROM MORE LIAISON OFFICERS).

1980s BOP JAIL CONTRACTING WHICH HAD BEEN AN INITIAL ADD ON TO CPM DUTIES IN THE 1970s BECAME INCREASING IN NEED - THEREFORE THE BOP RELINGUISHED CONTRACTING RESPONSIBILITIES TO THE UNITED STATES MARSHALS (OFFICERS OF THE COURT OF EACH JUDICIAL DISTRICT) AND NOW THE CPO UTILIZES THE U.S. MARSHAL'S CONTRACT JAILS. (MANY MORE LOCATIONS AVAILABLE)

THERE IS NO DOUBT ABOUT THE BOP COMMUNITY PROGRAMS BRANCH BEING HEAVILY INVOLVED WITH PROCEDURES RELATED TO OFFENDERS SERVING A SENTENCE FROM DESIGNATIONS TO CONTRACT JAILS AND DETENTION CENTERS, AND THE COMMUNITY EVALUATION, JUSTIFICATION AND FEASIBILITY STUDIES REQUIRE TO SUBMIT CONTRACT SOLICITATIONS IN ADDITION TO THE CTC MONITORINGS AND REVIEWS. GRAMM-RUDMAN

ACT REQUIRES FINANCIAL REDUCTIONS THEREFORE COMMUNITY PROGRAMS FOR SENTENCED OFFENDERS ARE BEING REVIEWED TO IMPLEMENT LESS COSTLY METHODS AND PROCEDURES. THIS QUOTA IS FOR THE OFFENDER SERVING A SENTENCE UNDER THE CUSTODY OF THE ATTORNEY GENERAL (BOP). THERE HAS BEEN A RECOMMENDED INCREASE FOR THE CTC USE FOR PROBATION AND PAROLE OR MANDATORY RELEASE SUPERVISED CASES REFERRED TO CTCs THROUGH THE U.S.P.O.s.

CLASSIFIED GOSSIP INDICATES THE CONTRACTING PROCEDURES AT THE REGIONAL LEVEL OF THE BUREAU OF PRISONS HAS BECOME SO CUMBERSOME THAT ALL CONTRACTING WILL BE PROCESSED AND FINALIZED AT CENTRAL OFFICE. PRIVATIZATION APPEARS TO BE HAVING A NATION WIDE IMPACT AND THE BUREAU CPMs HAVE BEEN SPREAD EXTREMELY THIN, MANY WITH A JURISDICTION INCLUDING A NUMBER OF JUDICIAL DISTRICTS IN MOST CASES IN MORE THAN ONE STATE.

CTC ATTENTION NOW SEEMS TO BE FOCUSED TOWARD METROPOLITAN AREAS ABLE TO SUPPORT LARGE FULL SERVICE HALFWAY HOUSES, CTCs, OF 25 OR MORE PRE-RELEASE RESIDENTS. THIS IS PROBABLY THE MINIMUM NUMBER OF RESIDENTS TO JUSTIFY A PROGRAM FULLY STAFFED MEETING CONTRACT REQUIREMENTS FOR 24 HOURS PER DAY, SEVEN DAYS PER WEEK SUPERVISION. CTC PROGRAM AGREEMENTS IN SMALLER CITIES NECESSITATE CONTRACTS WITH MULTI SERVICE/ MULTI DISCIPLINE RESIDENTIAL FACILITIES. STAFF FACE A VARIETY OF PROBLEMS, THE LEAST OF WHICH IS LEARNING LANGUAGE AND PROCEDURES RELATED TO A VARIETY OF DISCIPLINES, WHICH SOMETIMES RESULTS IN MIS INFORMATION AND FOR COMMUNICATIONS BREAK DOWN.

IT APPEARS POSSIBLE THAT THE UNITED STATES COURTS WOULD SOON BE CONTRACTING FOR CTCs IF THE BUREAU OF PRISONS RELINQUISHES THAT RESPONSIBILITY. U.S. PROBATION OFFICERS WOULD NEGOTIATE CONTRACTUAL AGREEMENTS FOR THEIR OWN JUDICIAL DISTRICT TO MEET THE NEEDS OF THE SPECIFIC COURTS AS DECIDED BY THAT LOCAL CRIMINAL JUSTICE FAMILY. EACH COURT COULD DEAL WITH IT'S OWN GEOGRAPHICAL AREA CULTURE, CRIMES AND COMMUNITY ATMOSPHERE.

AS EXAMPLES - BROWNSVILLE, LAREDO, DEL RIO AND EL PASO, TEXAS SITUATIONS DIFFER GREATLY FROM BUFFALO, ROCHESTER, UTICA, ALBANY, NEW YORK OR OLYMPIA, TACOMA, SEATTLE, SPOKAN, WASHINGTON. ADDITIONAL JUSTIFICATION FOR EACH U.S. DISTRICT COURT TO NEGOTIATE CONTRACTS FOR ITS NEEDS WOULD BE THE MANY MORE RESOURCES THE BUREAU OF PRISONS WOULD HAVE AVAILABLE FOR SERVICE OF SENTENCE PRE-RELEASEES. THIS WOULD BE ACCOMPLISHED BY "PIGGY BACKING" THE U.S. COURT CONTRACT AS THEY NOW DO THE U.S. MARSHAL'S CONTRACTS FOR JAILS AND DETENTION CENTERS.

LARGE METROPOLITAN AREAS WOULD CONTINUE TO ATTRACT LARGE BUSINESS BIDDERS FROM OUTSIDE AREAS. CONTRACTS FOR SMALLER PROGRAMS WITH MULTI-DISCIPLINE AGENCIES IN THE INTERMEDIATE SIZED CITIES WOULD PROBABLY BE LIMITED TO LOCALLY ESTABLISHED ORGANIZATIONS. THESE CONTRACTS COULD BE BASED IN PART ON THE "TRACK RECORD" OR HISTORICAL INFORMATION, EASE AND AVAILABILITY TO STAFF TRAINERS AND TECHINICAL ASSISTANCE AND GUIDANCE FROM THE CONTRACT SOLICITOR TO THE SERVICE PROVIDER. MORE REALISTIC COST AND PRICING JUSTIFICATIONS COULD BE NEGOTIATED AND THE LIAISON AND HARMONIOUS WORKING RELATIONSHIP BETWEEN ALL CONCERNED WOULD ESCALATE.

THIS OPINION IS ONLY THAT, AN OPINION, WHICH MAY BE TOTALLY MIS DIRECTED. IT IS BASED ON THE CONCEPT THAT CORRECTIONS IS INCREASINGLY A COMMUNITY RESPONSIBILITY AND THE JUDGES, MAGISTRATES, PROBATION OFFICERS AND MARSHALS HAVE THE PULSE OF, AND RECOGNIZE THE NEEDS AND RESOURCES OF THEIR COMMUNITY. OPPORTUNITIES TO PLACE LOW RISK NON VIOLENT OFFENDERS IN CONTROLLED SITUATIONS REQUIRING THEIR FINANCIAL CONTRIBUTION TOWARD THEIR OWN WELFARE AND REMAINING IN THE COMMUNITY WITH RESTRICTIONS PLACED ON FREEDOM OF MOVEMENT WOULD BE ACCEPTABLE TO SOCIETY, ESPECIALLY RECOGNIZING THE LIGHTENED BURDEN TO THE TAX PAYER. A CLOUD OF CLOSE CUSTODY HANGING OVER THE HEAD OF THE COMMUNITY PROGRAM PARTICIPANT WOULD REINFORCE MOTIVATION TO FUNCTION IN AN ACCEPTABLE MANNER.

COMMUNITY BASED CORRECTIONS PROGRAMS MAY BE AN ALTERNATIVE TO PRISON FOR THOSE OFFENDERS DETERMINED TO BE A MINIMAL

RISK IN THE COMMUNITY. SUCH PROGRAMS ARE NOT EXPECTED TO BE UTILIZED FOR THE HOSTILE, VIOLENT, ASSAULTIVE AGGRESSIVE OFFENDER. THEY MAY BE SENT TO A CONTRACT JAIL OR PRISON OF CLOSER CUSTODY OR TO A FEDERAL CORRECTIONAL INSTITUTION. COMMUNITY BASED PROGRAMS WILL HAVE TO MEET THE APPROVAL OF THE COMMUNITY CRIMINAL JUSTICE FAMILY.

MAKE THINGS HAPPEN AND THEY'LL USUALLY HAPPEN IN YOUR FAVOR OR: LET THINGS HAPPEN AND YOU MIGHT BE ABLE TO UTILIZE PART OF THAT TO YOUR ADVANTAGE OR: DO WHAT MOST OF SOCIETY IS CURRENTLY DOING BY TAKING NO ACTION THEN WONDERING "WHAT HAPPENED". THESE ARE EXCITING TIMES FOR THE COURAGEOUS AND AMBITIOUS, ADVENTURESOME, DREAMERS AND BUILDERS AND U.S. PROBATION OFFICERS HAVE A GREAT OPPORTUNITY TO INFLUENCE THEIR ROLE IN THE COMMUNITY.
THANK YOU FOR THE TIME AND ATTENTION.

SINCERELY,

JOHN B. JOCKS, COORINATOR,
COMMUNITY CORRECTIONS
THE SALVATION ARMY, TEXAS
DIVISION
FEDERAL BUREAU OF PRISONS:
RETIRED
PRESIDENT: TEXAS ASSOICATION
OF HALFWAY HOUSES
MEMBER: AMERICAN CORRECTIONAL
ASSOCIATION
INTERNATIONAL
HALFWAY HOUSES ASSOCIATION
TEXAS CORRECTIONS
ASSOCIATION



RECEIVED

OFFICE OF THE
PUBLIC DEFENDER

Twelfth Judicial District

STATE OF NORTH CAROLINA

CUMBERLAND COUNTY COURTHOUSE

SUITE 307, 117 DICK ST.

FAYETTEVILLE, NORTH CAROLINA 28301

MARY ANN TALLY
PUBLIC DEFENDER

TEL: 919 486-1251

May 9, 1986

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

Dear Mr. Wilkins:

I am responding to your letter of April 25, 1986 with regard to how a defendant's criminal record should affect his sentence. The following are my thoughts in regard to the questions posed:

1. Felony and misdemeanor offenses should be defined according to the nature of the offense in light of the definitional disparity among the states. Such a definitional determination would help to alleviate disparity of treatment of defendants which results from the vagaries of various state laws.
2. Convictions of more serious offenses should be weighted more heavily than less serious offenses. The seriousness of the offense should be delineated according to the statutory definition of the offense for which there was a conviction rather than the offense for which the defendant was arrested, particularly in light of the very common practice of over-charging and resultant plea-bargaining.
3. No previous conviction which occurred 10 years or more from the date of sentencing should be considered, unless the defendant was serving

Mr. William W. Wilkins, Jr.
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an active prison sentence within 5 years of the date of sentencing.

4. Juvenile convictions should, under no circumstances, be considered in sentencing of adult offenders. Many state laws provide for confidential and sealed records of juvenile adjudications and dispositions, and many also have specific statutes prohibiting the use of a defendant's juvenile record for any purpose in adult proceedings. Prohibition of use of such records would ensure uniformity of treatment of adult offenders and protect the purposes behind confidentiality requirements of juvenile records. It should be noted that most states have bind-over provisions for serious felony offenses for juveniles; for instance, in North Carolina, a 14-year-old may be bound over and tried as an adult on any felony offense. I would further propose that no conviction prior to an offender's 18th birthday be used at sentencing.

5. Military convictions should be considered only if they otherwise meet the criteria I set out in 1 through 4, supra.

6. Only previous convictions, not arrests, should be used in determining a defendant's prior criminal record. Such a practice would ensure that unfounded arrests, arrests upon insufficient evidence for conviction, and arrests for offenses for which the defendant was acquitted could not be used against him.

7. The fact that a defendant is currently on probation or parole could be considered. However, the nature of the offense which underlies the probationary/parole status should be considered, as well as the defendant's length of good time on probation/parole and his compliance or lack of compliance with terms of probation/parole and for what period of time.

8. Sentences should be aggravated in small increments according to the number of prior convictions and the seriousness of the offense for which there was a conviction, discounted by any mitigating

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circumstances such as the defendant's family,
background, emotional and mental condition, and
actual role in the current offense.

I hope these comments will be of benefit to the Commission.
I appreciate the opportunity to comment upon these
matters.

Sincerely,

A handwritten signature in cursive script that reads "Mary Ann Tally".

Mary Ann Tally
Public Defender

MAT:jh

Board of Directors
Lon Taylor
Chairperson
Minnie Loera
Vice-Chairperson
Cindy Scaglione
Secretary

CURE

CHARLES & PAULINE SULLIVAN
#11 15TH ST. N.E. SUITE 6
WASHINGTON, D.C. 20002
202-543-8399

RECEIVED MAY 14 1986

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"A NATIONAL EFFORT TO REDUCE CRIME
THROUGH CRIMINAL JUSTICE REFORM"

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May 13, 1986

William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Ave. NW
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins,

Enclosed is another letter from a prisoner that I think The Commission will find very informative.

Although CURE would not agree with all his conclusions (eg. CURE is totally opposed to the death penalty), I am forwarding his paper.

As you can see, this is because of the excellent insights he provides, and these insights are from the perspective of a prisoner (a "consumer" of sentencing practices and procedures).

I apologize for the lateness, but I just received his letter.

Sincerely,

Charlie Sullivan
Charles Sullivan

PS. I am not including his name because I do not have his permission. However, he is from a prison in Idaho.

ISSUE: How should the Sentencing Commission define felony and misdemeanor offenses in view of the definitional disparity among states, and between states and the federal system? For guideline purposes, should the determining factor be the nature of the offense, the length of the sentence imposed, the statutory maximum of the offense or some other variable?

In terms of prior record, it is clearly difficult at best to compare priors due to the difference in criminal definition and punishments. For example, in Idaho, certain sex crimes which amount to nothing more than consenting oral sex between husband and wife constitute a felony carrying life in prison while the same conduct is not even illegal in California and carries only six months in county jail in New York. Similarly, in Idaho, burglary (night-time) carries fifteen years in prison and only eighteen months incarceration in New Mexico. Therefore, the length of sentence imposed and the statutory maximum should be given little consideration when comparing crimes in connection with prior record. The nature of the offense, particularly whether it was violent or non-violent seems more appropriate. Since the federal criminal statutes seem to be more uniform, it is suggested that all crimes be categorized according to current federal law. Perhaps some sort of point based classification system could be created whereby a crime of violence in the defendant's past record is attributed a higher point value than a non-violent crime. The higher the total point value earned due to prior criminal conduct, the greater weight given to the prior record. A point based system would eliminate any arbitrary or capricious treatment of certain offenses and would be more fair to all participants in the process.

ISSUE: How should prior felony convictions be weighted? Should serious previous offenses count against the offender more in establishing the current sanction than relatively less serious prior offenses? How should the seriousness of prior offenses be delineated?

Prior convictions are often given far too much weight in the sentencing process. Once a person has been convicted, sentenced and served his/her time, we are all taught that the "debt" to society has been paid, yet if another incident occurs, we run right back to the priors and punish the offender twice: once for the prior record and again for the substantive charge. When consideration is given to prior offenses, once again a uniform system is required for fairness. A point system as described above seems most fair with an emphasis on violence. When priors are considered, a point value should be given each conviction with extra points for any

violent crimes. Any prior conviction involving diminished capacity should be mitigated by a reduction in points.

ISSUE: What decay factor, if any, should the Commission build into the guidelines when considering a defendant's prior criminal history? For example should a prior felony conviction factor into a defendant's possible sentence if his conviction occurred 10 years earlier? Should the starting point in a decay period be the conviction date, prison release date or supervision release date?

Decay factors are a big problem for prison inmates. Convictions twenty, even thirty years can be considered against any instant sentence. Once again, the belief that one has paid one's debt to society once a sentence is served is a myth if the conviction can be called back to haunt a person years after his release. Many defendants can conform their conduct to prison rules but have trouble adjusting to free society. Due to this point, the decay time should be calculated from the date of release from incarceration. If a defendant is able to remain conviction free for seven (7) years, any point total given for prior offenses should be reduced 50%. If a defendant is able to remain conviction free for ten (10) years, his prior offenses should not be considered at all. Only felony convictions should be included in the seven and ten year periods unless the misdemeanor crimes to be considered are violent in nature, e.g. simple assault. It is very difficult for ex-felons to remain free of legal trouble. This is because police look first to ex-felons, parolees and probationers when trying to solve a crime. If a defendant should manage to stay away from criminal entanglements for long periods of time, society should consider him rehabilitated and look upon renewed criminal conduct many years later as an isolated incident.

ISSUE: Should prior juvenile offenses be considered in establishing sentences for adult offenders? Should they be given the same weight as adult convictions? If so, what decay factor, if any, should be built in?

American society has sought to protect young people by uniformly requiring that juvenile convictions be sealed in court records and that the identity of juvenile offenders be protected. It is clear that crimes committed by juveniles have little or no bearing on whether or not those same juveniles will engage in adult criminal conduct. Before the age of majority, a person is in the developmental stage and may lack the capacity to appreciate the rightness or wrongness of his/her conduct. It is for this reason that juvenile convictions of any sort should be given no weight when considering an adult criminal's prior record. It is contrary to the spirit of modern penology to impose on juvenile offenders

whose need is reform rather than punishment, the penalties intended for adults (See: 43 C.J.S. Infants § 196, p. 515), and as a result of a growing sentiment in that direction, most jurisdictions have enacted special laws treating juvenile offenders as delinquents rather than criminals. Keeping this in mind, it is only fair to continue this protection in the form of a permanent bar against the use of juvenile convictions when considering a defendant's prior record. The only exception to this should be for situations wherein the juvenile was tried as an adult, rather than a juvenile.

ISSUE: How should the Commission handle military convictions?
What about foreign convictions or tribal convictions?

This issue is closely related to the second issue concerning the weight and delineation of prior offenses as well as the first issue regarding the definitional disparity between crimes amongst various states and the federal government. It is suggested that military, tribal and foreign convictions be categorized and classified similarly to the way crimes would be categorized under issue number one. It is suggested that these types of convictions be given less weight than standard American criminal convictions due to the fluctuation in customs amongst these three groups. In the case of military convictions, they may stem from mere disciplinary problems rather than actual criminal conduct. Tribal convictions may stem from ancient Indian religious customs which have little or no bearing on "criminal conduct" and foreign convictions are the least reliable since other countries' systems of justice are so completely different to those used in the U.S.A. An example of the latter would be the common penalty for stealing in Iraq: The loss of one hand. Obviously, it is difficult to assess these many differences and in the interest of fairness, these extreme differences should be considered when weighting such convictions. In the case of foreign convictions, when there is consideration to be given thereto, actual court documents (Judgment of Conviction & Sentence) should be used to establish the conviction since Inter-pol computer records are particularly unreliable.

ISSUE: Should the Commission consider previous arrests or only convictions when determining a defendant's prior record?

It is a fundamental touchstone of American justice that one is to be innocent until proven guilty. It is the responsibility of the states (government) to prove each and every element of the offense charged, beyond a reasonable doubt. If for any reason this does not happen; if the State drops the charges or the defendant is found not guilty, etc., then absolutely no weight should be given to the incident in terms of prior record. The mere fact that an individual has been arrested, in no way establishes that person's

guilt. Arrests can be made as a result of computer error or mistaken identity. Unfortunately, when a mistake does occur, there is no delineation of such in computer records. If a distraught woman accuses her ex-boyfriend of rape to get even with him for leaving for another woman, there is listed a charge of rape against the boyfriend. Should such an entry be considered with prior record even if the charges were later dropped or the boyfriend found not guilty at trial? It is fundamentally unfair to consider a mere arrest as part of a defendant's criminal record. Unless we are to change the entire concept of American justice, we must stridently work to protect every aspect of the accused's right to be considered innocent until proven guilty.

ISSUE: Should the fact that a defendant was on probation or parole at the time of the offense of conviction be considered, and if so, how should it be weighted?

Parole and probation are mere forms of incarceration. If a defendant is convicted of a crime while on probation or parole, it can be assumed that his penal or judicial experience has had little effect on his ability or desire to conform his conduct to the norms of society. Therefore, these offenses should be aggravated due to the parolee /probationer's status. The aggravation factor can once again, be determined by a point value. If the defendant was on parole or probation at the time of the new crime, an additional point(s) can be added to the total prior offense score and thereby be taken into consideration when passing the new sentence. As a prison inmate, this writer is particularly aware of the need to be able to conform to special rules and regulations. In this writer's experience, those inmates who cannot abide by the conditions of parole/probation ordered for them by the courts, will have a high likelihood of repeating their offenses and should be punished accordingly.

ISSUE: What level of sentence aggravation should be given for what level of prior record?

This is perhaps one of the most difficult areas to define. Prior record consideration will need to depend on the basic sentence structure. For instance, will the sentences for the basic crime be fixed or indeterminate? Will there be mandatory minimums or maximums prior to parole eligibility? Will there be mandatory paroles or probations after the basic sentence? Are other enhancements such as for a weapon applicable? Each state treats sentencing differently. A uniform sentencing system will make this issue much easier to address. This writer proposes the following system:

1) Classification levels for all felonies...

- a. Capital Felonies, e.g., 1st Degree Murder
Treason, etc.
- b. 1st Degree Felonies, e.g., 2nd Degree Murder
Manslaughter
Armed Robbery
Kidnapping, etc.
- c. 2nd Degree Felonies, e.g., Rape
Aggravated Assault
Unarmed Robbery, etc.
- d. 3rd Degree Felonies, e.g. Theft Over \$2500.00
Extortion
Night Or Residential Burglary
Narcotic Sales, etc.
- e. 4th Degree Felonies, e.g. Possession Narcotics
Daytime Or Commercial Burglary
Theft Under \$2500.00
Insufficient Funds Checks
Forgery, etc.

2) Standard penalties for each classification...

- a. Death or Life In Prison No Parole
- b. Life In Prison Parole Eligible After Ten Years
-or- 30 Years
- c. Twelve Years
- d. Six Years
- e. Two Years

3) Mandatory parole of at least one year after release...

4) Aggravation and/or mitigation depending upon prior record...

Mitigation could come in the form of probation, suspended sentences, withheld judgments, etc. Mitigation should be based upon lack of prior adult felony convictions.

Aggravation should be framed in some sort of habitual criminal enhancement as follows:

- (1) One additional year for one prior adult felony conviction.
- (2) Three additional years for two prior adult felony convictions.
- (3) Six additional years for three prior adult felony convictions.
- (4) Nine additional years for four (or more) prior adult felony convictions.

The habitual enhancement should not apply to military, foreign or tribal convictions nor should it apply to multiple convictions arising out of the same occurrence or series of events, nor to multiple convictions entered on the same day.

The forementioned system is uniform and would work with a point based system. Of course the crimes could be defined into different categories and punishments fixed at higher or lower terms, but this formula can serve as a model and can be modified as needed. Specific periods of incarceration per prior felony seem to be more fair than the run of the mill life sentence for habitual criminals now handed down in many states.

An issue which is not specifically framed as such but is to be discussed at the May 22 hearing before the Commission involves the availability and reliability of offender background information relevant to sentencing. This writer would like to make a few comments in this regard...

Most jurisdictions conduct some sort of pre-sentence investigation prior to passing sentence. In Idaho, Rule 32, Idaho Criminal Rules (See Appendix "A") governs pre-sentence investigations. From the defendant's point of view, the PSI is the most unfair, uncomfortable part of the sentencing process. The reason being that most jurisdictions rely completely on F.B.I. "Rap Sheets" to provide prior criminal history. Rap Sheets are nothing more than computer generated reports gathered by the F.B.I. which contain the arrest history of the subject, and compiled by the F.B.I. as it receives alleged arrest/conviction data from various police agencies around the U.S.A. The information is usually based upon fingerprint data submitted by the arresting agency. Obviously, this entire procedure is based on multiple hearsay. The F.B.I., the agency collecting and disseminating this information is rarely if ever directly involved with any of the cases and therefore, compounds the hearsay problems already inherent in the process.

Most states simply count as a conviction, any entry on the Rap Sheet. Idaho does this as does New Mexico and other western states this writer is familiar with. It is submitted that 28 U.S.C. §1738 should be uniformly adopted by all sentencing jurisdictions requiring that:

"The records and judicial proceedings of any court of any... State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed...together with a certificate of a judge of the court that the said attestation is in proper form..."

There is no doubt but that Rap Sheets are definable as multiple hearsay. The reliability of Rap Sheets as opposed to the types of documents required by 28 U.S.C. §1738, is clearly suspect. For example, in Clainos v. United States, 163 F.2d 593 (D.C.Cir. 1947) the court held that a record of convictions made by a police agency (such as the F.B.I.) is not admissible evidence of those convictions. The court pointed out that while Rap Sheets may be useful to police in their law enforcement capacity, the record of convictions for the purposes of a court must come from the court itself in order to be considered reliable. Id. at 596. See also: United States v. Scott, 592 F.2d 1139 (10th Cir. 1979) (Rap Sheets not admissible as public records of convictions, Id. at 1143).

It is important to note that Rap Sheets are not based on first-hand knowledge of the matters being recorded. Only the court where a conviction actually occurred has first-hand knowledge of same and it is unfair to hold a defendant accountable for any conviction unless court documents can be produced prior to or at sentencing which clearly establish CONVICTION.

Other courts have similarly held that Rap Sheets or identical reports cannot be admitted in a court of law to establish a defendant's prior criminal record. In United States v. Perlmutter, 693 F.2d 1290 (9th Cir. 1982), the court held that Interpol Rap Sheets were not admissible as evidence that the defendant had been convicted of crimes in Israel and that such records were not admissible under hearsay exceptions such as the public record exception, (Fed.R.Evid. 803(8)), the judgment of previous conviction exception, (Fed.R.Evid. 803(22)), or the residual exception, (Fed.R.Evid. 803(24)).

In State v. Taylor, 424 P.2d 612 (1967), the Kansas Supreme Court held that a machine copy of a Rap Sheet in and of itself

constitutes hearsay and is inadmissible to establish prior convictions. In Taylor, the court also refused to take judicial notice of Rap Sheets, stating that the court could not be persuaded they contain facts of generalized knowledge capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy. Id at 619. The court also noted that while it had been liberal in approving methods of establishing prior convictions, it had never held that courts could dispense with legal proof of said convictions. Id. at 620. Likewise, in State v. Buck, 670 S.W.2d 600 (1984), the Tennessee Supreme Court held that computer print-outs from N.C.I.C. are not admissible as a substitute for certified copies of court convictions or for any other purpose, since the information contained in such reports is pure hearsay, of a dubious degree of accuracy, prepared for purposes other than court use, contain information that is likely to be prejudicial under all circumstances and is not the best evidence of matters that can be proven by reliable, documentary evidence. Id. at 607.

Other computer generated reports (Such as I.R.S. print-outs) have also been declared inadmissible. See: United States v. Ruffin, 575 F.2d 346 (2nd Cir. 1978).

It is clear that the use of computer generated reports is more convenient for prosecutors but it is equally clear that such reports are of such a nature that any probative value they possess is outweighed by the prejudice they impose on the defendant and for that reason, this writer would suggest that the Commission implement strict guidelines requiring that actual court certified copies of Judgments be introduced to establish prior convictions.

Juror's reluctant, equivocal, or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case, 25 A.L.R.3d 1149.

What constitutes lesser offenses "necessarily included" in offense charged, under Rule 31 (c) of Federal Rules of Criminal Procedure, 11 A.L.R. Fed. 173.

Rule 32. Standards and procedures governing presentence investigations and reports. — The following standards and procedures shall govern presentence investigations and reports in the Idaho courts:

(a) When presentence investigations are to be ordered. The trial judge need not require a presentence investigation report in every criminal case. The ordering of such a report is within the discretion of the court. With respect to felony convictions, if the trial court does not require a presentence investigation and report, the record must show affirmatively why such an investigation was not ordered.

(b) Contents of presentence report. A trial judge may request a record check and other background information concerning the defendant prior to sentence without conducting a full presentence investigation of the defendant. However, whenever a full presentence report is ordered, it shall contain the following elements:

(1) The description of the situation surrounding the criminal activity with which the defendant has been charged, including the defendant's version of the criminal act and his explanation for the act, the arresting officer's version or report of the offense, where available, and the victim's version, where relevant to the sentencing decision.

(2) Any prior criminal record of the defendant.

(3) The defendant's social history, including family relationships, marital status, age, interests and activities.

(4) The defendant's educational background.

(5) The defendant's employment background, including any military record, his present employment status and capabilities.

(6) Residence history of the defendant.

(7) Financial status of defendant.

(8) Health of the defendant.

(9) The defendant's sense of values and outlook on life in general.

(10) The presentence investigator's analysis of the defendant's condition. That analysis of the defendant's condition contained in the presentence report should include a complete summary of the presentence investigator's view of the psychological factors surrounding the commission of the crime or regarding the defendant individually which the investigator discovers. Where appropriate, the analysis should also include a specific recommendation regarding a psychological examination and a plan of rehabilitation.

(c) Recommendations concerning sentence. The presentence report may recommend incarceration but it should not contain specific recommendations concerning the length of incarceration, the imposition of a fine or the amount of a fine, or the length of probation or other matters which are within the province of the court. Provided, however, the presentence report may comment generally on the probability of the defendant's successfully completing the term of probation or the defendant's financial ability to pay a fine imposed by the court.

(d) Psychological evaluations. The presentence investigator may recommend a psychological evaluation, but the decision as to whether to order a psychological evaluation is to be made by the sentencing judge.

(e) Information which may be included in the presentence report. (1) Content. The presentence report may include information of a hearsay nature where the presentence investigator believes that the information is reliable, and the court may consider such information. In the trial judge's discretion, the judge may consider material contained in the presentence report which would have been inadmissible under the rules of evidence applicable at a trial. However, while not all information in a presentence report need be in the form of sworn testimony and be admissible in trial, conjecture and speculation should not be included in the presentence report.

(2) Previous charges against defendant. It is permissible for the sentencing judge to consider information in a presentence report regarding a previous charge against the defendant which been dismissed after a successful probation period.

(f) Additional report may be ordered. The sentencing judge may order an additional investigation of the case if he deems it necessary and use such results in considering the disposition.

(g) Access to presentence report. (1) Disclosure of report, exceptions. Full disclosure of the contents of the presentence report shall be made to the defendant, his counsel, and the prosecuting attorney prior to any hearing on the sentence except as hereinafter provided. The defendant and his attorney shall be given a full opportunity to examine the presentence investigation report so that, if the defendant desires, he may explain and defend adverse matters therein. The defendant shall be afforded a full opportunity to present favorable evidence in his behalf during the proceeding involving the determination of sentence. Provided, however, the trial court may withhold from disclosure parts of the presentence report which contain diagnostic opinion which might seriously disrupt a program of rehabilitation, or information which in the court's discretion may prove harmful to an individual not a party in the proceeding.

(2) Explanation of non-disclosure. Where the trial court chooses to withhold from disclosure to the defendant information in the presentence report, the court must state for the record the reasons for its action, inform the defendant and his attorney that information has not been disclosed, and explain the general nature of the information being withheld. Further, if requested, the defendant's attorney, if the defendant is represented by counsel, shall be allowed to review any information in the presentence report which is so withheld from disclosure so as to allow the attorney a full opportunity to explain and rebut the information contained therein.

(3) Time of disclosure. Disclosure of the information contained in the presentence report under the conditions mentioned above shall be made at a sufficient time prior to the imposition of sentence so as to afford a reasonable opportunity for the defendant or his attorney to verify or rebut any information contained in the report. Reasonable requests for a continuance of the sentence proceeding, when based on lack of sufficient time to examine or offer rebuttal to information contained in the presentence report, may be granted by the sentencing judge.

(h) Disclosure of presentence reports. (1) Custody of presentence report. Any presentence report shall be available for the purpose of assisting a sentencing court. After use in the sentencing procedure, the presentence report shall be sealed by court order, and thereafter cannot be opened without a court order authorizing release of the report or parts thereof to a specific agency or individual. The presentence investigator's own copy of the presentence report similarly is restricted from use by all but authorized court personnel. Neither the defendant, his counsel, the prosecuting attorney nor any person authorized by the sentencing court to receive a copy of the presentence report shall release to any other person or agency the report itself or any information contained therein. Any violation of this rule shall be deemed contempt of court and subject to appropriate sanctions.

(2) Availability of presentence report to third parties. With the permission of the sentencing judge, the presentence report may be available to persons or agencies having a legitimate professional interest in the information likely to be contained therein, if it appears that such availability will further the plan or rehabilitation of the defendant or further the interests of public protection, and that appropriate safeguards for the confidentiality of information contained in the presentence report will be provided by the persons or agencies receiving such information. Such persons or agencies may include a physician or psychiatrist appointed to assist the court in sentencing, an examining facility, a correctional institution, a probation or parole department, or the supervisors of a public or private rehabilitation program.

(3) Availability of presentence report on appeal. The report shall be available for review in courts of appeal when relevant to an issue on which an appeal has been taken. [Adopted December 27, 1979, effective July 1, 1980.]

Rule to rule ref. This rule is referred to in Rule 33.1.

DECISIONS UNDER PRIOR RULE OR STATUTE

Discretion of Trial Court.

Where presentence report revealed that contrary to defendant's testimony he had lived in Florida and had used another name and that defendant had violated probation in Pennsylvania, the information was properly

considered by the trial court as being relevant to court's refusal to grant probation and its imposition of sentence for rape conviction. *State v. Cunningham*, 97 Idaho 650, 551 P.2d 605 (1976).

Rule 33. Sentence and judgment. — (a) Sentence. (1) Time for judgment and sentence. After a plea or verdict of guilty, if the judgment be not arrested nor a new trial granted, the court must appoint a time for pronouncing judgment and sentence, which, in cases of felony, must, unless waived by the defendant, be at least two (2) days after the verdict. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally to ask him if he wishes to make a statement in his own behalf and to present any

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
PROBATION OFFICE

MICHAEL J. LUCIANO
CHIEF PROBATION OFFICER

May 14, 1986

207 U. S. COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007
(212) 791-0088

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

Dear Commissioner Wilkins:

Reference is made to your letter of April 29, 1986. In regard to your specific questions, for all adult arrests yielding convictions, records are centralized in New York State through fingerprints. However, to obtain detailed information as to the original allegations at the very least a trip to the Police Headquarters is necessary for the five counties of New York if a local arrest is involved. When more detailed information is needed, either in regard to the allegation or to the legal history of the case, trips to the Courts in each county are often necessary. Within the City, each county has a lower Court and a higher Court and outside of New York City, in addition to the County Court which handles felonies, there are many smaller jurisdictions which handle misdemeanors. The Probation Offices in the State are also divided by county and again by higher and lower Court within the five counties that compromise New York City.

Generally, there is no need to go to various law enforcement agencies in cases which resulted in convictions, although in rural areas and small jurisdictions, this is sometimes useful. (For example, in the case of a 1976 drunk-driving arrest which went before a Town Justice where the arresting agency was the State Police, it may be the State Police who have the better records.)

New York State has centralized records for their prisons which handle felony convictions. In New York City, there are central records for individuals institutionalized for misdemeanor offenses, but elsewhere in New York State the records are less centralized.

There are no centralized records available in regard to juvenile arrests and convictions, and for all practical purposes the only information available at all in regard to such matters is through the Probation Department in each County. Arrests occurring after the individual reached his 16th birthday are treated as adult arrests.

May 14, 1986

Accurate records are generally available and accessible on all criminal charges and arrests for adults which lead to convictions. The available records indicate clearly whether the offense was a misdemeanor or a felony. Recently, cases which result in dismissal or acquittal have been removed from the computerized central State filing system and access to such information is denied at both the Court and centralized police level. There is no problem in regard to determining whether or not a defendant was represented by counsel, inasmuch as such representation has been mandated in New York State for many years. Information is generally available on Probation sentences as to dates of termination and violations where revocations have resulted. On all felony sentences, accurate information is usually available and accessible as to the date and method of release from custody and the date of termination. Information is also readily available as to the dates of revocations, but information as to the details of the violations are usually available only if they occurred within the last few years.

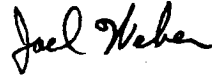
In this District, there are no native American Indian reservations. We do have regular need to check criminal records in Mexico, Central America, South America, Great Britain, Europe, the Mid East, parts of Africa (Ghana, Nigeria, South Africa, Morrocco) India, Pakistan, Nepal, Thailand, the People's Republic of China, Hong Kong, Taiwan, South Korea and Japan. Response time, the amount of information provided and the usefulness of the information varies greatly, not only from country to country, but also depending on what method is used (that is, whether the request went to Interpol, the State Department, the Embassy of the country involved, etc.). Sometimes the significance of the case or the defendant to the country involved is a major determining factor as to whether or not useful information is provided. Interpreting and using the information once it has been provided is usually not a problem.

In regard to the issues raised in your April 25, 1986 letter, it is my opinion that it is the statutory maximum of the offense of conviction which should determine whether an offense is a misdemeanor or a felony. I know of no practical way of giving differential weights to more or less serious offenses. Although I have mixed feelings on the subject of including a decay factor, if one is included I believe that it should be ten years from the release from supervision to the beginning of the instant offense. I would apply a similar standard for juvenile offenses, but restrict those to be considered to only those offenses which would be offenses had the individual been an adult. I would suggest similar standards for military convictions in that only those convictions should count which would be for offenses prosecutable in State or Federal Courts had not the individual been in the military. All foreign convictions should count if the offense behavior would have been prosecutable had the individual committed the offense in the United States. As I have no experience with tribal convictions, I would not wish to offer an opinion on that subject.

May 14, 1986

I am quite comfortable with the current Parole Commission standards for weighing the fact that the defendant was on Probation or Parole at the time of the offense and the level of sentence aggravation for the number of convictions and periods of incarceration the defendant has. Although I feel very strongly that juvenile arrests and adult arrests which did not lead to conviction should be a part of the sentencing process*, since information in regard to these matters is often not available, it is difficult to include them in a guideline situation. However, I suggest that standards could be developed for use of such information when it is available as well as for the use of "ancient" prior record information if that has particular relevance to the sentence at hand.

Very truly yours,



JOEL WEBER
U.S. Probation Officer

*See Page Three A

(JW:map)

May 14, 1986

I would like to offer three examples of situations where the use of dismissed cases would be relevant in determining sentence. All three are actual examples.

Example #1: Defendant A was arrested for selling \$30.00 worth of Cocaine to a New York City Police Officer acting in an undercover capacity. He entered a plea of guilty to this offense on 1/29/86. On 3/1/86, he was arrested with others for openly hawking Cocaine. That case was dismissed when laboratory analysis revealed that the vials containing a substance which appeared to be Cocaine in fact contained no controlled substance. The arresting officer on the 3/1/86 matter indicated that the defendant had told him that he had purchased the Cocaine at that location and had not been selling it. The defendant had made a similar claim before the Court prior to entering his plea of Guilty on 1/29/86. The 3/1/86 arrest was dismissed prior to the date Defendant A was scheduled to be sentenced. During the course of the pre-sentence investigation, he denied current involvement with either the sale or abuse of drugs.

Example #2: John Gotti who has been frequently publicly identified as the reputed head of the largest organized crime family in the New York City area is currently facing Racketeering charges in the Eastern District of New York. During March 1986, prior to jury selection in the Federal Court, Gotti went to trial on local assault and robbery charges. The alleged victim in that case first did not appear in Court and then stated that he could no longer identify any of his attackers. The charges against Gotti were dismissed. It seemed quite apparent to anyone watching interviews with the alleged victim on television that he had been intimidated. In fact, on 5/13/86, the Honorable Eugene Nickerson in the Eastern District of New York revoked Gotti's bail, in part based upon testimony at a hearing which convinced the Court that the witness/victim in the assault and robbery case had been intimidated.

Example #3: On March 15, 1977, Leroy "Nicky" Barnes was arrested by federal authorities in New York and charged with the distribution of massive amounts of Heroin. Prior to his conviction later that year, a story regarding Barnes appeared in the magazine section of the New York Times with a picture of Barnes occupying the front page of that magazine section. He was described in that article as "Mr. Untouchable", in part because during the seven years prior to his federal arrest, he had seven cases against him either dismissed or result in acquittals. If the Court had only been allowed to consider prior convictions and periods of imprisonment or incarceration stemming from those countable convictions and the period for decay was judged to be from the time of last release to the present arrest, then Barnes would have had guidelines based upon no prior criminal record. In fact, prior to 1965, Barnes had six convictions, and during early 1966 he was convicted on Heroin charges and sentenced to fifteen to twenty years confinement. Although this was later overturned on appeal, Barnes was in custody from early 1966 to mid 1970. It should also be noted that while on Probation or Parole prior to 1965, Barnes had a number of revocations which lead to his return to prison. Some of these were for technical matters, and some of these were for new convictions. In the opinion of the undersigned, revocations which lead to incarceration or imprisonment of more than thirty (30) days should be counted as convictions.

(JW:map)



RECEIVED MAY 11 1986

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ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

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BENNETT H. BRUMMER

PUBLIC DEFENDER

May 13, 1986

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William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

As per your request of April 25, 1986, I am providing you with the following views on the issue of the impact a defendant's prior criminal record should have on sentencing guidelines.

The State of Florida, as the U.S. Sentencing Commission is aware, has been using the newly fashioned sentencing guidelines system of sentencing since October 1983. Our office has noticed a number of problems concerning the way Florida utilizes a defendant's prior criminal record in calculating the defendant's presumptive sentence under the guidelines. Perhaps our experience will be of use to you.

The Florida sentencing guidelines, Rule 3.701, Florida Rules of Criminal Procedure, provide that a defendant's prior criminal record shall be scored on the sentencing scoresheet. The prior criminal record is given a numerical value according to the degree of the prior offense (i.e. whether "life, first degree felony punishable by life, first degree felony, second degree felony, third degree felony, or misdemeanor") and according to the number of prior convictions in each offense degree. The defendant thus receives more points for (1) more serious priors, presumably based upon the theory that the greater the offense degree, the more serious the crime, and (2) more prior convictions. The exact value of the points assessed depends upon the category of offense for which the defendant is now being sentenced. Florida has categorized its criminal offenses into nine such categories, ranging from homicides down to "all other

felony offenses." The type of category of crime for which the defendant is now being sentenced governs the number of points that will be assessed for the same prior offense. On paper, this system looks equitable.

The single biggest problem we have found with this system, however, is that defendants who have extensive prior criminal records tend to rack up a tremendous score on their guidelines scoresheets due to the accumulation of points for prior criminal record even though the crime for which the defendant is being sentenced is a minor offense. Thus, for example, we frequently have clients who have committed relatively minor felony offenses, such as the theft of five pairs of sunglasses totaling \$125, the possession of a small amount (21 grams) of marijuana, or turning back the odometers on several used cars, who score out under the guidelines to an enormous sentence of somewhere between 12 to 40 years, not because of the severity of the offense for which they are being sentenced, but due to an extensive prior record. In those situations, the defendant's present sentence truly does not reflect the gravity of the crime he committed but instead has been skewed by the accumulation of points for priors.

Although it may be equitable to aggravate a defendant's sentence due to priors, such excessive aggravation on a sentence for an insignificant offense is inequitable and offends our sense of justice.

The impact of this inequity also can be seen in plea bargaining, as defendants who know they are looking at 27 years in prison for stealing five pairs of sunglasses are not going to plead guilty without the guarantee of a lesser sentence, a guarantee which they normally will not receive in this jurisdiction. The impact also extends to the public perception of criminal sentencing, as the public wonders what is wrong when a man with priors (especially nonviolent priors) who steals five pairs of sunglasses gets 27 years in prison whereas a man without priors who repeatedly and viciously stabs another to death and is convicted of manslaughter receives under the Florida guidelines a sentence of three to seven years in prison.

I might also point out that Florida does allow the trial judge to deviate downward and upward from the presumptive sentence under the guidelines for "clear and convincing reasons." In theory, a trial judge could deviate from the presumptive 27 year sentence and give the defendant who stole five pairs of sunglasses a lesser sentence on the grounds the offense was nonviolent and simply did not merit the 27 year sentence which was arrived at due to accumulation of priors. However, our experience has been that most trial judges do not deviate downward and that even if they do, Florida appellate courts frequently disallow such a reason as not a "clear and convincing reason" to deviate downward. When that happens, the defendant has no recourse.

This problem is augmented by the fact that in Florida there is no real "decay period" for priors. In other words, all priors are scored whether they were committed the previous year, five years earlier, ten years earlier or twenty years earlier, and so on. The only redress is that if the defendant has "maintained a conviction-free record for a period of ten consecutive years," then the prior record is not scored. So the defendant with numerous priors committed seven to ten years earlier scores out the same as the defendant who has the same priors committed this year. Again, although in theory a trial judge could deviate downward for the first defendant who led a crime-free life for many years, many judges would not deviate downward and the defendant would have no recourse if the judge did not.

I hope these thoughts will be of use to the U.S. Sentencing Commission. Of course, the problem we see in Florida could probably be remedied by altering the point system for scoring priors. This has not been done, however, and the inequities remain. I bring the problem to your attention for your consideration. If you have any questions, please feel free to contact me.

Very truly yours,

Marti Rothenberg

MARTI ROTHENBERG
Assistant Public Defender

MR/dc

RECEIVED MAY 13 1986

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May 8, 1986

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Honorable William W. Wilkins, Jr.
Chairman, The United States Sentencing
Commission
1331 Pennsylvania Avenue, NW
Suite 1400
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Dear Chairman Wilkins:

Thank you for your letter of April 25, 1986, inviting me to submit my views concerning sentencing of a criminal defendant. While, as I am sure you are aware from your experience as a prosecutor and as a Federal District Judge, the issues you present are difficult, I will attempt to address these.

The first question raised concerns the definition of felony and misdemeanor offenses. In my judgment, it seems that the most critical factor in determining this should be the nature of the offense. In determining the nature of the offense, however, the most significant factor would seem to be what society has determined to be an appropriate punishment, for if society has determined that the punishment includes incarceration for a long period of time, it obviously must consider this a serious offense, while if only a short period of incarceration or no incarceration is permissible, the offense is a significantly less "culpable" one. In my view, for guideline purposes, the determining factor should therefore be the length of the sentence imposed.

Of course, any significant crime of violence or any major drug offense would be easy to classify as a felony. The difficulty with classifying crimes becomes apparent on the lower end of the scale where crimes are notably less serious. Thus, to avoid confusion and maintain some semblance of certainty, since a line must be drawn somewhere, I feel that offenses for which a sentence of over 1 year (not including time suspended) is imposed should be categorized as felonies with all other offenses being considered misdemeanors.

As to the issues raised by your letter concerning the weight to be given prior felony convictions, the decay factor, prior juvenile offenses, and consideration of previous arrest only, it is my feeling that while it would be helpful if some guidelines could be established in determining how these factors should be considered, in the last analysis, all efforts should be made to maintain the discretion of the trial judge as there is no substitute for human judgment in sentencing.

Obviously, the more serious the prior offense, the greater it should be weighed against the Defendant. Obviously, any prior offense categorized as a felony should be weighed more heavily than a misdemeanor. However, the current problem in our Federal system is that an offender is for practical purposes punished twice for the same prior offense. The judge imposes a more severe penalty upon learning of the Defendant's prior record. Then, after the offender reports to his institution, the Parole Commission penalizes him a second time for his prior offense. The same offender will have already been penalized by the Bureau of Prisons by the time he reports since his prison designation will have been made based on a prior offense. Therefore, while I agree that the factors above should be considered by Sentencing Courts, the best results are reached by our traditional system, with a sentencing report prepared and the right of elocution on the part of the Defendant.

Your letter also raises the question of the decay factor in connection with consideration of a Defendant's prior criminal history. As to this, while it is difficult to establish a line of demarcation to be used in considering a Defendant's prior criminal history, it seems only fair to do so. For some reason, the legal profession has long recognized any crime which occurred more than 10 years previously as being stale and too far removed to be of consequence and I am in agreement with the 10 year period. I further feel that the starting point for such a decay period should be the date of supervision release, since at that time rehabilitation is theoretically complete.

In specific response to some of the inquiries made, I would state that I do not feel that previous arrest should be used to determine a prior criminal record. Many arrests are the result of inaccurate police information and poor judgment on behalf of law enforcement rather than criminal conduct. I think that the factor of a Defendant being on parole or probation at the time of an offense should be considered and weighed against the Defendant. If the Defendant has almost completed his period of probation, however, this should be waived less heavily. As to the level of sentence aggravation to be given, I think the guidelines etched in stone are inappropriate. While a Sentencing Court should be given discretion to impose some sentence aggravation, I am of the opinion this should not be done without at least 3 felony convictions wherein the sentence imposed in each, not counting time suspended, was over 5 years. In connection with all of these specific areas, all circumstances must be taken into consideration.

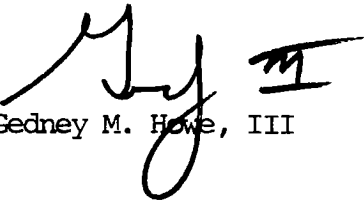
I am in agreement with the specific eleven factors in your letter being considered and I am also in agreement with having sentencing guidelines. However, I feel that it is important for your Commission to consider that while one who deviates and engages in criminal activity should be punished, criminal Defendants, like the population as a whole, are comprised of many, many different types of people responding to different stimuli, rewards and punishment. Because of this, and although I recognize that serious crime is a serious problem in the United States, I think that the most important characteristic of our Criminal Justice System now is the flexibility and discretion given to the Sentencing Courts. I

guess that it is in part because of this that your Commission has been established; however, if the guidelines are established such that they must be strictly adhered to, I am afraid that the most important thread which I feel must run through the fiber of criminal sentencing (discretion of the Trial Judge) will be lost. Any mechanical applications of factors or guidelines does not serve the Criminal Justice System well. It is ultimately the Trial Judge who must bear the responsibility that he has born since our nation was founded. That is, sound legal judgment tempered by compassion, with the sentence fitting the crime as well as the individual Defendant.

Again, I appreciate very much your extending the opportunity to me to set forth my views and I hope they will be of some benefit to the Commission.

With highest and kindest personal regards, I am

Sincerely,

A handwritten signature in dark ink, appearing to read 'Gedney M. Howe, III'. The signature is stylized with a large, sweeping 'G' and a distinct 'H'.

Gedney M. Howe, III

GMH,III:kw

CHARLIE E. VARNON
CHIEF U. S. PROBATION OFFICER

650 CAPITOL MALL, RM 8558
SACRAMENTO 95814
(916) 551-2641 (FTS) 460-2641

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
PROBATION OFFICE

REPLY TO Sacramento

May 6, 1986

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

Dear Judge Wilkins:

I write in response to your letter of April 25, 1986 wherein my views regarding the impact of a defendant's prior record on sentencing was solicited. I preface my comments with the statement of my understanding that the purpose for which the Sentencing Commission considers prior criminality differs from the purposes for which prior records were considered by the Parole Commission. I understand that the Parole Commission considered prior convictions as an indicator of likelihood of an inmate reoffending and therefore there was no differentiation among the various types of prior convictions. It seems the Sentencing Commission is charged by congress with the task of avoiding unwarranted sentencing disparities among defendants with "similar records." Based on this assumption, I offer my responses to your questions as follows:

1. I believe that in the ideal system of criminal sentencing consideration should be given to the nature and the severity of the defendant's prior criminal behavior and not to the legal definition of the offenses for which he was previously convicted. To do otherwise perpetuates disparity and results in unwarranted leniency for defendants who were fortunate enough to be charged in a jurisdiction in which the court calendar was backlogged to the extent plea negotiations to misdemeanor offenses were offered merely to dispose of cases. Also, plea negotiations tend to be influenced by prosecutorial priorities and, therefore, the same offense behavior may result in a plea to a misdemeanor at one time and a conviction by jury trial of a felony offense at another time.

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It is recognized that such an ideal system is impossible to achieve without extensive litigation in each case for the purpose of establishing the actual severity of prior behavior. Very limited access to old police reports and to witnesses to old offenses results in an impossible task for the government to meet almost any burden of proof of the severity of prior criminal conduct. Therefore, it is felt the Commission must rely on records of conviction as the best workable solution to a system which will always have some unwarranted disparity. It is believed that this inherent disparity would be reduced to the greatest extent by considering the nature of the offense of conviction and thereafter applying the federal felony and misdemeanor definitions to that particular offense. A situation has existed in the past, and probably does to a lesser extent today, wherein simple possession of marijuana may be an infraction in one state jurisdiction and a Class-A felony in another state jurisdiction. If the Commission relies on the sentence actually imposed or even on the statutory maximum for the offense in various jurisdictions, there will be an even greater increase in disparity which will already exist due to plea bargaining pressures and varying prosecutorial priorities. There are a very few offenses which have no federal counterpart, and it is felt the Commission should adopt the Assimilative Crimes Act approach of considering the sentence which could have been imposed in establishing the definition of those few offenses.

2. I sincerely believe that a system which provides for weighting the severity of prior convictions will, in appearance and in fact, result in greater fairness and rationality in criminal sentencing. Under the present parole guidelines system, a prior conviction for petty theft has the same effect on the guideline computation as a prior conviction for murder. When the defendant's present offense involves a crime of violence, assigning equal weight to these prior convictions does not promote common sense credibility of the guidelines system. I am confident that research demonstrates these prior convictions to be of equal predictive validity so the Parole Commission was well justified in establishing such a system since their primary purpose is to determine that release of the offender will not jeopardize the public welfare. I believe more serious prior offenses should have a greater impact on establishing a current sanction than relatively less-serious priors. I believe the felony and misdemeanor classification system set forth in the Crime Control Act provides a rational and consistent means by which prior offenses may be weighted. Greatest weight should be given to a Class-A felony and a prior conviction for an infraction should have little or no impact on the present sanction.

3. I believe it is appropriate for the Commission to consider the "decay factor" when considering a defendant's prior criminal history. I suggest that some consideration should be given to establishing a relationship between the seriousness of the prior conviction and the term of months or years after which that prior conviction will not influence the present sanction. It seems that credibility of the sentencing system requires that a Class-A felony affect sentencing for a period longer than the period in which a Class-C misdemeanor affects the present sanction. I believe the starting point for the "decay period" should be the prison release date or the date of conviction if no term of incarceration is imposed. If the decay period is tied to the date upon which the defendant is released from supervision, disparity will be built into the system since I believe some states still provide for ten-year terms of probation supervision while three years may be the maximum in other states. It seems the defendant's ability to remain crime-free in the community with or without supervision is the matter of legitimate consideration of the Commission. I might suggest the appropriateness of the supervision release date if the terms of supervision were the same throughout the country and if the quality of supervision was equal.

4. I believe it is absolutely necessary that juvenile offenses be considered in establishing sentences for adult offenders. Naturally, it would not be appropriate to consider status offenses as prior criminal convictions. It may be appropriate for the Commission to consider fixing some age below which it is believed a juvenile is not criminally responsible, but that age should be significantly less than the ages which establish juvenile court jurisdiction throughout the country. I believe serious crimes committed by a 17-year-old should be given weight in establishing the sanction for that offender when he commits a crime a few months later when he is 18-years-old and, at least in this state, comes under jurisdiction of the adult courts. I do not believe the decay factor should differ for juvenile offenses although some consideration may be given to the offender's youthfulness at the time of the present offense.

5. I believe military convictions for offenses which would be considered criminal in civil courts should be given the same weight as other prior convictions. If possible, I think the same approach should be taken to foreign and tribal convictions although I realize the constitutional protections

of this country are not afforded defendants in foreign jurisdictions and, therefore, the validity of the conviction, at least by our standards, may be suspect. It may be appropriate to leave to the discretion of the trial court the decision regarding appropriate weight given to foreign or tribal convictions. These convictions are few and the court could examine the convictions on a case-by-case basis to determine, to whatever standard of proof the Commission or the courts require, that the conviction appropriately reflects the nature and seriousness of the defendant's conduct.

6. For the purpose of establishing the guideline sentence, I believe only prior convictions should be considered. To do otherwise could result in the guidelines system being influenced by racial, economic, and residential factors which may not accurately indicate the degree to which the defendant has been involved in criminal activities. I think the court should consider arrests without convictions as cause for going above the guidelines if there is credible evidence that the defendant was actually involved in criminal activities and the failure to convict was not a result of the defendant's innocence. Consideration of convictions in this fashion would allow the circuit courts to review the court's exercise of discretion in this regard.

7. The question as to whether a defendant's status as a probationer or parolee should be considered presents some difficulties. On the one hand, such a defendant is conditionally released to the community and being in harm's way you would expect him to be doubly deterred. On the other hand, giving weight to this factor may result in disparity based on the degree to which probation or parole is used in various state and local jurisdictions. Maybe the best course of action would be to allow the probation or parole jurisdiction to sanction the violation of conditional release and for the Sentencing Commission to provide a guideline without consideration of probation or parole status. If the guidelines system already considers the fact of the prior conviction which results in the probation or parole status, as modified to whatever appropriate degree by the decay factor, it may not be necessary to weight probation or parole status. To consider this status in establishing guidelines could result in an extremely complex system. I believe the Commission would have to face the problem of weighting probation differently than parole and within the status of probationer, consideration would probably have to be given to different weights for misdemeanor probation, felony probation, and unsupervised probation.

8. It is difficult to suggest a specific level of guideline enhancement based on a specific level of prior record severity without knowing what the guidelines look like. In a very general way, I would suggest that the "in or out" guidelines should be weighted heavily against probation for anyone with two or more prior Class-A, B, or C felonies. If the sentencing guidelines reflect the process by which judges presently impose sentence, I believe prior convictions must be weighted by severity if they are to justify a higher guidelines sentence. The Parole Commission procedure for establishing offense severity when there are multiple separate offenses may be worthy of consideration by the Sentencing Commission as a means of weighting prior records. We are faced with the problem of reconciling the sentence of an offender convicted of a Class-E felony who has two prior Class-B felony convictions with that of an offender convicted of a Class-B felony who has two prior Class-E felony convictions. If a system similar to the multiple separate offense computation used by the Parole Commission is adopted, it may be possible to establish a single quantitative value to represent the weight of the total prior record.

Although your present inquiry does not invite comments regarding the procedures for establishing offense severity for the present offense of conviction, the discussions at the recent Ninth Circuit Sentencing Institute at Phoenix have given me some cause for concern. Under our present sentencing system, the government may agree to accept a plea to one count on the condition that it will move the court for dismissal of the remaining counts. Thereafter, it falls to the probation officer to provide the court with a discussion of the defendant's overall offense behavior. In some cases the probation officer must, with varying degrees of assistance from the government, prove to a preponderance of evidence standard that the defendant is guilty of the offenses charged in the counts to be dismissed. Defense has the opportunity to challenge the factual accuracy of our reports of dismissed counts under the provisions of Rule 32. To resolve this problem, probation officers in some districts, at the direction of their courts, report only the offense of conviction and do not discuss dismissed counts at all. When that approach is adopted, the Parole Commission may request a post-sentence report from the probation officer with information regarding dismissed counts or the Commission may go to the United States Attorney or the investigative agency for that information. When this information is supplied to the Parole Commission by means other than the presentence report, the defendant's rights to challenge the report as provided by Rule 32 are

Honorable William W. Wilkins, Jr.
Page 6.

greatly diminished. I have approached the United States Attorney in this District with a suggestion that, as part of the plea agreement, the defendant be required to plea to one count and, for the purpose of establishing offense severity only, admit responsibility for those counts to be dismissed which the government and the defense agree the government can prove to a preponderance of evidence standard. If both the government and the defense agree a count to be dismissed cannot be proven, then that count should not be reported in the presentence report, and it should not be considered by the Parole Commission in establishing parole guidelines. The United States Attorney and the Federal Defender assure me that this would have a chilling effect on plea negotiations, and the proposal has been soundly rejected. I am concerned that under the guidelines system a defendant may plead to a Class-E felony when the underlying offense behavior is a Class-A or B felony. Such a system may result in the court being overwhelmed with evidentiary hearings solely for the purpose of establishing offense severity. Frankly, I can see no motivation for a defense attorney not to request such a hearing. I understand that a system by which offense severity is established at the time of the plea will transfer a great deal of discretion to the government, but the Sentencing Commission may, by way of policy statements, provide guidance to the United States Attorney in the area of plea negotiations and to the court in the area of approval of negotiated pleas.

Under the present procedures the offense of conviction has little impact on the parole guidelines beyond establishing the maximum term the defendant may serve. I believe responsibility for establishing offense severity should be assigned to the government since the government is responsible for filing the charges and for proving the case if it goes to trial. The defendant should not be required to enter a plea and then wait until the sentencing hearing to be advised of the court's determination of the real severity of his crime.

I was very impressed with the Sentencing Commission's contribution to the recent Sentencing Institute. Based on my observations of the quality and dedication of your staff, I am beginning to believe the Commission may really be able to accomplish what appeared to be an impossible task.

Respectfully submitted,



CHARLIE E. VARNON
Chief U. S. Probation Officer

CEV:je

RECEIVED MAY 15 1986

1835 K Street, N.W. • Suite 700 • Washington, D.C. 20006
202/634-9821



NATIONAL
CENTER FOR
**MISSING
& EXPLOITED**
CHILDREN

May 12, 1986

William W. Wilkins, Jr.
The United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

The National Center for Missing and Exploited Children is very pleased to be invited to submit further comments to the U.S. Sentencing Commission. We are particularly pleased to be able to submit our views on the effect that prior convictions should have in fashioning a just sentence. The issue of what sentence to accord a multiple offender is of particular interest to the criminal justice and youth services professionals here at the National Center for Missing and Exploited Children because of the repetitive nature of the crimes of kidnap and child sexual assault.

A study of the crime of kidnapping recently completed by the National Center for Missing and Exploited Children found that the crime of kidnapping is a crime that usually precedes and facilitates the commission of another crime, usually a sexual assault. Over seventy percent of the child-victims studied were also victims of one or more crimes involving sexual assault, physical assault, or murder. National Center personnel examined police department crime reports in two jurisdictions in addition to examining numerous other sources of information about kidnapping cases. Eighty-three percent of the child kidnapping victims in Jacksonville, Florida were also victimized by a subsequent sexual assault by the kidnapper. The crime reports of the Houston, Texas Police Department disclosed that child kidnap victims were sexually assaulted by the kidnapper in 96% of the cases.

Research into the type of individual who commits these crimes indicates that, frequently the child molester is a person for whom children are the preferred sexual object. In cases where the child molester is satisfying a sexual preference, typically the offender will molest large numbers of children over the course of a lifetime. As Supervisory Special Agent of the FBI's Behavioral Science Unit stated in Child Molesters: A Behavioral Analysis, "For many of them, their problem is not only the nature of their sex drive (attraction to children) but also the quantity (need for frequent and repeated sex with children)." Even where the offender is not satisfying a sexual preference, child

Mr. Wilkins
May 12, 1986
Page Two

molestation may represent a long-term pattern of behavior.

For these reasons it is vital that serious consideration be given to evidence concerning the number of victims involved in the crime for which the offender is being sentenced. It is also vital that evidence of prior convictions be considered as a significant indication that the offender is indulging in the sexual molestation of children as a course of conduct. Evidence of prior felony convictions in these cases should count heavily in the sentencing of a child molester.

Evidence of prior misdemeanor convictions should also be given significant consideration. It is the conduct that is at issue and not the classification of the offense. Also, the latest research, such as that performed by Eugene Abel, demonstrates that individuals who commit sexual crimes against children are also involved in relatively less significant sexual crimes such as indecent exposure and peeping tom activities. Furthermore, sexual crimes against children have traditionally been the subject of plea bargains to lesser offenses because of the obstacles inherent in the judicial system to the presentation of testimony by child victims.

Research into the issues concerning the commission of sex crimes against children has begun to focus increasing attention on the commission of sex crimes by children, usually by adolescent males. Although, in the past, the seriousness of sex crimes by adolescent child molesters has often been minimized because, "boys will be boys" or "he's just going through a phase", it has become apparent that many adult sex offenders began committing sex crimes as adolescents against younger or more vulnerable children. This fact needs to be given careful consideration when determining whether a sentencing judge should be able to consider prior convictions as a juvenile in establishing sentences for adult offenders. Sex crimes, even those committed by juvenile offenders, may provide vital information to a sentencing judge concerning patterns of conduct or indications that these crimes are becoming increasingly serious or more frequent. Accordingly, although this is a sensitive issue due to the protections accorded the youthful offender, where the current offense is a sexual offense and the prior juvenile convictions arise from a conduct indicating a sexual offense, it is advisable to allow the judge the discretion to consider these offenses.

For reasons similar to those just discussed, the amount of time that has elapsed between the prior conviction and the instant offense may be less significant in the area of sex crimes against children than in other kinds of crimes. Also, it is significant when considering whether to build in a decay factor that the sex offender, for many reasons, is more likely than other kinds of criminals to escape without detection for longer periods of time. This is because many victims are still reluctant

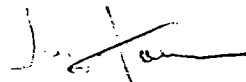
Mr. Wilkins
May 12, 1986
Page Three

to report being victimized by sex crimes. As the U.S. Department of Justice, Bureau of Justice Statistics Bulletin (March, 1985) reported, "Only about half of the victims of rape or attempted rape surveyed during the decade stated that the crime had been reported to the police." This is especially true of child victims. Even when these crimes get reported and investigated, the lack of eyewitnesses and other physical evidence renders these crimes harder to successfully prosecute. When the victim is a child, rules of competency and rules pertaining to leading questions and other standard courtroom procedures put the child victim at a disadvantage. Estimates put the figure of unreported child molestation cases as high as 90%. (Praeger, "'Sexual Psychopathy' and Child Molesters: The Experiment Fails" Journal of Juvenile Law, Volume 6, Number 1, 1982.)

Nonetheless, research into the recidivist rate of sex offenders indicates a high rate of recidivism among pedophiles. More than half of sex offenders released from a treatment facility have been found to reoffend within five years of release. (Sturgeon and Taylor, Report of a 5-Year Follow-Up Study of Mentally Disordered Sex Offenders" Atascadero State Hospital, California, 1973; R. Geiser, "Hidden Victims: The Sexual Abuse of Children" 1979). Because pedophilia is a self-reinforcing lifestyle producing satisfaction to the sexual offender so that reoffending is likely, yet reluctance to report and obstacles to successful investigation and prosecution reduce the likelihood of conviction within short time periods, any delay factor built into national sentencing policy should be lengthy. Consideration should be given to time periods as long as ten to twenty years in fashioning a decay factor.

My staff and I have appreciated the opportunity to provide comments to the U.S. Sentencing Commission on these issues of significant importance to decreasing the incidence of crimes against children. If we can be of any further assistance, please do not hesitate to contact us further.

Sincerely,



Jay Howell
Executive Director

JH/JK/mg

RECEIVED MAY 13 1986

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES COURT HOUSE

BOX 040

550 W. FORT STREET

BOISE, IDAHO 83724

MARION J. CALLISTER

CHIEF JUDGE

May 9, 1986

Honorable William W. Wilkins, Jr.
1331 Pennsylvania Avenue N.W.
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

I recently attended the Ninth Circuit Sentencing Institute and have been reviewing the new statute. There are some things that give me a great deal of concern.

There is so much variance between offenders that I do not believe that justice can result from a rigid sentencing program. I do not believe that the system proposed will be as effective as the sentencing under the judicial discretion now allowed by experienced and qualified judges. I know that we have an occasional judge that acts beyond the bounds of that which we feel is reasonable, but I believe this effort to correct that situation will cause a great deal more injustice than results from the few offenders that we have. I hope that you will act to retain the power of the judge to exercise discretion in accordance with the facts and circumstances that the history of the offender and the nature of the problem in the district where he resides dictates.

I am greatly concerned about the loss of the ability to modify a sentence within 120 days. It has been a very effective tool in this district in certain types of cases, such as tax protestors who, when they have been placed in jail under a substantial sentence, have often finally realized it is best to obey the law. I think it has been in the interests of justice to then release these people and let them go about their business. The new statute is going to prevent this from being done. I think that this procedure is particularly helpful with young and relatively inexperienced offenders who need a taste of prison to realize the consequences of what they are doing and who may need to go there under circumstances of a substantial sentence but do need to be released after recognition of the problem that they face.

Honorable William W. Wilkins, Jr.
May 9, 1986
Page 2.

I also feel that with young offenders there are those that should be permitted to have the felony conviction wiped from their record. I feel that the loss of this power, while not frequently used, is very detrimental to the justice system.

Very truly yours,

Marion J. Callister

Marion J. Callister
Chief Judge

cc: Judge Ryan
Judge Williams

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
PROBATION OFFICER

ROBERT K. SIBILLE
CHIEF PROBATION OFFICER

May 8, 1986

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647 MAIN STREET
BATON ROUGE 70801-1996
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Honorable William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I am responding to your letter of April 25, 1986 requesting input on issues to be considered in the May 22 hearing. Questions raised in both this letter and the first make me realize the very difficult and complicated task which the commission faces.

Regarding the definition of felony and misdemeanor offenses, I believe the Sentencing Commission cannot hope to come up with a definition which overcomes the disparity found throughout the nation; therefore, the Commission must set an arbitrary guideline most likely using the nature of the offense. You would be concerned with such factors as use of weapons, drug related behavior, or victim impact. To rely on length of sentence given would be to rely on the same type of disparity of the sentencing which the Commission is trying to remove in the federal system.

Prior felony convictions must be weighted in terms of seriousness for impact on the current sanction. To rate the seriousness of the prior offenses, the Commission could use a system which compares the prior offenses to the ratings you have established for the present offense. If armed robbery of a post office is more serious than burglary of a government building, then a defendant's armed robbery of a grocery store will be more serious than a simple burglary of an inhabited dwelling.

When considering a defendant's prior history, a decay factor would be useful. The Commission may set an arbitrary time period between the defendant's last offense and the present offense which could be used to exclude a conviction. I would use a conviction free standard rather than an arrest free standard. I also recommend you use the release date if the defendant was imprisoned and the conviction date if he received only a community supervision sentence. Prior juvenile offenses must be considered if they involve actual criminal activity which would have resulted in charges if the defendant were an adult. Juvenile offenses have, in many districts, a decay factor built in. Often juvenile records are destroyed when the defendant becomes an adult.

Military, foreign, and tribal convictions should be considered with the nature of the offense being compared to offenses already described in the guidelines. Some discretion will be used if the information concerning the prior offense is incomplete.

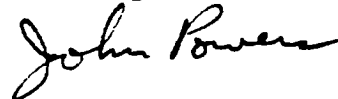
In the issue of convictions versus arrests, I think you must go with only convictions in rating a defendant according to guidelines. I believe a sentencing judge should however have access to information concerning previous arrests which did not result in convictions. Again, there has to be some judicial discretion, and there must be top quality presentence reports from the federal probation system.

My first thought regarding whether or not a defendant's probation or parole status at the time of the offense should be considered was yes and heavily. Now I am not so sure. First, the quality of probation or parole supervision varies greatly from officer to officer and agency to agency. The defendant is the same individual whether he committed his offense one month before the expiration of his probation sentence or six months after. Also, to expect many offenders to suddenly become rational, law-abiding citizens the day they are placed on probation is similar to expecting an alcoholic to swear off drinking due to a court order. There is going to be backsliding.

I cannot offer a specific recommendation concerning the appropriate level of sentence aggravation relating to a level of prior record. The Sentencing Commission must get some guidelines down on paper from a consensus of opinion among its members. Almost every agency involved in pretrial, probation, or parole develops its own guidelines with varying degrees of success. The Commission will be forced to use its discretionary powers in order to reduce the abuse of discretion already present in our system. I do not believe the Commission can come up with guidelines for every factor including the eleven specific factors listed in the statute. The extent to which the system is fair and consistent will continue to be dependent on the quality of our judges and the staffs which serve them.

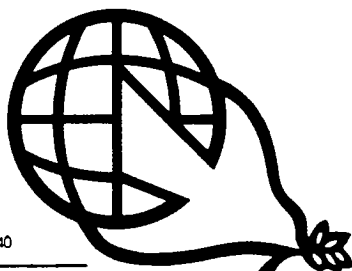
Thank you for this opportunity to express my opinions.

Sincerely,

A handwritten signature in cursive script that reads "John Powers".

John D. Powers
U.S. Probation Officer

JDP:kc



Formed 1940

NISBCO

National Interreligious Service Board for Conscientious Objectors

MAY 15, 1986

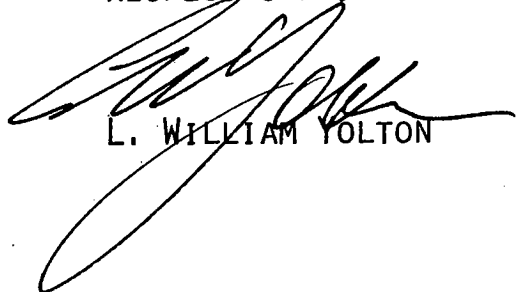
THE HONORABLE WILLIAM W. WILKINS, JR. CHAIRMAN
U. S. SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, N.W.
SUITE 1400
WASHINGTON, D.C. 20004

DEAR JUDGE WILKINS:

MY APOLOGIES FOR BEING QUITE LATE IN THIS SUBMISSION.
I HAVE BEEN OUT OF TOWN DURING THE TIME I SHOULD HAVE
BEEN WORKING ON IT, OR PREPARING TESTIMONY FOR A
CONGRESSIONAL HEARING. I TRUST IT WILL STILL BE
USEFUL TO THE COMMISSION. I AM WELL AWARE THAT IT
DEALS WITH A VERY SPECIALIZED GROUP OF OFFENDERS.

FOR THAT VERY REASON I SHALL NOT SUBMIT TESTIMONY IN THE
NEXT ROUND OF HEARINGS, FOR THE SUBJECT, ORGANIZATIONS, IS
ONE THAT DOES NOT ENTER INTO OUR CONSIDERATIONS. TO MY
KNOWLEDGE, NO ORGANIZATION HAS BEEN CHARGED WITH VIOLATION
OF THE MILITARY SELECTIVE SERVICE ACT, EXCEPT THE SYSTEM
ITSELF!

RESPECTFULLY,



L. WILLIAM TOLTON

REV. L. WILLIAM TOLTON
Executive Director

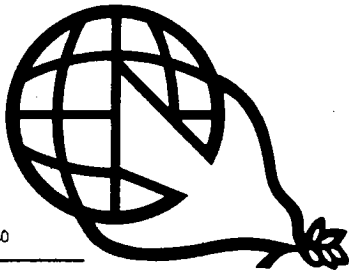
SHAWN PERRY
Associate Director for Program
CHARLES EDD

CHARLES MARESCA
Associate Director/Counseling
JOSPH S. TICHINSKY

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GERALD SHENK

Suite 600, 800 Eighteenth St., NW, Washington, DC 20006-3599 (202) 293-5962



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NISBCO

National Interreligious Service Board for Conscientious Objectors

TESTIMONY ON OFFENDER CHARACTERISTICS

before the

U. S. SENTENCING COMMISSION

on behalf of the

National Interreligious Service Board
For Conscientious Objectors

by Rev. L. William Yolton
Executive Director

May 12, 1986

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As Executive Director of the National Interreligious Service Board for Conscientious Objectors I present written views on how offender characteristics should affect sentencing. In testimony on April 15, 1986, I presented views on the grading and duration of sentences.

NISBCO is the agency through which thirty-four religious organizations cooperate to defend and extend the rights of conscientious objectors. In the course of its work NISBCO has become involved in the analysis and reform of conscription laws and administrative practice. Since its inception in 1940, NISBCO has cared for those convicted of violations of Selective Service law and other statutes, supporting them during their trials, and visiting them in prison.

1. The "political setting" of determinations about war objectors, and the unpopularity of their conscientious convictions must be considered:

The anomalous situation of war objectors requires special attention in sentencing. Unlike perpetrators of violent crimes, most convicted violators of the Military Selective Service Act oppose violence, and have acted from sincerely-held conscientious beliefs. The circumstances of their "crimes" are colored by a highly politicized situation. Sentiments against the offender may be aggravated by the political climate.

The Selective Service System itself is highly pro-military and political in its spirit and appointment of personnel. Since

reactivation of the System the principal officers in the system are military officers detached for this service. When the system is mobilized the Area Offices will be staffed by reserve officers placed on active duty in offices located in recruiting stations.¹ The current system limits civilian participation to the claims boards and the appeal boards, which have much reduced jurisdiction over classifications.

In practice, these civilians are selected by the System itself. Military reserve officers recruit the volunteers. These civilian boards usually reflect the demographic composition of the local community. The appointment process inevitably relies upon cooperating veterans organizations, and on the interest of citizen members in facilitating the delivery of military manpower. Currently, despite congressional intent that the appointments be made impartially, only Michigan has tried to insure this impartiality via questionnaires to screen for bias.

These appointees who determine classifications affecting the liberty of claimants² under the System have no tenure or signifi-

¹ The System has been redesigned beginning with new regulations first promulgated in 1982 the guiding principle of this change is "streamlining," which is said to facilitate rapid mobilization at a time of a declared national emergency. As a consequence the civilian character of the system has been weakened (local board offices no longer exist) and the rights of registrants which were minimal in the earlier system, from 1948 to 1975, have been further restricted.

² The defects of due process in Selective Service law are similar to those in the 1850 Fugitive Slave Act in which commissioners had power over the liberty of slaves without judicial review, except for the "no basis in law" standard of review. The opponents of the law argued that constitutionally there was a right to a jury determination whenever human liberty was at stake. See: "Human Rights and Freedom of Conscience in Administrative Law: A Critique of the Fugitive Slave Act and the Selective Service Act

cant training. The training they do receive focuses on how to reject claims with legal reasons.³ The hearings are in camera.

Due process, rules of evidence, presence of counsel, and transcripts are all lacking.

The Supreme Court in Cox left no opportunity for the indicted registrant to obtain a review of the local board's decision: "the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous."⁴ Only if the Board failed to follow its own regulations can a conviction be overturned.

The individual war objectors are subject to the prevailing political winds. For instance, at the beginning of the Vietnam conflict few claims for conscientious objection were won, and defendants lost most cases. At the end of the conflict, when opposition to the war was at its height, few claims for conscientious objection were lost, and the Government lost most court cases.

Given the minority views of war objectors, the heightened emotions, and political passions in times of conscription it is not surprising that war objectors are often the object of overt

³ The law (1971) now requires that reasons must be given for rejection of claims by the claims board and the appeal board.

⁴ Cox v. United States, 332 U.S. 442 at 448 (1947) (emphasis added).

hostility. In colonial times they were termed "dogs," "lazy," and "cowardly," for their "monstrous" teachings of non-resistance and their friendship with the "heathen" Indians.⁵ When Judge Julius Mayer sentenced Roger Baldwin, founder of the ACLU, he said "I think such an attitude would have led inevitably to disorder and finally to the destruction of government."⁶ When the Secretary of War commanded military officials to court-martial any conscientious objector who was "active in propaganda" or "sullen and defiant" almost all absolutist non-cooperators were tried, convicted, and sentenced to long terms. Seventeen were sentenced to death.⁷ In World War II the director of the Bureau of Prisons attacked the COs as products of "over-protective homes" and "mother fixations."⁸ Objectors were punished for their views on racial integration and prison conditions. During the Vietnam conflict war objectors were called "shameful and disgusting" (Rep. Gerald Ford, who later as President instituted a clemency program), a "spectacle of organized treason and blatant cowardice...encouraged by

⁵ Peter Brock, Pacifism in the United States—From the Colonial Era to the First World War. Princeton: Princeton Univ. Press, p.55. William L. Saunders, ed., The Colonial Records of North Carolina, 1662-1776. Raleigh, N.C.: P. M. Hale, state printer, 1886-1890, vol. 1, pp.810-814.

⁶ Roger Nash Baldwin, The Individual and the State. ACLU, 1981, p 14.

⁷ Stephen M. Kohn, Jailed for Peace. Westport, Ct.: Greenwood Press, 1986, p. 28.

⁸ James Bennett, Federal Prisons 1943. El Reno, Oklahoma: Federal Prison Industries, Inc., 1944, pp.11,12.

half-baked professors and communist sympathizers,...crackpots who have little comprehension of world problems or American responsibilities."9

The war objector/conscientious objector defendant is particularly vulnerable to the prejudices of the majority, not only for the objector's conscientious refusal to participate in the organized violence of war, but also for his apparent opposition to the political ends for which the war is being waged. The rights of the offender must be protected against the excessive zeal, particularly when heated emotions are fanned by the sentiments of patriotism stirred by wartime polarization.

It is important, not only for the preservation of basic human rights observed in our society that these persons be insulated from prejudice and unreasonably harsh treatment, but also because our enlightened practice has advanced the rights of those in other nations. While America is no longer unique in providing alternatives for those who have conscientious scruples against participation in war, it is nevertheless remarkable that the influence of our traditions dating from colonial times have not only prevailed in our own society, but also, contributed significantly to advance the rights of war objectors which are observed in other societies as well.

It should also be held in mind, that as in the cases of Walter Collins, Cleveland C. Sellers, and Arthur Burkhart Banks, which were mentioned in our previous testimony, Selective Service

9 Congressional Record, October 20, 1956, 27425. Rep. Sikes, ibid., 27724.

prosecutions are often initiated to stifle dissent and civil rights activism. The availability of the broad powers of the Act, and the fact that the courts cannot review the decisions of the System, make miscarriages of justice inevitable, and the punishment of social activism as well as conscientious dissent a certainty.

2. A determination of sincerity or conscientiousness should be made at sentencing.

Since the trial court will not make a determination based on arguments from the religious objections of a CO, the illegality of a war, and even the proven error of a local draft board,¹⁰ it is important to distinguish the person who acts from higher motives from those who act from mere expediency. The judge should inquire as to the motivation for refusing to comply with the law. In the recent cases of draft non-registrants Mark Schmucker, David Wayte, and Andrew Mager, the judges have noted the high motivation of the offenders and have modified the sentences accordingly.

Although in federal procedure at sentencing the jury is not involved, it might be considered a reform to be recommended to Congress that an offender be given the option of a jury determination of the conscientiousness of his actions. Our long tradition of jury trial is relevant to the determination of

¹⁰ See generally Witmer v. U.S., 348 U.S. 375 (1955); U.S. v. Mitchell, 246 F.Supp. 874(1965); U.S. v. Garrity, 443 F.2d 649, (8th Cir.1970); Petrie v. U.S., 407 F.2d 267,272 (1969).

sincerity and conscientiousness for four reasons:

(1) Jurors are independent, the local claims [draft] board is not.

(2) Lay people, not experts, are required to hear and decide criminal cases.¹¹

(3) A jury may be particularly suited to determine the objector's sincerity.¹²

(4) The constitutional provision for a jury is to "protect the accused from oppression by the government."¹³

All these reasons are particularly apt for the situation of the convicted war objector awaiting sentencing. Nevertheless, in the light of the inflamed passions of the people, it might be preferable to have the option of choosing that "expert," the judge who might be less susceptible to the political moment. The offender should therefore have the option of either a determination by jury or by the sentencing judge.

¹¹ On the premise "that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury.

Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any single field, including specialists in the military field." Witmer v. United States, 348 U.S. 375, 381 (1955).

¹² "The law has established this tribunal because it is believed that, from its number, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent; than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice." Quarles, 350 U.S. at 18 n.10.

¹³ Singer v. United States, 380 U.S. 24, 31 (1965).

3. All prior record offenses, including juvenile records, are not relevant, with few exceptions.

Most war objector offenders will have committed their acts at relatively young age, nineteen or twenty. Assuming that sincerity and conscientiousness have been established, except for the unlikely case of a prior offense related to Selective Service violations or acts of war protest, all other offenses are irrelevant. The difference between the considered, moral basis of war objection and other infractions of the law (moral turpitude) is itself a sufficient consideration. The fact that one man may have shop lifted and another did not should not have a bearing on sentencing for a Selective Service violation because it bears no relation to the motivation of the second crime. In addition, standard theory of moral development identifies the formation of the ability to reason about moral considerations in political responsibility as among the last in a hierarchy of stages of moral development to mature.¹⁴ Acts of violence should be considered only if they took place after the crystallization of the conscientious objector beliefs.

4. Only convictions within the last ten years should be considered.

¹⁴ Jean Piaget, The Moral Judgment of the Child, trans. Marjorie Gabain. New York: The Free Press, 1965. Lawrence Kohlberg, The Philosophy of Moral Development. San Francisco: Harper and Row, 1981. Carol Gilligan, In a Different Voice. Cambridge, Massachusetts: Harvard University Press, 1982.

Given the political character of the actions of the offenders in Selective Service cases, the pattern of use of the Selective Service law to suppress free speech, and the necessary criticism of a war policy for the sake of a healthy examination of the political decisions of the war policy, such offenders may be subject to arrest to intimidate their exercise of first amendment rights. Arrest records may indicate only that the offender deviates from popular moral or political opinion. In any case, the fundamental doctrine of innocence until proven guilty requires the preclusion of matters not resulting in a conviction. Anyone may be arrested, only the guilty are convicted (at least theoretically).

Given the transient nature of political judgments about wars, one need only consider the most recent conflict in Vietnam, the deterrent effect is irrelevant for objectors to future wars, and negligibly appropriate for the temper of later times. Those who once were in a minority of opposition to that conflict were for a while in high repute, and only a little less so now that that conflict has been rehabilitated. Binding up the wounds means that differences over previous conflicts should not be a factor in subsequent determinations in new situations. Ten years is certainly long enough to allow for the changes in political winds. Proposed regulations for the emergency mobilization include some persons up to age thirty-five, and proposals for a medical draft include persons up to forty-five. There is a possibility that a future draft might include some older persons

under a return to the "oldest first" rule, and persons convicted under the aiding and abetting section of the MSSA could be of any age.

5. The starting point for the decay period should be the conviction date.

Under the previous parole rules, and depending on whether or not the offender had been convicted under the Youth Corrections Act, there was wide variation in release dates (parole eligibility). With sentencing guidelines that would give more equitable sentencing, the base point should be the conviction date. Were it possible to take into account the time of indictment, it is not likely that a fairer determination could be made on that basis since in addition to varying backlogs in differing jurisdictions, the defendant has it in his power to introduce delays in going to trial, thus producing an inequity to his advantage.

I wish to acknowledge the considerable assistance in preparing this testimony which was provided by attorneys Stephen M. Kohn, Eileen McCarthy, and J. E. McNeil.

RECEIVED MAY 14 1986

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May 9, 1986

Honorable William W. Wilkins, Jr.
Chairman, U. S. Sentencing Commission
Washington, D. C. 20530

Dear Judge Wilkins:

This is in reply to your letter dated April 25, 1986, requesting our input on the impact a defendant's prior criminal record should have on sentencing.

The first question: "How should the Sentencing Commission define felony and misdemeanor offenses in view of the definitional disparity among states and between states and the federal system?"

As I indicated in my first letter to the U. S. Sentencing Commission, I believe the seriousness of a crime should be determined by the impact the offense has on the community. Therefore, a prior offense should be categorized for federal sentencing purposes as the specific local or state government has designated the offense.

The second question: "How should prior felony convictions be weighed?"

Prior criminal convictions should be taken into consideration in determining the sentence. The prior offenses should be viewed with careful consideration to two areas. The first is the offense for which the defendant was convicted, not arrested. The second is the penalty the defendant received. A review of the defendant's prior convictions could establish, for example, if defendant is a career criminal, dangerous, or troubled. The penalty, on the other hand, usually reveals the actual seriousness determined by the Sentencing Court. Thus, a conviction for burglary which did not receive incarceration would receive less weight than one which received a prison sentence.

The third question: "What decay factor, if any, should the Commission build into the guidelines when considering a defendant's prior criminal history?"

The only way a prior criminal conviction should not be considered in sentencing is if the defendant has had no convictions the ten years prior to his arrest for the instant offense. If there is no such gap in his criminal activity, all prior convictions should be considered in his sentencing. The starting point in a decay period should be the conviction date if defendant is not incarcerated or the prison release date if he is imprisoned.

The fourth question: "Should prior juvenile offenses be considered in establishing sentences for adult offenders?"

Juvenile convictions for offenses that would be considered criminal if committed by an adult should be considered in sentencing. They should be given the same weight as adult convictions, using the considerations outlined in the answers to the previous questions.

The fifth question: "How should the Commission handle military convictions. What about foreign convictions or travel convictions?"

The following criteria should be used in determining if these convictions should be considered: 1) Would the offense be considered criminal if committed outside a military or tribal area, or in the United States. 2) Did the defendant receive due process, that is, was the defendant allowed counsel. The answer should be yes to both of these questions before considering these convictions.

The sixth questions: "Should the Commission consider previous arrests or only convictions when determining a defendant's prior criminal record?"

Definitely only convictions should be considered for the purposes of sentencing. Arrests alone are opened to too much conjecture and speculation for the purposes of objective sentencing.

The seventh question: "Should the fact that a defendant was on probation or parole at the time of the offense of conviction be considered, and if so, how should it be weighed?"

It is obvious that if a defendant is on parole or probation when he commits the instant offense, he has taken the criminal justice system very lightly. However, there are two major considerations to take into account in determining the seriousness of that offense for which they are on probation or parole: 1) Whether the offense was a misdemeanor or a felony; and 2) If a conviction was for the same type of offense. If the offense is for a felony and for the same type of offense as the

defendant is being sentenced for, this should be weighed quite highly. If it is for a misdemeanor that is of a completely different nature than the instant offense, it should be given much less weight than the previous situation.

The eighth question: "What level of sentence aggravation should be given for what level of prior record?"

This should be the second most important factor used in determining a sentence; the first being the instant offense. However, the factors that should be taken into consideration are all of those discussed in the previous seven questions.

I hope that my response to your questions are helpful. If you need any further information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Anthony P. Baca". The signature is stylized with a large initial "A" and a long, sweeping underline.

ANTHONY P. BACA
U. S. Probation Officer

mlm

RECEIVED MAY 14 1986

WILLIAM D. GRAVES
CHIEF PROBATION OFFICER

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May 9, 1986

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The Honorable William W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
Washington, D. C. 20530

Dear Judge Wilkins:

It has been most gratifying to be included among those individuals who have been asked to contribute to the Commission's work in establishing sentencing guidelines. I do appreciate the Commission's invitation to testify on May 22, 1986; however, previous commitments here will make that impossible. Please consider the comments in this letter as my views on the complicated, and often controversial, issues presented in your recent letter.

I feel I should preface my remarks on the specific issues asked in your April 25th letter with an assumption that the Sentencing Commission will follow existing case law. For example, existing case law [Zannino v. Arnold, 531 F. 2d 687 (3d Circuit 1976) and Billiteri v. United States Board of Parole, 541 F. 2d 938 (2d Circuit 1976)] allows for consideration of aggravating offense circumstances in applying guidelines which are now in effect through the U. S. Parole Commission. I also presume that the Court could continue to consider a wide range of offender characteristics, including aggravating or mitigating circumstances, just by my reading of the Comprehensive Crime Control Act at 18 USC 3553(a and b). Philosophically, I favor allowing the Court as much latitude as possible in applying and going outside the guidelines because my experience is that there are aggravating and mitigating circumstances in virtually all cases. Those individual circumstances would make it extremely difficult to develop guidelines that could be applied uniformly to all cases. I continue to believe that the Court must rely most heavily on the current offense, but will continue to consider total offense behavior, and the verified record of prior criminal convictions in arriving at a fair sentencing. I also believe that the Court will continue to want to consider the defendant's lack of truthfulness during trial or with the Probation Department and his lack of remorse for the crime (U.S. v. Bangert, 645 F. 2d 1297 (8th Circuit 1981)).

I will attempt to answer the Commission's specific questions on the criminal record in the same order asked in the Commission's letter of April 25, 1986:

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DEFINING FELONY AND MISDEMEANOR OFFENSES:

There is a problem in defining felony and misdemeanor offenses across the country, Colorado included. Colorado does have a Class One misdemeanor that carries a maximum sentence of two years confinement, a sentence that could only be imposed in felony cases in the Federal Courts. I would recommend that the definition for felony follow the Federal law based on the maximum sentence possible for a particular offense, so that the Colorado First Class misdemeanor would be considered a felony for the Commission's purposes.

WEIGHTING OF PREVIOUS OFFENSES:

I would recommend that the Commission weigh felony convictions more heavily than lesser offenses but would, by definition, consider a case a felony if the original offense charged had a penalty of more than one year's confinement. It is my view that it is important to consider the full scope of any prior offense behavior of defendants both because it provides a more realistic means of evaluating past conduct and because plea bargaining is so common. The majority of offenders (68.8% for the 12 month period ending June 30, 1983 in Federal Courts) enter pleas, generally to only one charge or less serious charge. The individual's conduct in the past is the most important predictor of what he is apt to do in the future. Unfortunately, it is a complex problem because prosecutors historically tend to overcharge in anticipation of plea bargaining with defense attorneys. It is often difficult to establish how serious any particular offense is without reviewing a recitation of the behavior.

DECAY FACTOR:

I feel it important to favorably recognize a crime-free life-style and so would agree that a "decay factor" be incorporated into the Commission's guidelines. I do believe that all of the defendant's prior conviction record should be included in the presentence report, but would suggest weighting more recent offenses heavier in determining the guideline for sentencing. The Parole Commission has used the ten year date as a cutoff for inclusion of prior record in its deliberations, however, I am not sure that there is anything magical about that criteria. On the whole, I would recommend that the ten year time frame continue to be used, but simply because it is going to be easier for probation officers to interpret and apply the guideline uniformly because of the carryover from the Parole Commission's guidelines. It would be interesting to learn if there are statistical studies available that would suggest some other time frame, for example, five or seven years free of law abiding behavior as significant. If the Sentencing Commission were to adopt the ten year time frame, then, again, for ease of computation and uniformity of application, I suggest that that ten year period be a period free of commitments while the individual offender is in the community.

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In that I would include any time spent on probation or parole but certainly not any time the offender was confined. I would recommend that that ten year period run from the date of sentencing (and therefore final entry of guilt) to time of current offense behavior. If there are no incidents in that period of time, then the prior conviction wouldn't work to the offender's disadvantage.

CONSIDERING PRIOR JUVENILE OFFENSES:

I feel, based on my personal experiences as an administrator of a juvenile facility, that too large a number of those confined there continued in crime after their release. It is important for the Court to be aware of those juvenile adjudications; however, I would not want to see entries in the presentence report for "status offenses", such as running away, being in need of supervision, etc. I believe that the Commission should weight serious offenses (burglary, personal injury assaults, etc.) as heavily as it would serious adult offenses in arriving at sentencing guidelines. I would favor an accelerated "decay factor" for minor juvenile offenses, (for example, minor thefts, joyriding, etc.) and would suggest a reduced time frame, say five years. Again, a review of available statistical studies on that might be revealing.

MILITARY/TRIBAL CONVICTIONS:

We would encourage the Commission to consider military convictions, foreign convictions and tribal convictions the same way as it would convictions in Courts of record in this country. We suggest that with one caveat, that is that those be constitutionally valid convictions for offenses that would be violations of law if committed outside the reservation. For example, we believe the Court would want to consider a rape that occurred on a military reservation, where there was counsel at the Court-martial proceeding, the same as it would a rape committed in the community. We would not, however, think the Court would want to consider a missing formation violation heard by a unit commander.

CONSIDERING PRIOR ARRESTS:

I would encourage the Commission to consider only that prior record where there was a finding of guilt in determining prior record. Previous arrests where cases were dismissed, where there was no adjudication of guilt, or where there was an acquittal don't seem proper to reply on in arriving at a sentence for a new offense. In adjudications, we would include any case where a defendant entered a plea of guilty, for example, under a pretrial diversion type agreement. That individual, once the supervision time is served, can have the plea withdrawn and the case dismissed, however, the fact that a plea was once entered is indicative of guilt in a prior criminal matter and should be considered.

The Honorable William W. Wilkins, Jr.
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NEW CRIME WHILE ON PROBATION:

I think it extremely important to weigh more heavily the fact that an individual is on supervision (probation, parole or pretrial diversion) at the time he commits another offense than if the offense were committed while he wasn't under supervision of the Court or parole authorities. The fact that another offense is committed while one is serving out a sanction for a previous offense is indicative that the offender hasn't taken seriously the opportunity given him to avoid incarceration. [U.S. v. Nagleburg, 413 F. 2d 708 (2d Circuit 1969) cert denied.]

SENTENCE AGGRAVATION:

I believe that a sentence should be proportionately aggravated if it comes after a string (2 - 3 convictions) of similar offenses (whether white collar or violent offenses) but firmly believe that the most serious sentences should be meted out to those who repetitively perpetrate crimes against another individual's person, the security of the nation or where a potential for great harm exists to the general public (for example, distribution of drugs, explosives, etc.).

Again, I do appreciate the opportunity to provide input to the Commission and hope that we will have the same opportunity as the Commission considers corporate sanctions, plea negotiations, and other important topics.

Sincerely,

A handwritten signature in black ink, appearing to read "William D. Graves". The signature is fluid and cursive, with a large, stylized "W" and "G".

William D. Graves
Chief U. S. Probation Officer

WDG:RWJ:bg



National Governors' Association

RECEIVED MAY 14 1986

May 13, 1986

Lamar Alexander
Governor of Tennessee
Chairman

Raymond C. Scheppach
Executive Director

The Honorable William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004

Dear Mr. Wilkins:

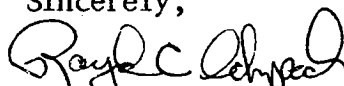
I appreciate your giving the National Governors' Association an opportunity to express its views on sentencing. Your letter asks specific questions about the sentencing process which our Association has not addressed. However, I have asked the National Criminal Justice Association, which is part of our staff arm on criminal justice issues, and the Association of State Correctional Administrators, to look into your questions and develop a response.

In the process of developing guidelines, I suggest that the Commission look more for guiding principles rather than specific criminal sanctions, especially in giving guidance to states. Several states, for example, have guideline commissions which have developed various approaches to sentencing guidelines. The Delaware Sentencing Reform Commission established a range of sanctions available to judges. These sanctions are referred to as "levels of accountability." The Minnesota Guidelines Commission was more prescriptive in emphasizing what crimes should be punished and how. They emphasized "just deserts" as a policy for prison sentences, with more imprisonment for violent offenders, and other punishments for certain property offenders. Other states, Pennsylvania, Washington, Connecticut, New York, Maine, and South Carolina have established sentencing guideline commissions.

The Commission may wish to review the work of the different state commissions on sentencing guidelines to understand the problems and differences that exist. States, as one former Justice of the Supreme Court stated, are laboratories for our federal system. This does not mean that overarching principles cannot be developed, for the federal government is in a unique position to review all of the states systems and develop these guiding principles which are reflected in the different policies.

Once again, I appreciate this opportunity to comment on the work of the Commission, and I will be getting further comments to you as they are developed.

Sincerely,


Raymond C. Scheppach

cc: Gwen A. Holden, Executive Vice President
National Criminal Justice Association

George Camp, Executive Director
Association of State Correctional
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May 12, 1986

Honorable William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
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Dear Judge Wilkins:

In response to your request for comments concerning the broad category of offender characteristics and specifically prior record and the issues outlined, the following is provided.

* The present criteria for felony offense is the "in excess of one year" sentence potential. Although this is not a flawless standard, this information is generally available to a court at sentencing and is the dividing line in federal cases. To try and define felony and misdemeanor in terms of "nature of offense," "length of sentence" or "statutory maximum" would seemingly cause more problems than already exists for the present standard. With regards to "nature of offense," this is hard to define and the information is not always available to the court. Using "length of sentence imposed" perpetuates sentence disparity as the sentence imposed may be out of line with the normal sentence for the type of offense. "Statutory maximums" greatly vary from one jurisdiction to another and their use would certainly not decrease confusion or question. For this reason it is felt that the present criteria of "in excess of one year" sentence potential is quite adequate for defining felony and misdemeanor offenses.

* The weight of prior felony convictions could be easily assessed using the same scale (yet to be) developed for federal offenses. In the same way that the sentencing offense is rated, so could the individual prior convictions be rated and their cumulative rating be assigned a value. Specifically, the more serious the conviction, the more impact it should have on sentencing on any new charges.

Honorable William W. Wilkins, Jr.
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As discussed in earlier submissions, my basic suggestion for the ranking of offense seriousness would involve a ranking of offense behavior based on the real impact the crime has on people/the community. Offenses that have a real and/or significant impact should be considered the more serious. If these are part of a defendant's prior record, then they should impact more significantly on the sentencing than would a less serious (those with little demonstrated impact on person or community).

* I see little or no benefit to incorporating a decay factor into any guideline sentencing plan. Prior criminal conduct, whether it took place yesterday or 20 years ago, has value in reaching a sentencing decision. To establish a cutoff point in consideration of prior record is unnecessarily arbitrary. There is really no reason not to consider total prior criminal history. If accepting a decay factor it would seem more reasonable to put it on a gradient so that the "ancient" record is still considered but maybe not as weighty as more recent criminal activity.

* The existence of adjudicated juvenile record (for non-status offenses) is worthy of consideration. However, it is by longstanding philosophy not equal to the criminal conduct of an adult and therefore should not be counted the same as adult prior record. As to decay or ancient record, if a record exists, it should be considered.

* Military, foreign and tribal convictions should be considered and weighed equally with "regular" prior record if the conduct is such as would be considered criminal in civilian jurisdiction. The problem would certainly arise as to the defining of felony/misdemeanor in some cases primarily because circumstances of the offense might not be available and/or penalty structure could be completely incongruent with other state and federal penalties.

* A complete arrest history should be made available to the court in sentencing deliberations. However, for determining possible aggravation of sentence based on prior record, only convictions should be considered.

* In the case of a defendant being on probation or parole at the time of new criminal conduct, whether the new conduct is the present sentencing matter or a prior sentencing, this fact should have added impact in sentencing consideration. Possibly it could be weighted as some other aggravating offense circumstances.

Honorable William W. Wilkins, Jr.
May 9, 1986
Page 3

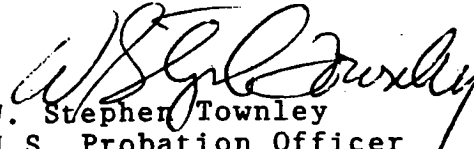
* As a factor in sentence aggravation, prior record is likely the most significant of the offender characteristics. Of the several offender characteristics, it is the best predictor of future conduct. Therefore, as the prior record is comprised of increasing entries and serious circumstances, it should enhance sentence or at least enhance the exposure to sentence.

With regards to the remainder of the category of offender characteristics, they will be much more difficult if not impossible to weigh or rate in a system of guidelines. This is not to say that they are not important in a sentencing decision. However, they are generally sufficiently subjective in nature that it would be difficult to fit them into a hard and fast model. The eleven characteristics as stated in the statute broadly define the traditional areas of interest for present Probation Officers and Judges. Certainly, any fair and equitable guideline sentencing system will provide for the exercise of judicial interpretation and evaluation. These factors would certainly lend themselves to this type of judicial action.

As with previous responses, this is necessarily limited due to time constraints and the desire to be as brief as possible.

Sincerely,

Kenneth B. Anderson, Chief
U.S. Probation Officer


W. Stephen Townley
U.S. Probation Officer

WST:nlm



RECEIVED MAY 14 1986

State of South Carolina

Office of the Governor

RICHARD W. RILEY
GOVERNOR

May 12, 1986

OFFICE OF EXECUTIVE
POLICY AND PROGRAMS

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., NW
Suite 1400
Washington, DC 20004

Dear Judge Wilkins:

Thank you again for the opportunity to provide input to the U. S. Sentencing Commission in your deliberations on the development of sentencing guidelines.

I am attaching a response to the questions asked in your April 25th letter. I hope this information will prove helpful and should you desire further assistance from our office, please contact me.

Sincerely,

Ritchie P. Tidwell
Director

RPT:bj

Attachment

Obviously, all the questions asked are closely interrelated as they relate directly to (1) the overall extent to which criminal history and seriousness of offense should be considered for sentencing purposes, and (2) the extent to which certain types of information regarding prior convictions should be considered. For this reason my response will be twofold.

I. Sentencing Based on Current Offense and Prior Criminal History

Research has shown that most sentencing judges rely heavily on a defendant's current offense and his/her prior criminal history when determining the length and type of sentence a defendant will receive. The most recent survey of judges within the state of South Carolina further exemplifies this reasoning as its results clearly demonstrated the strong relationship of prior criminal history and seriousness of offense(s) to sentencing decisions (see attachments #1 and #2).

Obviously, the seriousness of an offender's crime and his/her past criminal history are going to play a predominant role in sentencing practices, as this information is most readily available to judges. Further, because most judges tend to feel that past criminal history is a viable indicator of an offender's predisposition to criminal behavior, the use of such information will in all probability continue to weigh heavily in the considerations made by sentencing judges. This is also evident when one reviews the results of recent attempts to develop uniform sentencing guidelines in selected states. In South Carolina, for example, the report of the Sentencing Guidelines Commission was not accepted, primarily as a result of strong opposition from judges who felt that attempts to assist them in making fair sentencing decisions interfered with the broad discretionary powers allowed them. Thus, it becomes apparent that criminal history information and seriousness of a defendant's offense should play a role in sentencing--not only for the reason that sentencing judges appear to think so but, because the use of such information does, in fact, make sense.

The seriousness of an individual's offense should play a significant role in sentencing in order to ensure protection of the general public and to "balance the scales of justice". Additionally, a defendant's prior criminal history is, as noted, one of the only indicators available which can be used to judge whether an individual may be a habitual offender, career criminal, amenable to rehabilitative efforts, etc. In fact, the S.C. Department of Corrections uses past criminal history data to determine how an offender should be classified in the system and what programs the offender should participate in. Further, criminal history data gives judges the ability to gain insight into the "personal make-up" of the defendant. For example, offenders with extensive criminal histories containing numerous violent crimes, can basically be presumed to be "violent" individuals; therefore, their sentences should reflect the overall protection of the public from further violent behavior. Additionally, criminal histories can make sentencing judges aware of the "risk" an offender is to society. First offenders (non-serious crimes) could be considered "low-risk" offenders and their sentences should reflect such, i.e., probation, fine, etc. In legislation now pending with the S.C. General Assembly, violent crime will be defined as murder,

criminal sexual conduct in the first and second degree, assault and battery with intent to kill, kidnapping, voluntary manslaughter, armed robbery, arson in the first degree, and burglary if committed with a weapon, if committed at night, or if physical injury is involved. This definition will guide correctional administrators in excluding such offenders from a variety of community and early release programs.

Thus, it becomes apparent that criminal histories and current offense play an important role in the disposition of "just" sentences. In other words, to make the assumption that past criminal histories should not be used to determine the type of sentence an offender should receive, could be equated to a doctor who makes a diagnosis of an individual based on how he looks when he walks into his office. In either case, the offender/client would not be treated fairly, properly or effectively.

II. Criminal History Information

Questions 2-8 appear to imply that the more information a sentencing judge has with regard to an individual's past criminal history, the more effective his/her sentencing decisions will be. The extent to which certain types of information contained in criminal history reports will, therefore, be addressed below:

- A. Prior Felony Convictions: In order to ascertain the weight which should be given prior felony convictions, one needs to consider what "felony" actually means and how it should be defined. If "felony" could be defined by the "nature of the offense," i.e., its seriousness, then prior felony convictions should play an important role in sentencing. However, all too often most states have unclear definitions as to what is considered a "felony." This, naturally, only leads judges to make their own individual interpretations as to what is considered a "serious" offense, and what prior offenses should be used for determining an offenders "risk" to the community.

If an effective and uniform classification system for grouping serious offenses into a specific felony category characterized by a separate set of sentence lengths from that of misdemeanors could be developed, then the effect of using prior felony convictions for sentencing purposes would be most effective. In this way, criminal histories which reflect prior felony convictions could be used by judges because the word "felony" could automatically be equated with the word "serious". An even better system would be one which grouped such felonies as to their level of seriousness, i.e., felony A,B,C...or 1,2,3.... Until such criminal classification "grids" are developed and implemented, the use of prior felony convictions for sentencing purposes should be viewed with much skepticism and used cautiously.

- B. "Decay Factor": Again, caution needs to be given to the use of the "decay factor" for sentencing purposes. In order for the use of the "decay factor" to be effective, criminal histories must also contain information regarding any arrests (not just convictions) which may have occurred prior to the completion of an offender's last sentence.

If no information is provided regarding arrests, and only information regarding convictions is included, then the "decay factor" is biased in favor of the defendant.

As to how long a period should be considered an effective period of time for purposes of defining "decay", and for purposes of determining when the decay factor should begin, is difficult to say. Current and available studies appear to suggest that the first six months to one year following completion of an offender's last sentence are the most important, inasmuch as this period of time is when it is most likely for an offender to commit another offense. However, because most studies have looked at all offenders, regardless of the crime they have committed, and because most studies have used averaging to determine the "6 months to one year" time lapse, the evidence is not conclusive enough to suggest that such a time lapse should be used for all types of offenders. Possibly, if more in-depth study were given to the average amount of time which usually lapses before "re-offense" for each type of criminal offender, than the "decay factor" would be a more viable tool for making sentencing decisions.

- C. Prior Juvenile Convictions: Because individual state laws usually require juvenile records to be sealed once an individual comes of a certain age, the use of such information, in some states, may be non-existent. Thus, for purposes of developing uniform sentencing guidelines, juvenile record data may not be feasible. However, because juvenile records have been shown to be strong predictors of future adult criminal behavior, the use of some records may prove beneficial for sentencing purposes. Particularly if the juvenile records contains many counts of prior violent, habitual or "sexually deviant" behavior. Thus, in certain cases, the use of juvenile records may assist sentencing judges in making effective sentencing decisions. However, an effective definition of "violent", "habitual" and "sexually deviant" criminal behavior (to name a few) should be made before consideration is given to the use of prior juvenile offense(s) so as to not make room for sentencing disparity.
- D. Prior Military Convictions: (Same As Above)
- E. Parole/Probation Considerations: Offenses committed while an individual was on probation or parole should weigh heavily in the sentencing decisions made by judges. Usually, probation and parole is provided to low-risk individuals who are considered able to "function" in society. The fact that an offense is committed by this type of individual while on probation/parole should indicate that a mistake has been made with regard to the offender's "risk-level" and that a possible stricter penalty may be warranted. In terms of parole violations, attention must also be given to the possibility that the offender was not ready to be reintroduced to society. In either case, probation or parole, offenses committed by such individuals should weigh heavily in the decision to sentence the offender. Obviously, sentencing the offenders to another term of probation, or allowing the offender to remain on parole, would only be redundant.

F. Prior Offenses Containing Aggravating Circumstances: Because aggravating circumstances increase the level of seriousness of a crime, it only seems natural that the penalties for crimes containing aggravating circumstance be increased to reflect such seriousness. However, limits as to the maximum penalties which can be imposed as a result of aggravating circumstance should also be constructed in order to reduce the possibility of sentencing disparity.

In sum, the seriousness of a defendant's offense and his criminal history should play an important role in sentencing. Obviously, the more informed a sentencing judge is with regard to a defendant which stands before him, the more able he will be to make an effective assessment of the individual and, in turn, to make an effective sentencing decision. However it should be stressed that until advances are made which enable information to be used by sentencing judges in a uniform manner, i.e., the uniform classification of offenses into felony and misdemeanor categories, more effective decay factor statistics, etc., current use of extensive criminal history information should be viewed with caution. Additional consideration needs to be given to the use of prior violent, sexually deviant, habitual, juvenile or military convictions, not to overstep state and federal statutes which may prohibit their use.

In order for effective sentencing decisions to be made, attention also needs to be paid to the role of other key officials taking part in the sentencing process, i.e., prosecutors, defense attorneys, parole boards officials, etc. Obviously, the first step in reforming such a complex process is to establish policy which defines common objectives toward which all participants in the process may work. In this way then, the sentencing process may be able to be changed to an effective sentencing system, this being the goal toward which we must strive to achieve. A continuum of alternative sanctions similar to one under development in Delaware should be explored.

TABLE 10
AVERAGE SIGNIFICANCE RATINGS FOR 28 FACTORS

FACTOR	AVERAGE SIGNIFICANCE RATING FOR	
	A. DETERMINING WHETHER OR NOT TO SEND OFFENDER TO PRISON	B. DETERMINING LENGTH OF PRISON TERM
Offender's age	3.19 (10)	3.43 (10)
Offender's sex	1.34 (23)	2.30 (20.5)
Whether or not offender is from community in which offense was committed	1.49 (23)	1.51 (27.5)
Length of residence in the community	1.68 (23)	1.61 (25)
Offender's education level	2.37 (16)	2.35 (18)
Offender's marital status	1.78 (25)	2.08 (23)
Offender's current employment	2.46 (19)	2.32 (19)
Offender's employment history	2.76 (14)	2.63 (14)
Offender's income	1.31 (24)	1.51 (27.5)
Number of persons supported by the offender	2.32 (20)	2.38 (17)
Presence or absence of psychological problems	2.78 (13)	2.78 (13)
Number of previous convictions	3.39 (2)	3.36 (2)
Seriousness of previous convictions	3.95 (1)	3.95 (1)
Length of time since last conviction	3.46 (9)	3.57 (7)
Whether or not offender had previously served time in prison	3.62 (7.5)	3.70 (4)
Length of time previously served in prison	3.16 (11)	3.32 (11)
Whether or not offender is currently on probation or parole	3.68 (5)	3.58 (5.5)
Use of weapon in commission of crime	3.84 (3)	3.83 (3)
Threat of personal injury in commission of crime	3.73 (4)	3.68 (5.5)
Extent of actual personal injury in commission of crime	3.62 (7.5)	3.54 (8.5)
Total value of property stolen/ damaged	2.51 (19)	2.43 (16)
Number of totally separate criminal events with which the offender was charged	2.59 (15)	2.30 (20.5)
Number of totally separate criminal events of which the offender was convicted	3.65 (6)	3.54 (8.5)
Involvement of drugs or alcohol in the commission of crime	2.54 (17)	2.53 (15)
Solicitor's recommendation	2.16 (22)	2.19 (22)
Defense counsel's recommendation	2.62 (18)	2.37 (18)
Prosecution officer's recommendation	2.35 (20)	2.38 (18)
Offender's attitude	2.95 (12)	3.05 (12)

- Significance ratings are based on a 5-point scale in which 0 = not at all significant and 4 = extremely significant.

- Numbers in parentheses indicate the rank of the significance of each factor among the 28 factors.

TABLE 11

LIST OF FACTORS IN ORDER OF AVERAGE SIGNIFICANCE RATING FOR
DETERMINING WHETHER OR NOT TO SEND OFFENDER TO PRISON

FACTOR	RANK
Seriousness of previous convictions	1
Number of previous convictions	2
Use of weapon in commission of crime	3
Threat of personal injury in commission of crime	4
Whether or not offender is currently on probation or parole	5
Number of totally separate criminal events of which the offender was convicted	6
Whether or not offender had previously served time in prison	7.5
Extent of actual personal injury in commission of crime	7.5
Length of time since last conviction	9
Offender's age	10
Length of time previously served in prison	11
Offender's attitude	12
Presence or absence of psychological problems	13
Offender's employment history	14
Number of totally separate criminal events with which the offender was charged	15
Offender's education level	16
Involvement of drugs or alcohol in the commission of crime	17
Total value of property stolen/damaged	18
Offender's current employment	19
Number of persons supported by the offender	20
Solicitor's recommendation	21
Probation officer's recommendation	22
Offender's sex	23
Offender's income	24
Offender's marital status	25
Length of residence in the community	26
Defense counsel's recommendation	27
Whether or not offender is from community in which offense was committed	28

TABLE 12

LIST OF FACTORS IN ORDER OF AVERAGE SIGNIFICANCE RATING FOR
DETERMINING LENGTH OF PRISON TERM

FACTOR	RANK
Seriousness of previous convictions	1
Number of previous convictions	2
Use of weapon in commission of crime	3
Whether or not offender had previously served time in prison	4
Whether or not offender is currently on probation or parole	5.5
Threat of personal injury in commission of crime	5.5
Length of time since last conviction	7
Extent of actual personal injury in commission of crime	8.5
Number of totally separate criminal events of which the offender was convicted	9.5
Offender's age	10
Length of time previously served in prison	11
Offender's attitude	12
Presence or absence of psychological problems	13
Offender's employment history	14
Involvement of drugs or alcohol in the commission of crime	15
Total value of property stolen/damaged	16
Number of persons supported by the offender	17
Offender's education level	18
Offender's current employment	19
Offender's sex	20.5
Number of totally separate criminal events with which the offender was charged	20.5
Solicitor's recommendation	22
Offender's marital status	23
Probation officer's recommendation	24
Length of residence in the community	25
Defense counsel's recommendation	26
Whether or not offender is from community in which offense was committed	27.5
Offender's income	27.5

RECEIVED MAY 1 1986

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
PROBATION OFFICE

DANIEL D. RECTOR
CHIEF PROBATION OFFICER
2003 U. S. COURTHOUSE
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ATLANTA 30303

Atlanta, Georgia
May 12, 1986

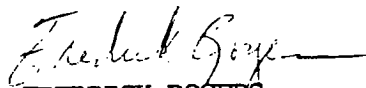
ROME 30161
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126 U. S. COURTHOUSE

Mr. William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
Washington, D. C. 20530

Dear Mr. Wilkins:

Enclosed are views regarding the impact a defendant's prior criminal record should have on sentencing. Hopefully, these responses will be of benefit to the Guidelines Process.

Sincerely,



FREDRICK ROGERS

Supervising U. S. Probation Officer

FR:ph

Enclosure.....

*** How should the Commission handle military convictions? What about foreign convictions or trials?**

I recall receiving a military parolee under supervision who had been convicted of Attempted Murder. The circumstances entailed him kicking his drill sargent about the body while wearing his combat boots. In my opinion, the charge was exaggerated or did not fit the behavior. For this reason, the commission should handle military, foreign and tribal convictions based on the nature of the offense behavior.

*** Should the Commission consider previous arrests or only convictions when determining a defendant's prior criminal record?**

When considering a defendant's prior criminal record, convictions only should be considered.

*** Should the fact that a defendant was on probation or parole at the time of the offense of conviction be considered, and if so, how should it be weighted?**

Yes, it should be weighed heavy when considering a sentence of probation or incarceration.

*** What level of sentence aggravation should be given for what level of prior record?**

The level of sentence aggravation should be contingent on the seriousness of the defendant's prior criminal convictions. Those defendant's with prior convictions involving violent act against persons, convictions involving organized crime, or those convictions committed by defendants that present the greatest threat, to the general public should have a high level of sentence aggravation. Those convictions presenting less threat to the public and the offense behavior is more or less spontaneous or unsophiscated should have low level sentence aggravation.

*** How should the Sentencing Commission define felony and misdemeanor offenses in view of the definitional disparity among states, and between states and the federal system? For guideline purposes, should the determining factor be the nature of the offense, the length of the sentence imposed, the statutory maximum of the offense or some other variable?**

1. There appears to be no need to re-define felony and misdemeanor offenses in view of the definitional disparity. The existing definition in Section 1 of Title 18 seems appropriate.
2. For guideline purposes, the determining factor should be the nature of the offense.

*** How should prior felony convictions be weighted? Should serious previous offenses count against the offender more in establishing the current sanction than relatively less serious prior offenses? How should seriousness of prior offenses be delineated?**

1. Felony convictions should be weighed based on the nature of the offense.
2. Yes, serious previous offenses should count against the offender more in establishing the current sanction than relatively less serious prior offenses.
3. Seriousness of prior offenses should be delineated by the offense nature and this should include the extent of harm incurred, etc.

*** What decay factor, if any, should the Commission build into the guidelines when considering a defendant's prior criminal history? For example, should a prior felony conviction factor into a defendant's possible sentence if his previous conviction occurred 10 years earlier? Should the starting point in a decay period be the conviction date, prison release date or supervision release date?**

1. It appears that a "decay factor" would be obligatory and binding to a sentencing judge when the defendant's past criminal conduct is at issue or when it is necessary to show a pattern or similarity in criminal behavior.
2. Yes, especially when the behavior or offense nature is similar and serious. For example, subject robbed a bank 11 years ago and another bank today. How could one overlook this type of conviction?
3. If decay factor is to be considered, supervision release date seems appropriate as a starting point. Some individuals do well under supervision, the test of his ability to remain law abiding comes after supervision ends.

*** Should prior juvenile offenses be considered in establishing sentences for adult offenders? Should they be given the same weight as adult convictions? If so, what decay factor, if any, should be built in?**

1. Yes, juvenile offenses should be considered in establishing sentences for adult offenders. When the nature of the offense is such that the offense would result in prosecutory action as an adult.
2. No, they should not be given the same weight as adult convictions.

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
PROBATION OFFICE

May 2, 1986

ELIZABETH L. TAYLOR
CHIEF PROBATION OFFICER

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Honorable William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

This is in response to your letter of April 25, 1986. Once again, I appreciate the opportunity to respond to a Sentencing Commission study.

With regard to how an offender's prior criminal record should affect his sentence, I tend to agree with and favor the current Salient Factor method used by the U.S. Parole Commission. That method treats prior felonies and misdemeanors generally the same. I think if you attempt to differentiate, you initiate an endless series of problems, not the least of which is the subject's past plea bargaining history.

In thinking about what you call the "decay factor", I believe that an ancient prior record, that is, one with a 15-year incident-free period (not 10 as used by the Parole Commission) can be disregarded in terms of its effect on sentencing. I would define this incident-free period as one in which the offender has been arrest-free, crime-free, free of probation or parole supervision and free of residential substance abuse or residential mental health treatment.

I do not believe, when considering the interval between arrests, that an offender should be given credit for time in prison, under supervision, or in residential treatment. The fact that a person has not been arrested during those periods is not a predictor of his ability to remain crime-free.

Honorable William W. Wilkins, Jr.
Chairman
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May 2, 1986

I believe that at least one type of offender, an individual identified as an organized crime member, should not be given positive credit for having an ancient prior record. Such an individual may show no arrests, let alone convictions, since his early youth, particularly if he is in the hierarchy. Yet, this is not an indicator that he has been crime-free or has the ability to live crime-free. It simply means that he has insulated himself from the street. On a daily basis, he may conspire to commit multiple felonies.

Organized crime cases seem to defy the entire salient factory theory. Perhaps because of this, those types of cases should be subjected to a completely different sort of measure.

As to whether a prior juvenile record should be given the same weight as an adult record, I believe that it should. With regard to military, foreign, and tribal convictions, they should be treated, I think, the same as regular adult and juvenile convictions so long as they relate to offenses that would be considered crimes in an open (non-tribal, non-military) community.

I believe crimes committed while under probation or parole supervision should be given more weight, or should be considered more serious. The logic behind this is that these crimes indicate either a greater lack of control or a defiance of the system.

Somehow, arrests, even though they lack convictions, should be counted as a negative indicator. While I am not able to offer a method for this, I think that these sorts of arrests under current law strongly suggest criminality on the part of the offender.

I am aware that the argument is that certain individuals living in certain communities are likely to be arrested without cause for crimes they never committed. I do not question that there are those who find themselves subject to this type of harassment. I believe, however, that these individuals are usually arrested for crimes that should not be weighed as prior record offenses to

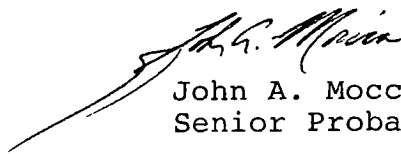
Honorable William W. Wilkins, Jr.
Chairman
Page 3
May 2, 1986

begin with (loitering, disorderly, etc.) I am not suggesting a presumption of guilt, only that a person with several arrests and no convictions is likely to be a different character than a person with no arrests at all.

Finally, as to what level of sentence aggravation should be attached to a prior criminal record, I believe the levels adopted by the Parole Commission are adequate. I am unable to make any suggestions towards change in this area.

Should you require further information, please do not hesitate to contact this office.

Sincerely,

A handwritten signature in dark ink, appearing to read "John A. Moccia", with a long, sweeping underline that extends to the left.

John A. Moccia
Senior Probation Officer

JAM/ah

Board of Directors
Don Taylor
Chairperson
Minnie Loera
Vice-Chairperson
Cindy Scaglione
Secretary



CHARLES & PAULINE SULLIVAN
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WASHINGTON, D.C. 20002
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May 11, 1986

William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Ave. NW
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins,

Enclosed is CURE's detailed thoughts on the topic of prior record and other offender characteristics.

As you can see, our thoughts are reflected in a letter to us from a prisoner. I am sending you the original letter. I think you will find some interesting insights and distinctions in this prisoner's letter.

Also, I think there are many other prisoners who have similar practical input.

Again, I appreciate your openness to our concerns, and I will attend the hearing on May 22.

Sincerely,
Charles Sullivan
Charles Sullivan

May 6, 1986

Mr. Charlie Sullivan
C.U.R.E.
#11 15th Street N. E. #6
Washington, D. C. 20002

Dear Charlie:

Today I received your letter copy from the U. S. Sentencing Commission. You need input immediately I see. The following are some ideas based upon the questions posed in the letter you sent me from the Commission.

1. In the context of considering a 'prior conviction record' in sentencing it would almost be necessary to define felony and misdemeanor convictions as they were defined in the state jurisdiction where the offense occurred, where state convictions are concerned. There is a very definite reason for this. If the Commission should establish new criteria which defines misdemeanor and felony convictions (or even references the particular offense to what would constitute a felony or misdemeanor under Title 18 of the U. S. Code) then there's the chance that an offense that was a 'misdemeanor' when committed (in the state jurisdiction for example) (and punished as a misdemeanor) could be elevated to a felony under new standardized criteria. If this should happen, and the sentencing judge then considers the offense a felony rather than a misdemeanor, then the defendant has been deprived of notice of what his wrongful conduct would constitute. He has a federal constitutional right to notice of the proscribed conduct. If that conduct is later elevated to a felony consideration then he has been deprived of that notice and is being in effect punished, in a sense, beyond what was prescribed by the jurisdiction where the offense occurred. This is one reason why it is so difficult to appropriately "consider" offenses committed in the state jurisdictions.

2. The weight of priors. If the commission does not have before it, or rather I should say if the sentencing judge does not have before him, the facts of the offense in question (that is being considered) then it is going to be very difficult to give proper weight to any felony or misdemeanor conviction due to jury sentencing in the state and the wide disparity of sentences meted out by juries which are not always commensurate with the seriousness of the offense, regardless of the nature of the offense. In the absence of the facts of each conviction (evidence sufficiency, plea bargain, etc.) then I would generally submit that the commission of another, like offense (current offense) should be accorded more weight than the commission of prior, unrelated offenses. It is simply not possible to delineate the seriousness of a prior offense by the title or nature of the offense itself. The caprice of jury sentencing makes very difficult any consistent relevance between the nature of the offense and the number of years imposed, as to actual seriousness or lack thereof. I would assign two different 'weights', and two only, to prior

convictions, i.e., those of a prior, like offense and those of an unlike offense. I would not assign a great deal of weight, as to the current offense punishment, due to these prior offenses. The person has served his time as to priors normally and feels as though he is again being punished for those offenses, regardless of the theory behind using prior to increase punishment.

3. A prior felony conviction should not be considered at all. But if it must, then it should not be considered beyond a date of ten years after the date of the arrest or conviction of the defendant. I say after arrest, or conviction most likely, because of the disparity of sentencing in the state courts and particularly with juries. State courts are very, very inconsistent in their sentencing practices, and particular juries. Where two cases may be very similar, or two co-conspirators (both first offenders for example) are tried at different trials for the same offense and with equal culpability, the two resulting sentences are quite liable to be in substantial disparity. One person is quite apt to do more time in prison than the other; or than another similarly or even worse situated at time of trial. Therefore, the date of accrual of the limitations period should be no later than the date of conviction. That way, the disparities in prison time actually served will not be the significant factor in this regard.

4. If Juvenile convictions are to be considered they should be given little weight and certainly not the same weight as adult convictions. They should not be considered at all after a date of five years after the date of conviction.

5. The commission should not consider previous arrests without convictions. The Constitution does not guarantee that only the guilty will be arrested. Baker v. McCollam, 443 U. S. 137, 145 (1979)(U.S. Supreme Court). An accused is entitled under the Constitution to procedural safeguards, including proof beyond a reasonable doubt of each and every element of an offense for which he has been charged. By considering arrests without convictions a court engages in pure speculation in its worst form. Perhaps nothing embitters the accused more than to have the feeling that he is serving time based upon speculation about the merits of what he was arrested for or charged with and not prosecuted for. There are a ll too many arrests on suspicion, misidentifications, some police departments actually charging defendants with crimes in order to plea bargain with the defendant or clear the books as they say, etc. These things happen. There is a profound sense of being treated unfairly and bitterness when a convicted person has had his sentence increased based on such speculation, as to arrests and charges without convictions and necessary safeguards.

6. If the person was on probation at the time the new offense was committed it probably makes little sense to use the fact that he was on probation. This is because, practically speaking, his probation will be revoked anyway and he'll no doubt incur punishment for that offense, or additional punishment for it by reincarceration, if he was on parole. The only consideration I would give in this area would be if the new offense committed was the same sort of offense for which the person were on probation or parole and the weight of the evidence as to the new offense was substantial, as well as that of the prior offense.

Charlie Sullivan, p. 3.

7. If prior convictions are to be considered I would establish a 'grid system' for the aggravation of same. I would separate the priors to be considered into like and unlike offenses as to the present offense. I would perhaps add, to the present (new) sentence, 10 per cent to the new sentence for each 'like' prior up to about four priors, or a maximum of 40 per cent. For 'unlike priors' I would add five percent to the sentence for each such prior, up to a total of 20 per cent to the new sentence. Whatever is done it must be standardized and structured for the sentencing judge, if priors must be considered - and fair.

Hope some of these comments help, Charlie. Wish I had more time but know you are rushed in this.

As always,



Daniel Johnson, #274157
Ellis Unit
Huntsville, TX 77343

DJ

UNITED STATES DISTRICT COURT

RECEIVED MAY 13 1986

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PROBATION OFFICE

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CHIEF PROBATION OFFICER

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REPLY TO: Detroit

The United States Sentencing Commission
1331 Pennsylvania Avenue N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins

Attached is my response to the questions for consideration forwarded under date of April 25, 1986.

What offender characteristics should affect sentencing ... The ones we now use in establishing a salient factor are most relevant with the exception of one area. Namely, (f) which relates to drug use history. This question should be expanded to cover other non-opiate drugs such as cocaine and marijuana. However, if only one of the later two could be considered, then cocaine use definitely is the more serious. This drug plays a huge part in many defendant's effort to secure money through illegal means.

Prior Record

Definitional disparities now cause a problem in trying to score the salient factor. Many times the offense of arrest is plea bargained to something lesser. I believe the defendant should be held accountable for what really was the original charge and not what some lawyer manages to arrange either for the benefit of the defendant or because the practical matter of time precludes the issue of a trial to resolve guilt or innocence.

Using a statutory maximum for the guideline is not practical. The writer of the presentence report does not know or have experience (usually) with the laws as they relate to state courts and would find it very difficult to secure that type of information for offenses committed in some other state.

Page Two

Serious offenses should weigh more in that they are counted. Lesser offenses such as reckless driving or drunk driving, fleeing, should not be counted unless they was physical injury or harm to others.

On the matter of decay factor, we presently use the date of arrest as the gauge. It would carry more significance to use the date of prison release or supervision release because the person should be held more accountable for crime committed while on supervision or when released. Incarceration, though not now viewed as a remedy for crime, should at least remind the person of the fact that one's liberty can be restricted for violation of law.

Juvenile offenses when of significant nature, such as assault and battery, murder, violation of drug laws, (generally all crimes against people and drug offenses) should definitely have some being on the sentence imposed in the federal court. I personally believe that as long as the juvenile has an attorney they should be weighed equally with those committed by an adult. HOWEVER, With the exception of capital offenses or serious assaults, if the juvenile is under age 13, the offense should be carry less significance.

Regarding military convictions, if they are matters carrying the same significance as a similar crime committed by a non-military person, then they should be weighed equally. I feel the same about tribal convictions. On the matter of foreign convictions, so often my experience is that these are in countries of dictatorship or where people do not have fair and adequate representation. In those matters, I believe there should be no consideration of them in a negative manner.

I believe prior arrests are indications of either a person's propensity to be involved in illegal activities or they are harrassed because (1) they are so well known in the community they are blamed for everything or (2) for racial reasons.

Again thank you for asking for my opinions.

Sincerely,

Joan M. Medl,
U.S. Probation Officer

EASTERN DISTRICT OF VIRGINIA
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JCC/dj

RECEIVED MAY 13 1986

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May 10, 1986

William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Ave, N.W.; Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

In response to your letter of April 25, 1986, the following reflects the opinion of this writer, in consultation with my co-workers. The defendants prior record is the second most significant factor to be considered in establishing sentencing guidelines. The most significant factor is the severity of the offense, and the defendant's role therein. When analyzing the prior record of the offender, there are several areas of interest; the first is arrests and/or convictions for offenses similar to the instant offense (i.e. if the instant offense is a drug offense, how many prior drug arrests does the defendant have). A person with more than two similar prior arrest offenses should be sentenced to a significantly longer term of imprisonment than a defendant with no prior record.

The second area of concern in analysis of the prior record is the number of prior arrests and/ or convictions. I do not personally distinguish prior arrests from convictions, unless a defendant has been found not guilty after jury verdict. Having worked in two major metropolitan cities (New York and Miami) , I have seen a large number of cases dismissed not as a result of the innocence of the defendant, but more as a consequence of an overburdened Criminal Justice System. I believe that a significant number of prior arrest demonstrates that the defendant has a propensity to commit crime. Therefore, he should be sentenced to a more significant period of incarceration than a first offender. In looking at a lengthy rap sheet, I do distinguish several factors, the most important is the amount of time between the last arrests and conviction, and the date of the instant offense. If that period of time is ten years or more, than

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Honorable William W. Wilkins, Jr.

May 10, 1986

Page 2

I consider with substantially less impact the prior record than if it is right up to the instant offense. I believe that a prior arrest history older than ten years is indicative of an effort by the offender to change his behavior, or a "burnout on crime" effect.

Another major area of concern with regard to prior record is the danger to the community of the offenses for which the defendant has been arrested and/or convicted. A criminal record that reflect that the offender is assaultive and constitutes a "physical danger" to the community, then that offender should be treated much more seriously than a fraud artist who constitutes a financial threat to the community. Additionally, a person with a prior arrest history containing only misdemeanors or less serious felonies, should not be treated as harshly as those that have lengthy histories of serious felony offenses. A lengthy arrest history also is indicative of a defendant's lack of suitability for community supervision. In my opinion, a first offender has a much better chance of never committing another crime, than a person possessing several arrests and/or convictions.

I would now like to respond to the specific questions posed in your letter in the order that they were posed:

- felony and misdemeanors should be defined in accordance to the distinctions within each state in which the crime is committed. By that I mean that if a person commits a fraud in the state of Florida, and the fraud involves over \$500., and Florida statute states that frauds over \$500. are a felony, then the federal guidelines should conform to that statute. For the purpose of the guidelines, the determining factors should be, in the order of their importance: 1) nature of the offense; 2) statutory maximum of the offense and 3) length of sentence imposed. The nature of the offense as I have mentioned above, is the most important factor in need of considerable analysis.

- Prior felony offenses should be weighted significantly. In my opinion, an offender with two or more convictions of offenses similar to the instant offense should be incarcerated for twice as long as a first offender. Seriousness of prior offenses should be delineated as I recommended above: 1) similarity of prior offenses to the instant offense 2) length of prior record and closeness to the date of the instant offense and 3) nature of the prior arrests and/or convictions as well as threat to the community (i.e. physical) and so on.

Honorable William W. Wilkins, Jr.

May 10, 1986

Page 3

- A decay factor should be built into the guidelines. The Commission should minimize the impact of crimes that are committed ten years after release from a period of confinement or following expiration of a period of Probation or Parole. The starting point in the decay period should be supervision release date.

- Juvenile offenses should be considered only if they are similar to the instant offense, or if they represent the beginning of a lengthy adult prior criminal history.

- Military, foreign and tribal convictions should be considered as indicative of the defendant's character. Any offenses that constitute a crime as defined by state or federal statute should be considered as outlined above.

- The Commission should consider both arrests and convictions for the reasons outlined above.

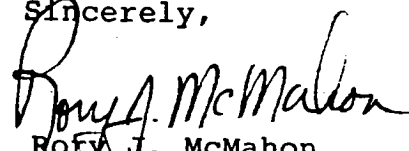
- If a defendant is on probation or parole at the time of the instant offense, I believe that they should thereby forfeit their eligibility for release on bond, and furthermore upon conviction they should be sentenced to the maximum penalty available under the law.

- As I outlined above the prior record should be most significantly aggravated when the defendant has a pattern of arrests and/or convictions for offenses similar to the instant offense and secondly, when the sheer number of prior arrests and/or convictions demonstrates that the defendant is a danger to the community.

The opinions of this writer that have been described above are based upon thirteen years in the Criminal Justice field; five as a state probation officer in New York, and eight as a federal probation officer originally in New York, and now in Florida. The opinions are indicative of the beliefs of my peers and co-workers both in Florida and New York as well as discussions with Probation Officers around the Country.

I would like to thank you and the Commission for allowing me the opportunity to provide input into the formulation of the guidelines. I look forward to providing further input in the future.

Sincerely,


Rory J. McMahon
Secretary, FPOA

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND
PROBATION OFFICE

May 8, 1986

David E. Johnson

CHIEF PROBATION OFFICER

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The Honorable William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Dear Judge Wilkins:

Thank you for your recent letter dated April 25, 1986, requesting my views on the impact a defendant's prior criminal record should have on sentencing.

As you are aware, criminal justice research has again and again found prior criminal record an important predictive factor for evaluating risk of defendant recidivism. Although I subscribe in part to a "just deserts" model of sentencing which structures a defendant's sentence around offense seriousness, I believe the severity of any sentence should also be reflective of the length and nature of the defendant's prior record. Such a sentencing matrix was presented by Dr. David G. Griswold and Dr. Michael D. Wiatrowski in "The Emergence of Determinate Sentencing" (Federal Probation, June 1983, p. 34).

My response to the specific questions in your letter are as follows:

"How should the Sentencing Commission define felony and misdemeanor offenses in view of the definitional disparity among states, and between states and the federal system? For guideline purposes, should the determining factor be the nature of the offense, the length of the sentence imposed, the statutory maximum of the offense or some other variable?"

Definitional disparity in felony and misdemeanor offenses among states, and between states and the federal system, is problematic. Fairness, however, mandates definitional uniformity when assessing a defendant's prior criminal record. In my opinion the most practicable solution to definitional disparity is simply to define all felony and misdemeanor offenses regardless of jurisdiction as presently defined for the federal system by Title 18, United States Code, Section 1. A felony offense would thus be "any offense punishable by death or imprisonment for a term exceeding one year." A misdemeanor offense would be "any other offense." For guideline purposes any determining factor must be

May 8, 1986

both uniform and reliable for fair and equitable measurement and application. The nature of the offense does not lend itself to such precise measurement. In addition, the length of the sentence imposed may vary in its relationship to the actual offense depending upon the criteria utilized to determine sentence. The statutory maximum of the offense, however, can be measured with reliance. It also relates more directly to the actual offense. Consequently, I believe the statutory maximum of the offense is more suitable for guideline purposes.

"How should prior felony convictions be weighted? Should serious previous offenses count against the offender more in establishing the current sanction than relatively less serious prior offenses? How should seriousness of prior offenses be delineated?"

In my opinion prior felony convictions should be weighted on a scale of graduated severity. More serious prior offenses should be weighted more severely on the rating scale, and weigh more heavily in establishing the current sanction than less serious prior offenses. Seriousness of prior offenses should also be delineated according to aggravation for distinguishing between individual victim and victimless crimes. Such an approach will enable the sanction severity to either increase or decrease in relation to the length and seriousness of a defendant's prior felony convictions.

"What decay factor, if any, should the Commission build into the guidelines when considering a defendant's prior criminal history? For example, should a prior felony conviction factor into a defendant's possible sentence if his previous conviction occurred 10 years earlier? Should the starting point in a decay period be the conviction date, prison release date, or supervision release date?"

There are divergent findings in criminal justice research with respect to the importance of a decay factor in developing sentencing strategy. Some research suggests sentencing guidelines be based on the entire prior record while other research recommends structure of the guidelines around prior felony convictions in the recent past. In my view the entire record of prior felony convictions is important although the convictions should be weighted according to recency. Felony convictions occurring within last three years should be accorded proportionately more weight than convictions occurring earlier. I believe the starting point in this decay period should be the date of arrest for any felony offense which later resulted in conviction. Dates of conviction, prison release, and supervision expiration usually have less correlation with the actual date of the defendant's offense behavior than the date of arrest.

May 8, 1986

"Should prior juvenile offenses be considered in establishing sentences for adult offenders? Should they be given the same weight as adult convictions? If so, what decay factor, if any, should be built in?"

Research suggests a strong correlation between prior juvenile offenses and adult criminality. Prior juvenile records, however, are often unavailable and/or undisclosable, and may have been destroyed when the defendant reached majority. Since juvenile records in most cases do not lend themselves to reliable measurement, I believe they should be disregarded in structuring sentence to lessen sentence disparity and more equally accord due process.

"How should the Commission handle military convictions? What about foreign convictions or tribal convictions?"

I believe military convictions for felony offenses should be handled like any other felony conviction. Foreign or tribal convictions, however, should only be incorporated in the prior record if the offense behavior which resulted in the particular conviction would have been felonious behavior if committed in the United States.

"Should the Commission consider previous arrests or only convictions when determining a defendant's prior criminal record?"

The prior criminal record of a defendant should be determined by relying solely on convictions. Although in some particular cases a more accurate appraisal of prior record might be gleaned by considering all previous arrests, I believe the benefits of due process outweigh the possible advantage of such consideration.

"Should the fact that a defendant was on probation or parole at the time of the offense of conviction be considered, and if so, how should it be weighted?"

I believe consideration should be given to whether the defendant committed the conviction offense while on probation or parole. Such convictions should certainly be weighted more severely on the sentencing matrix.

"What level of sentence aggravation should be given for what level of prior record?"

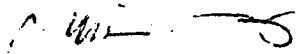
The level of sentence aggravation should be proportional to the level of prior record with uniformity in application. This is important because of the significant relationship between prior record and recidivism. In addition to correlating aggravation with prior record, any sentencing strategy should also protect against disproportionality which could allow the prior record to be weighted more severely than the new offense behavior.

May 8, 1986

A review of the guidelines adopted by the U.S. Parole Commission in 1973, may provide a starting point in formulating an appropriate model since the guideline strategy attempted to predict recidivism of sentenced offenders. Any correlation of sentence aggravation and prior record, however, will require future modification as dictated by later learning from experience.

I certainly appreciate having this opportunity to provide my thoughts on the very important work of the Commission. Although I recognize this response barely scratches the surface, I hope it is helpful in some small way. I look forward to attending the hearing on May 22, 1986.

Sincerely,



C. William VanScoy
U.S. Probation Officer

CWV:lnk



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RECEIVED MAY 13 1986

Jerald R. Vaughn
Executive Director

May 9, 1986

Mr. William W. Wilkins, Jr.
Chairman
The United States Sentencing
Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Dear Mr. Wilkins:

I am happy to respond to your request for comments concerning the affect of a defendant's criminal record on sentencing.

1. Felony and misdemeanor offenses should be differentiated by length of sentence. I would recommend that 5 years be the cut-off line. Offenses with sentences over 5 years would be a felony, less than 5, a misdemeanor. Also, I would recommend that felonies be incarcerated in state institutions and misdemeanors in county institutions.
2. Prior felony offenses should be weighed very heavily in sentencing repeat offenders. Prior violent offenses should have more weight than nonviolent offenses. For example, a second offense for armed robbery should have more weight than second offense check forgery. Seriousness of prior offenses should be delineated by violent personal crime and nonviolent property crime. Violent crimes would be any crime with a weapon involved.
3. If the commission is considering a decay period, it should begin at the expiration of the parole date and not be for less than 10 years. Should a pre-sentencing investigation reveal criminal activity during this period of time, the "decay" period should not be considered.
4. Prior juvenile offenses should be considered in sentencing if the juvenile record indicates habitual criminal acts. Noncriminal juvenile offenses (runaway, truant, etc.) should be taken into consideration when sentencing, but should not be weighed in favor of incarceration.

Mr. William W. Wilkins, Jr.

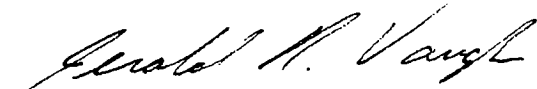
May 9, 1986

Page 2

5. Foreign, military and tribal convictions should be considered the same as other convictions if they, by factual occurrence, are crimes as defined under the criminal statutes.
6. Prior arrests should definitely be considered in sentencing. As we all know, a person may be factually guilty of a crime, but through technicalities, appeals, etc., may not be "convicted."
7. The fact that a person is on parole or probation at the time of an offense should definitely be considered and should be weighed heavily. After all, the fact that the defendant is on parole or probation is a good indication that he/she has previous involvement with criminal activities.
8. Prior records of three violent crime felony convictions should be grounds for mandatory long-term incarceration; such as, twenty years with no parole.

I hope this information will prove beneficial to the United States Sentencing Commission. I would be pleased to expand on the aforementioned points or answer other questions the Commission may have. Further, I would be available to appear before the Commission if you wish.

Sincerely,



Jerald R. Vaughn
Executive Director

THE UNITED STATES SENTENCING COMMISSION

1331 PENNSYLVANIA AVENUE, NW

SUITE 1400

WASHINGTON, D.C. 20004

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Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)



April 25, 1986

Mr. Rory J. McMahon
United States Probation Officer
Suite 207, U. S. Courthouse
299 East Broward Blvd.
Ft. Lauderdale, Florida 33301

Dear Mr. McMahon:

After a productive hearing on offense seriousness April 15, the U.S. Sentencing Commission is scheduling a second hearing to focus on how a defendant's criminal record should affect his sentence. A limited number of federal officials who work in the criminal justice system have been invited to testify at the hearing, scheduled for May 22, 1986.

In connection with the hearing, the Commission is asking you to submit your views in writing not only on the broad issue of what "offender characteristics" should affect sentencing, but specifically, the impact a defendant's prior criminal record should have on sentencing. Among the issues presented under prior record are the following questions:

* How should the Sentencing Commission define felony and misdemeanor offenses in view of the definitional disparity among states, and between states and the federal system? For guideline purposes, should the determining factor be the nature of the offense, the length of the sentence imposed, the statutory maximum of the offense or some other variable?

* How should prior felony convictions be weighted? Should serious previous offenses count against the offender more in establishing the current sanction than relatively less serious prior offenses? How should seriousness of prior offenses be delineated?

* What decay factor, if any, should the Commission build into the guidelines when considering a defendant's prior criminal history? For example, should a prior felony conviction factor into a defendant's possible sentence if his previous conviction occurred 10 years earlier? Should the starting point

in a decay period be the conviction date, prison release date or supervision release date?

* Should prior juvenile offenses be considered in establishing sentences for adult offenders? Should they be given the same weight as adult convictions? If so, what decay factor, if any, should be built in?

* How should the Commission handle military convictions? What about foreign convictions or tribal convictions?

* Should the Commission consider previous arrests or only convictions when determining a defendant's prior criminal record?

* Should the fact that a defendant was on probation or parole at the time of the offense of conviction be considered, and if so, how should it be weighted?

* What level of sentence aggravation should be given for what level of prior record?

The Commission has previously solicited your opinions and those of a broad group of individuals and organizations concerning the offender characteristics a judge should and should not consider when sentencing. This was done in partial fulfillment of the statutory requirement that the Commission "shall consider whether the following matters, among others, with respect to a defendant, have any relevance... and shall take them into account only to the extent that they do have relevance." The statute goes on to list eleven specific factors for the Commission's consideration: age; education; vocational skills; mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; physical condition including drug dependence; previous employment record; family ties and responsibilities; community ties; role in the offense; criminal history and degree of dependence upon criminal activity for a livelihood.

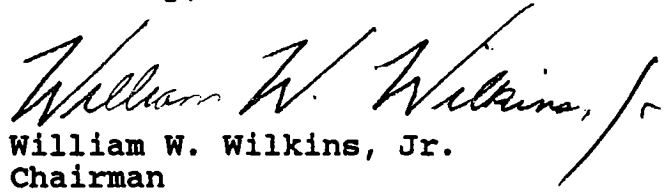
This letter, then, is an invitation to provide the Commission with your detailed thoughts on the topic of prior record and other offender characteristics before the next hearing. The Commission will study each submission and make it part of the hearing record. It would be most helpful to the Commission if your written views could be received on or before May 12, 1986.

The Commission has invited federal prosecutors, public defenders, probation officers, judges and an FBI records expert to testify at the Thursday, May 22 hearing on the availability, reliability and use of offender background information relevant to sentencing. The hearing will begin at 10 a.m. in the Commission's hearing room, 14th Floor of the North Office Tower

at National Place, 1331 Pennsylvania Avenue, N.W. Washington,
D.C. 20004. We invite your attendance.

In the months to come, the Sentencing Commission is planning to hold hearings in Washington, D.C. on sentencing options, corporate sanctions, plea negotiations and other topics. Complete information will be distributed upon confirmation of specific hearing topics and dates. The Sentencing Commission looks forward to your input and continued interest in our work.

Sincerely,


William W. Wilkins, Jr.
Chairman

RECEIVED MAY 22 1986

Thomas R. Brett
Judge

United States District Court
Northern District of Oklahoma
333 West Fourth, Room 4-508
United States Courthouse
Tulsa, Oklahoma 74103

May 1, 1986

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

Re: Response to letter of April 25, 1986 from
Chairman Wilkins

Dear Mr. Chairman:

Thank you for your letter of April 25, 1986, and the informative report. The responses to the eight questions in your letter follow:

1. How should the Sentencing Commission define felony and misdemeanor offenses in view of the definitional disparity among states, and between states and the federal system? For guideline purposes, should the determining factor be the nature of the offense, the length of the sentence imposed, the statutory maximum of the offense or some other variable?

I feel ill prepared to suggest a solution because I am familiar with the Criminal Code of only one state. Therefore, I cannot appreciate the disparity problems. It would seem, generally, the statutory maximums of prior offenses should be considered for guideline purposes. However, the sentencing judge should exercise some discretion in considering the various factors.

2. How should prior felony convictions be weighted? Should serious previous offenses count against the offender more in establishing the current sanction than relatively less serious prior offenses? How such seriousness of prior offenses be delineated.

Yes, the seriousness of the prior offense should be weighted. By such factors as the effect on the victim (including society) and the nature of the dishonesty, stealth and/or violence or potential violence involved.

3. What decay factor, if any, should the Commission build into the guidelines when considering a defendant's prior criminal history? For example, should a prior felony conviction factor into a defendant's possible sentence if his previous conviction occurred 10 years earlier? Should the starting point in a decay period be the conviction date, prison release date or supervision release date?

A 10-year factor should apply, to be calculated from the supervision release date.

4. Should prior juvenile offenses be considered in establishing sentences for adult offenders? Should they be given the same weight as adult convictions? If so, what decay factor, if any, should be built in?

Juvenile offenses should be considered, if a finding of guilt resulted and the juvenile was represented by counsel. A 5-year decay factor would be appropriate in reference to juvenile offenses which should probably be given lesser weight than adult offenses.

5. How should the Commission handle military convictions? What about foreign convictions or tribal convictions?

Military convictions by special or general courts-martial, not summary courts-martial, should be likewise weighted. Foreign-tribal convictions should be considered only if sufficient record of due process proceedings is available, or a relevant treaty with a foreign government exists.

6. Should the Commission consider previous arrests or only convictions when determining a defendant's prior criminal record?

Only convictions.

7. Should the fact that a defendant was on probation or parole at the time of the offense of conviction be considered, and if so, how should it be weighted?

Probably not, because the defendant has the prospect of revocation of parole or probation and additionally being charged with a separate crime.

The Honorable William W. Wilkins, Jr.
May 1, 1986
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8. What level of sentence aggravation should be given for what level of prior record?

A good question, which probably is incapable of specific recommendation, such as 3 years or 5 years for each prior felony conviction. This is due to the individual nature of each offender, the offenses, and the offender's past. It suggests the trial judge has to be given some discretion in this regard.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Thomas R. Brett", with a stylized flourish at the end.

THOMAS R. BRETT

P.S. I am sorry this is late.

University of Oxford
Centre for Socio-Legal Studies
Wolfson College
Oxford OX2 6UD
Tel: (0865) 52967

5 May 1986

Mr. Michael K. Block, Chairman
Offender Characteristics Subcommittee
United States Sentencing Commission
1331 Pennsylvania Avenue N.W., Suite 1400
Washington D.C. 20004

Dear Mr. Block:

Your letter of 24 March arrived on 2 May; hence the delay in my reply.

Your inquiry raises disturbing questions, and I am afraid my reply will disappoint you. Frankly, I do not feel I can contribute intelligently to a "laundry list" of characteristics of offenders which should or should not be considered in sentencing. The problem, of course, has to do with the nature of sentencing decisions and with the goals of the Commission. Without prior ~~prior~~ knowledge of the latter, I simply do not know what I am being asked to contribute to. Without specification of the former, no such list makes much sense.

There is, of course, much disagreement as to the goals of sentencing, among individual judges, legislators, administrators and others in the criminal justice system, and in the public at large. These goals vary a great deal in individual cases and among broad classes of offenses and offenders, as well as in different circumstances (e.g., offender circumstances, community thresholds of tolerance, etc.). The relevance of particular characteristics doubtless varies a great deal, depending on these varying goals.

Let me be more specific. If deterrence is the goal of the sentencer, the sentencing decision will be framed in a much different way than if rehabilitation of the offender is the goal. If moral retribution is regarded as the primary goal (in a particular case or for a class of cases) a much different decision is likely to be rendered than if either deterrence or rehabilitation is considered primary. If it is determined that sentencing should be experimental for certain classes of offenses or offenders, for whatever purpose, sentencing decisions will be influenced by that determination; other goals consequently may be considered less important. The types of offender characteristics which are relevant, irrelevant, or which should or should not be considered or weighted in any fashion, inevitably will be influenced by such considerations.

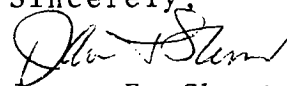
The matter is, of course, much more complicated than these remarks suggest. Deterrence may be specific or general, or some combination of each. The goals of sentencing rarely are straightforward, except in routine cases, and then often mistakenly. If one is concerned that the least harm be done to the offender, compatible with a conception of justice, or that the protection of society be maximized at whatever cost to offenders, different sets of offender characteristics will be relevant; and different characteristics of offenses, as well.

All of this probably is old hat to you and other members of the Commission. I do not mean to preach or to be flippant concerning a serious request and a serious problem. I mean only to convey my reluctance to reply in a simplistic manner to your request. There can be neither shortcuts nor easy answers to these problems; though that surely will be the temptation. My inclination is to recommend a thorough search of the research literature for factors associated with sentencing outcomes, together with rigorous questioning of the relevance of the sorts of value questions I have tried to raise, for what that search reveals. The value questions are at the heart of the matter. If you do not face them your guidelines are certain to be interpreted in whatever manner suits a given decision maker, and doubtless often distorted from what you aim to achieve.

I do hope the Commission will proceed with both rigor and flexibility. Absent either, I fear your efforts may be in vain and a real opportunity for improvement in present practice lost. Sentencing now is hampered by the lack of knowledge and available alternatives, and by a rather simplistic commitment to incarceration, at least as much as by the lack of systematic knowledge concerning offenders and the outcomes of sentencing decisions.

I wish you and your colleagues well with a most difficult task.

Sincerely,



James F. Short
Visiting Fellow

P.S.: Please forgive my miserable typing. Secretarial services are in short supply at the Centre under the best of circumstances, and today is a Bank Holiday in addition.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF IOWA
PROBATION OFFICE

May 6, 1986

MICHAEL EBINGER

CHIEF PROBATION OFFICER

RON TELECKY

PROBATION OFFICER

U.S. COURT HOUSE

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

Dear Mr. Wilkins:

Your letter of April 25, 1986, asks for views on the impact of a defendant's prior criminal record on the issue of sentencing. For an intellectual approach to this issue, I am sure the Commission has considered works of James Q. Wilson, Marvin Wolfgang and others.

From my vantage point as a corrections worker in the field, I would be very surprised if many of my colleagues felt there was a factor more crucial than "Prior Criminal Record" when trying to formulate a sentencing recommendation. Your letter certainly raises a lot of complex questions on the issues of sentencing and prior record.

Briefly, here is how I feel about some of the following questions.

Definition - The public, in general, and certainly most employers presently relate to the phrase "punishable by more than one year" as meaning a felony. The revisions of criminal codes by the states with the inclusion of such categories as "Aggravated Misdemeanors" have complicated this situation. However, I still think the above phrase is a good rule of thumb. As a practical matter, when a probation officer is examining the prior record of an offender who has many state convictions, it is not likely he or she is going to know what the maximum term of imprisonment was for each offense. Most correctional professionals can see the obvious examples of "over-criminalization" by certain state laws. Therefore, a method should be devised to allow an officer in one district to make an equivalent rating of offense behavior for an event that occurred in another jurisdiction. The typical example is the offense of Possession of Marijuana which is probably still punishable by up to five years imprisonment in some states. Despite the maximum term, the officer must have a latitude to assess this kind of behavior in the context of the prevailing type of sentence it would have drawn in his own district. It just seems that in the last decade, if an offender was

Mr. William W. Wilkins, Jr.
May 6, 1986

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sentenced to a term of more than one year, it is probably a fair representation of felonious behavior. Chronic offenders are going to be sentenced to longer terms for the same kind of behavior that a not-so-chronic offender will receive a shorter term. Therefore, this makes it difficult to take into account the "nature of the offense". The length of the sentence imposed still seems to be the best guide.

Previous Felony Convictions - If at all possible, there should be some way to weigh more heavily for those kinds of convictions that involve impulsive, irrational or random behavior, especially when that behavior is assaultive or in some other way menacing to a person or people. Again, the public is exposed to the misdeeds of chronic offenders through the media and of those types of offenders, the ones who present a physical risk are the most disdained. A chronic property offender should be viewed in terms of the number of prior instances or convictions for similar behavior. I should note that it seems the public is beginning to view distribution of illicit drugs on about the same level as "harm done to others". In short, any previous demonstration of similar behavior for which a defendant is instantly charged should be given significant weight and the more times demonstrated previously, the more seriously his or her record should be considered.

Decay Factor - I think the academics should be consulted on this subject because time periods tend to be rather arbitrary. It would be my recommendation that if twelve years separates the release (from probation or parole) from conviction on the instant offense, then that previous offense should be considered "ancient" and be given only slight weight, if any.

Juvenile Offenses - Prior juvenile offenses should absolutely be considered when establishing sentences for adult offenders. Adjudications of delinquency where the juvenile was represented by counsel should be given the same weight as adult convictions. With juveniles, usually several contacts with police accumulate before an adjudication of delinquency. Again, the decay factor should be twelve years which would mean that if a person made it from his or her 18th. birthday until age thirty without criminal activity in the intervening years, then these convictions for delinquency should be given only slight weight, if any at all.

Other Types of Convictions - Military, foreign and tribal convictions should be considered but only if a method is established for developing some sort of equivalency rating. This is more crucial in the area of military convictions since there seem to be procedural considerations in those cases. Establishing the validity of foreign or tribal convictions, is going to be much more difficult. Issues such as

Mr. William W. Wilkins, Jr.
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the type of judicial system, type of government, and extent of due process would have to be taken into consideration. This could raise all sorts of legal questions but could cloud the issue of sentencing if not fully resolved by the Sentencing Commission.

Prior Arrests - Previous arrests of a defendant should definitely be given some consideration because, conviction or not, an arrest usually represents an "event" that involved a defendant's behavior resulting in the intervention by authorities. By failing to give prior arrests any weight, sometimes one ends up with the classic situation where a defendant had several occurrences of obvious inappropriate behavior but due to legal maneuvering and other evasive maneuvers, somehow avoided a conviction of any sort. We have all seen those offenders who always seem to get someone else to "take the fall". Therefore, in some way, prior arrests should definitely be given weight.

Probation or Parole - The fact that an offender was on probation or parole at the time of offense should be weighted very heavily.

New Criminal Behavior - On the part of an offender who is always on a form of supervised release, would certainly seem to represent a complete disregard for the welfare of others and for the authority of the Courts.

The above thoughts are certainly not detailed but are intended to express a sense of what is important to a probation officer or other corrections practitioner in the field. Hopefully, after assembling all comments, some more detailed than others, the Commission will be able to resolve some of the very technical issues that are foreseen by the issues you have mentioned with regard to prior record.

Sincerely,

A handwritten signature in cursive script that reads "Michael Ebinger".

Michael Ebinger
Chief, U. S. Probation Officer

ME:dvs

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
PROBATION OFFICE**

**GERALD J. BONNAFFONS
CHIEF PROBATION OFFICER**

May 6, 1986

**500 CAMP STREET, ROOM 325
NEW ORLEANS 70130
504-589-6317
FTS: 602-6317**

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

Dear Mr. Wilkins:

I am writing to provide my comments as to the questions raised in your correspondence of April 25, 1986.

*I believe we should simply use the one year factor to separate offenses, and consider the statutory maximum for an offense, if available, or, if unavailable, the length of the sentence imposed.

*Prior offenses can be placed in three or four categories as to seriousness and weight given accordingly.

*I believe that the "decay" factor currently utilized by the Parole Commission is as appropriate as any other, although occasionally it allows for too lenient a consideration to a serious offender. Perhaps the top categories, as to seriousness of offense, should never be declared "an ancient prior record".

*Certainly juvenile offenses, other than status offenses, should be considered, and in the same light as adult offenses. A 19 year old with numerous juvenile adjudications should not be handled as a first offender. The only distinction that might be considered is shortening the "ancient prior record" definition for juvenile offenses. For example, a juvenile record would not be a factor if the individual has been conviction-free for seven years instead of ten.

*Military, foreign and tribal convictions should be considered in the same manner as offenses committed within the United States.

*Again, I believe the United States Parole Commission procedure is an equitable way of dealing with this issue.

*Offenses committed while under judicial jurisdiction (including bond), should be weighted more severely, although consideration must also be given to the punishment rendered for the violation by the controlling judicial body. The public has a right to increased punishment in such a situation.

*Broad categories should be set, considering the severity of the prior offense, the number of offenses and the time span since the last conviction (or supervision term). We must take steps to incapacitate the career and/or violent offender so that more weight should be given to a lengthy prior record, or one with prior serious offenses, than can be given under the United States Parole Commission salient factor score.

I hope these comments are useful in your deliberations.

Sincerely,

Gerald J. Bonnaffons
Chief, U.S. Probation Officer

GJB/tah



U.S. Department of Justice

*United States Attorney
District of Wyoming*

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May 8, 1986

Mr. Manuel Rodriques
Executive Office for U. S. Attorneys
U. S. Department of Justice
Washington, D. C. 20530

Re: Comments to Sentencing Commission Concerning
Offender Background Information.

Dear Manny:

Please submit the following to Ronald Gainer as my comments to the Sentencing Commission concerning offender background information.

First, I would like to stress that I believe sentencing guidelines are a desirable thing to eliminate extremes in severity and leniency. It must be recognized that, in every case, a trial judge is sentencing an individual human being, not an offense, or a number. For that reason, I generally favor allowing trial judges to retain sufficient discretion in sentencing matters to allow them to take into account the infinite number of variables which can occur in any given situation.

To illustrate my point, suppose there are two individuals who have been convicted of first degree murder in an area of exclusive federal jurisdiction. If one of them is a woman who has been beaten by her husband for twenty years and who finally determined that she would take the law into her own hands and the other is a man who commits a terrorist act by exploding a bomb in a public place, I believe that the terrorist should receive the more severe sentence, even if all other factors are equal between the two offenders. I am not sure that guidelines

can be written to take into account such variables, unless trial judges are left with a considerable amount of discretion.

In answer to the specific questions posed by Judge Wilkins, I submit the following:

Recognizing that definitions vary from jurisdiction to jurisdiction, I believe that the distinction between felony and misdemeanor should depend upon the statutory maximum of the offense. If the offense carries a term of imprisonment which exceeds one year, the offense should be categorized as a felony for federal sentencing purposes. If the maximum sentence was less than one year, then it should be categorized as a misdemeanor.

In general, I feel that more serious prior offenses should count far more heavily against the offender than "relatively less serious prior offenses." In determining "seriousness of prior offenses", the guidelines should take into consideration whether or not violence was involved, whether the crime was a "person to person" crime, the maximum possible sentence for the prior offense, the sentence actually imposed, and such factors as that. Drug offenses should be considered as serious offenses, even though violence is not involved. The quantity and quality of drugs involved should be considered, but they should be considered as they relate to the region where the offense took place. For example, a prior conviction for distributing 10 pounds of cocaine in Wyoming would be considered a very serious offense. In South Florida, it would probably be considered as relatively minor. In the area of white collar crime, the only way I know to distinguish between serious and nonserious offenses is on the basis of monetary amounts. Once again, so many human variables can enter into a determination as to the "seriousness" of a prior offense, that the probation office and sentencing judge must be left with some considerable leeway.

As to what decay factor should be considered, I feel that if an individual has been arrest free for 10 years from the date of release from confinement or supervision, whichever occurs later, that the prior offense should not be given the same weight as if it were a recent offense. On the other hand, any prior conviction should be given some weight. For example, it would not seem wise to forget, entirely, the prior conviction of a mass murderer who had managed to remain arrest free for 10 years after his release. Such a person should never be considered on an equal basis with one who has had no prior contact with the law whatsoever.

Prior juvenile offenses should be considered in establishing sentences for adult offenders, and the offenses should be given the same weight as adult convictions. The decay factor should be the same as in any other situation.

Insofar as military offenses are similar to civilian offenses, military offenses should be handled in the same fashion. The same is true of foreign convictions or tribal convictions. It would seem that an assault with a deadly weapon which results in a court martial or a foreign conviction is every bit as serious and every bit as noteworthy as the same crime committed in any state or federal jurisdiction.

The Commission should consider previous arrests, but not to the same extent as prior convictions. One or two arrests should have no effect, but if an individual's criminal history reveals a consistent pattern of arrests, it indicates that something is wrong and both the probation office and the sentencing judge should take those matters into account, on an individual basis, for whatever they are worth.

Obviously, the fact that a defendant was on probation or parole at the time of the commission should be considered and should be weighted very heavily against the Defendant.

Without knowing more about the framework in which the Commission is considering criminal history, it is almost impossible to say what level of sentence aggravation should be given for what level of prior record. In general, however, I would say that probation officers and judges should be allowed considerable discretion in sentencing. The guidelines should not remove the application of common sense or reasonableness from any particular case. Each case can be affected by a myriad of unforeseeable variables. The guidelines should be designed to prevent the extremes in undersentencing or oversentencing which cause the public to doubt the fairness of the criminal justice system. They should not be designed to take away the kind of wise and reasoned discretion which is demonstrated every day by the majority of trial judges across the nation.

Thank you very much for this opportunity to have some input into the extremely important job of establishing sentencing guidelines in accordance with the will of Congress.

Sincerely,



RICHARD A. STACY

United States Attorney

Page 4

cc: Robert G. Ulrich
United States Attorney
Western District of Missouri
547 U. S. Courthouse
811 Grand Avenue
Kansas City, MO 64104



U.S. Department of Justice

United States Attorney
District of Oregon
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312 United States Courthouse
620 S.W. Main
Portland, Oregon 97205

503/221-2101

May 9, 1986

Manuel A. Rodriguez
Executive Office for United States Attorneys
Department of Justice
Main Justice Building Room 1630
10th and Constitution Ave., N.W.
Washington, D.C. 20530

Re: Sentencing Commission
Offender Background Information

Dear Mr. Rodriguez:

This office has been advised that the Sentencing Commission has scheduled hearings commencing May 22, 1986, regarding the relevance of offender background information in the sentencing process.

Robert G. Ulrich, U.S. Attorney for the District of Missouri, has solicited comments at the request of Judge Wilkins. Pursuant to that request, I submit the following. I firmly believe that a defendant's prior criminal record is one of the most important factors to be considered in assessing future behavior. In particular, crimes of violence, especially those involving sex offenses, should be afforded great weight when evaluating the paramount need to protect society.

While adult records of prior convictions are normally available well in advance of sentencing, juvenile records are either unavailable or incomplete. In my experience, juvenile criminal records and adjudications of delinquency are quite valuable in assessing the dangerousness of the offender and the offender's potential for rehabilitation. Juvenile records frequently include adjudications for the crimes of armed robbery, burglary, rape and on occasion murder. Failure to either consider such records or failure to attribute adequate weight to such records renders the sentencing process unpredictable and unfair. In effect we are rewriting history to the prejudice of the public. I fully recognize the well-intentioned views of those who earlier wrote juvenile laws providing for confidentiality. However well-intentioned, the experiments in juvenile rehabilitation have shown more often than not that rehabilitation of violent juvenile offenders is mythical.

Manuel Rodriguez
May 9, 1986
Page 2

Judges must assess a defendant's dangerousness in every criminal sentencing hearing. In my experience, the best tool for assessing dangerousness is the prior criminal history of the defendant. Under present parole commission guidelines, offenders may be characterized as "fair" or "good" when in fact most citizens would consider their criminal records in a much different light. For example, as I understand current computation for determining offender characteristics, prior convictions are simply counted 1-2-3 etc. No attempt is made to distinguish a prior murder conviction from a prior larceny conviction. It seems that a prior murder or rape conviction should be treated much more seriously. Also, while the current computation considers prior heroin or opiate addiction, other serious drug problems such as methamphetamine, cocaine or PCP use is not considered.

In this district the most common federal crime of violence is bank robbery. The correlation between bank robbery and drug abuse or drug addiction is exceedingly high. In fact, it is uncommon for a bank robber not to have a drug related problem. The current salient factor score does not adequately consider prior criminal history or prior drug abuse (except for heroin or opiate addiction).

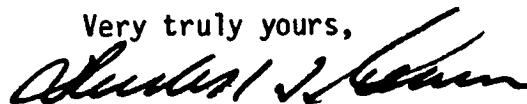
In this district a small number of career criminals commit or cause the commission of a disproportionately large number of crimes. These offenders are the most incorrigible and most dangerous and they are clearly identifiable by their criminal records.

In assessing an offender's dangerousness to the community, there is no factor to which I would attach more importance than an offender's prior criminal record. The experienced prosecutors in my office concur in this view.

In summary, I would urge the commission to give increased importance to prior criminal convictions, especially sex offenses, crimes of violence and drug related offenses. I would also urge the commission to give increased weight to juvenile adjudications because I believe it is safe to say they aid in the prediction of future dangerousness.

Thank you for soliciting my comments.

Very truly yours,



CHARLES H. TURNER
United States Attorney
District of Oregon



U.S. Department of Justice

United States Attorney

Middle District of Tennessee

879 United States Courthouse
Nashville, Tennessee 37203

615/736-5151

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May 9, 1986

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

Dear Mr. Wilkins:

In accordance with your letter of April 25, 1986, I am please to provide the following comments concerning the questions you have posed concerning "offender characteristics".

1. In my view, the definition between felony and misdemeanor should be based upon the statutory maximum of the offense which would, of course, generally be driven by the nature of the offense itself. I do not believe that the length of the sentence actually imposed is an appropriate standard to apply. In general, the system of dividing felonies and misdemeanors into various grades seems to be a workable standard which has been used by several states.

2. Prior felony convictions should, of course, be weighted. Again, it would be my opinion that the nature of the previous felony should be taken into account in weighing its relative impact on the current "offender characteristic". I would think that the starting point for delineation should be the maximum punishment which would have been authorized before the original conviction. Unfortunately, in many situations, particularly in Tennessee, as an example, robbery, burglary and other serious violations will be reduced to a catch-all attempt to commit a felony, which carries a 5 year maximum sentence. In order to appropriately appreciate the seriousness of the prior conduct, it is

William W. Wilkins, Jr.
Page 2
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necessary to look behind the plea of attempt to commit a felony to see what in fact was committed. The problem of pleading to reduced offenses makes the weighting of prior felony convictions difficult. It is my opinion, therefore, that the maximum punishment that the offender was charged with originally, should be the prime factor even if the plea is to a reduced charge.

3. Decay factors should be considered. My views would be that the starting point should be the date the defendant is released from prison or supervision, whichever is later, and that a decay factor of somewhere between five and 10% per year should be applied for 5 years with a residual factor of approximately 25% to remain regardless of the time since the violation. This approach which could, of course, be adjusted would recognize that time free from violations should be considered as a mitigating factor, but on the other hand would not totally wipe out a prior felony conviction simply through the passage of time. An individual guilty of robbery twenty years before should have that factor weighted against him in some respect, although certainly not as much as an individual who had a robbery conviction for which he was still on parole.

4. Juvenile offenses should be considered in establishing sentences for an adult offender. This is particularly true since juvenile offenders are normally given the procedural and legal rights afforded adults in most jurisdictions at the present time. These juvenile convictions are far more than simple civil adjudication of a juvenile status. I would think that the weight given them should be perhaps 75% of those adult convictions and roughly the same type decay factor should be built in as recommended above for adult offenders.

5. Military offenders should be handled the same as any other convictions. Military court martial are federal courts and their maximum punishments and sentences can be determined as readily as any other violations. Likewise, foreign convictions should be considered, however, as a practical matter there may be some difficulty in establishing the exact nature of foreign convictions. However, I believe that to the extent the foreign convictions can be determined that they should be considered to the same extent as any other convictions.

William W. Wilkins
Page 3
May 9, 1986

6. Although one can certainly make an argument that arrests should not be considered where they do not result in conviction, in view of the general presumption of innocence standard, I am nevertheless of the opinion that arrests should be considered to some degree. This is particularly true where there is not a finding of not guilty. I would think, however, that arrests which are disposed of on other than a finding of not guilty should not be weighted particularly heavily in the Commission's determination.

7. The fact that a defendant is on probation or parole at the time of the offense should be considered extremely heavily against a defendant. This is an individual who already has a prior conviction and who has been released on society on his good behavior. The fact that he commits another violation while on such a probationary period should be weighted very heavily against the individual. I would think that a factor of at least 30% to 50% increase in severity of the underlying conviction would be appropriate.

8. The question of what level of sentence aggravation should be given based on the prior record is a difficult question to answer without extensive research, which obviously my office does not have the capability of doing at the present time. I would say in general that increases of up to 100% should be considered where the defendants have prior records of violence or where they have repeated non-violent offenses of the same nature of which they are convicted. That is, an individual with a prior bank robbery should be severely punished for committing additional bank robberies. Similarly, an individual who has a long history of fraud cases should have his sentence substantially raised if he continues to commit fraud. The exact level of aggravation would have to depend on the authorized maximum punishment and the nature of the underlying convictions. An individual with a prior conviction for bad checks should obviously not have an extensive aggravation factor for committing an assault and battery-type violation.

One area that I remain concerned about particularly is the use of arbitrary cut-off points in rating severity. For examples, an armed bank robber should not have the

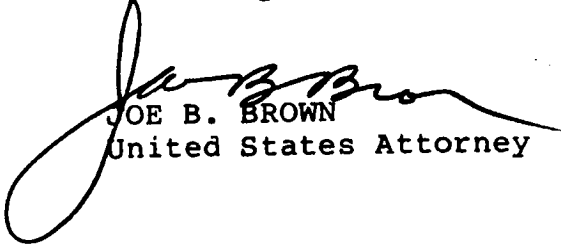
William W. Wilkins, Jr.

Page 4

May 9, 1986

severity effected because all the money he is able to carry out of the bank is less than a set amount. His intent is clearly to take all the money available in the bank. Likewise, an embezzler who is engaged in the course of conduct intends to embezzle all the money that he can and the amount of money that he embezzles is normally more a function when he is caught rather than any particular lack of criminal intent on his part. Thus, a sharp break point between a person who embezzles \$5,000 as opposed to one who embezzles \$5,500 to me is arbitrary and should be avoided, if at all possible.

Sincerely,



JOE B. BROWN
United States Attorney

JBB/pww

cc: Robert G. Ulrich
U.S. Attorney for the
Western District of Missouri
549 U.S. Courthouse
811 Grand Avenue
Kansas City, Missouri 64106



U.S. Department of Justice

United States Attorney
Eastern District of Kentucky

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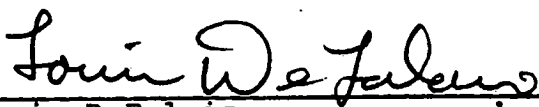
May 12, 1986

Hon. Robert G. Ulrich
United States Attorney
549 U.S. Courthouse
811 Grand Avenue
Kansas City, MO 64106

Dear Bob:

In response to your telex of May 5, 1986, I am enclosing a statement representing my views in response to the letter that you received from Judge Wilkins. Please feel free to forward them or incorporate them into some summary or to simply toss them if they are duplicitous of comments made by other United States Attorneys.

Sincerely,


Louis DeFalaise
United States Attorney

LD/nrc

Enclosure



U.S. Department of Justice

United States Attorney
Eastern District of Kentucky

Post Office Box 1490
Lexington, Kentucky 40591

606/233-2661
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May 12, 1986

Hon. William W. Wilkins, Jr.
Chairman, United States Sentencing Commission

Dear Judge Wilkins:

The following comments are meant to reflect only my own views as United States Attorney for the Eastern District of Kentucky.

Before I answer the specific questions posed by you in your letter of April 25, 1986, to the Hon. Robert G. Ulrich, United States Attorney for the Western District of Missouri, I would like to make some preliminary comments. The subject of imprisonment has been of interest to me for some period of time, as prior to my current position I was the Vice-Chairman of the House Judiciary Committee of the Kentucky General Assembly.

It has been my belief for some period of time that absent great advances in the art of psychology and the related sciences, the only way to deal with habitual and particularly violent offenders is incarceration, as all of the studies I have seen seem to indicate that only age seems to be a limiting factor on future violent behavior, excluding one-time passion killings. It has also been my belief that we need to make more of an effort for alternate forms of dealing with first time non-violent offenders to avoid their receiving post-graduate degrees in crime in our present prison system.

The most difficult type of offenders it seems for our present system to deal with is the habitual non-violent offender. As statistics seem to support the view that an inordinate amount of offenses are repeated by a small number of what could be called super offenders, I believe that whatever system you devise for sentencing should be weighed to provide maximum periods of incarceration for repeat offenders, particularly those with violent propensity. I would think that

Hon. William W. Wilkins, Jr.
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May 12, 1986

crimes committed during times of parole or probation should weigh particularly heavy as they tend to show individual inability to change his behavior pattern. In answer to your specific questions I would state as follows:

1) I believe the effective way to differentiate between felony and misdemeanor offenses, keeping an eye on traditional definitions, would be to look at statutory maximum sentence periods that could be imposed. However, a crime, is defined, if the period of maximum incarceration is a year or less. I think for your purposes it should be denoted as a misdemeanor, otherwise a felony.

2) I believe prior felony convictions should be weighed. I think the first distinction should be made between crimes against persons versus crimes against property. Crimes against persons should always be weighed more heavily as they in most instances will presumably involve violence, and secondly, within those two categories further distinctions should be given to the seriousness of the offense based upon harm inflicted, threats posed, etc.

3) While a decay factor should be considered, an arbitrary cut-off figure, such as 10 years does not allow for sophisticated or professional criminals, I have seen a few instances of extremely intelligent individuals who after some initial prison time are able to go long periods of time before convicted again, even though leading a criminal life. I would suspect that this would be particularly true in the case of organized crime figures. If there is to be a decay factor rather than a flat 10-year figure I would recommend some type of graduated step-down beginning at 10 years and decreasing every 5 years thereafter. If a flat 10-year figure is to be used then I would urge that the starting point be the later date of either the conviction date, prison release date, or supervision release date.

4) I certainly think serious juvenile offenses should be given the same weight as adult convictions, particularly if committed by older juveniles.

5) I have insufficient information to make an intelligent comment as to military, foreign or tribal convictions.

6) The facile answer would be that only prior convictions should be considered. However, considering factors such as plea bargaining, diversions, mediations, etc. it might be appropriate to give some weight to extensive arrest records, although it is difficult to picture how this could be done within a constitutionally protected fashion.

Hon. William W. Wilkins, Jr.
Page 3
May 12, 1986

7) I would urge you to give heavy weight to offenses committed while a person is on probation or parole.

8) I am not sure that I understand the full thrust of your final question, but taking it as I understand it, I would suggest a step system be devised to cause an increasing period of incarceration correspondent to the number of prior offenses with additional weight being given for severity of offenses so that habitual violent offenders would, in effect, be required to serve the maximum period of sentence that could be imposed, subject to good time only.

Sincerely,



Louis DeFalaise
United States Attorney

LD/nrc

AMGED
0001 09:27:09 05/14/86

RF AA AWMOU .

RJA
CCC
DCT
MAJ

REL
JWM
ALM
JRO

LLS
MAS
RBS
JOS

Springfield
~~0000000000~~
G.K.J.

0002 09:32:57 05/14/86

FR: JOE D. WHITLEY, U.S. ATTORNEY, MIDDLE DISTRICT OF GEORGIA
POST OFFICE BOX U, MACON, GEORGIA 31202

TO: ROBERT C. ULRICH, U.S. ATTORNEY
WESTERN DISTRICT OF MISSOURI
549 U.S. COURTHOUSE
811 GRAND AVENUE
KANSAS CITY, MISSOURI 66106

RGU
TML
RW

RE: RESPONSE TO INQUIRY FROM U.S. SENTENCING COMMISSION

THE FOLLOWING SETS FORTH MY VIEWS ON THE POINTS RAISED IN JUDGE
WILKINS' LETTER:

(1) DEFINITION OF FELONY VS. MISDEMEANDR: THE COMMISSION SHOULD
NOT ENGAGE IN A DETAILED ANALYSIS BUT SHOULD EITHER RELY UPON THE
DEFINITION OF FELONY & MISDEMEANOR FOUND IN TITLE 18 OR SHOULD RELY
UPON THE LEGISLATIVE DETERMINATION BY EACH STATE.

(2) WEIGHT OF PRIOR FELONY CONVICTIONS: SERIOUS OFFENSES SHOULD
CARRY MORE WEIGHT THAN LESS SERIOUS PREVIOUS OFFENSES. THE
COMMISSION COULD BE GUIDED BY THE GUIDELINES USED BY THE U.S. PAROLE
COMMISSION IN DETERMINING "SERIOUSNESS".

(3) DECAY FACTOR: THE STARTING POINT SHOULD BE THE PERSON'S
RELEASE DATE.

(4) JUVENILE OFFENSES: JUVENILE OFFENSES SHOULD NOT BE CONSIDERED
IN ESTABLISHING GUIDELINES BUT CONSIDERED ONLY IN A SUBJECTIVE WAY
BY THE SENTENCING JUDGE IN ARRIVING AT THE APPROPRIATE SENTENCE
WITHIN THE GUIDELINES.

(5) MILITARY, FOREIGN, TRIBAL CONVICTIONS: EXCEPT FOR STATUS
OFFENSES AND OFFENSES AGAINST MILITARY DISCIPLINE, MILITARY OFFENSES
SHOULD BE GIVEN THE SAME WEIGHT AS OTHER FEDERAL OR STATE
CONVICTIONS. FOREIGN AND TRIBAL CONVICTIONS SHOULD BE GIVEN THE
SAME WEIGHT AS OTHER FEDERAL OR STATE CONVICTIONS.

(6) PREVIOUS ARRESTS: THE COMMISSION SHOULD NOT CONSIDER PREVIOUS
ARRESTS BUT ONLY CONVICTIONS FOR PURPOSES OF ESTABLISHING
GUIDELINES. THE SENTENCING JUDGE SHOULD BE PERMITTED TO CONSIDER
PREVIOUS ARRESTS ALONG WITH WHATEVER INFORMATION IS AVAILABLE
CONCERNING THOSE ARRESTS.

(7) OFFENSES COMMITTED BY PAROLEES AND PROBATIONERS: THIS FACTOR
SHOULD BE GIVEN GREAT WEIGHT IN ESTABLISHING GUIDELINES.

(8) EFFECT OF PRIOR RECORD ON SENTENCE AGGRAVATION: UTILIZE
GUIDELINES CURRENTLY IN USE BY THE U.S. PAROLE COMMISSION.

Duplicate

0xAWMDU RR AA ATERM .
FROM: ROBERT C. ULRICH
UNITED STATES ATTORNEY
WESTERN DISTRICT OF MISSOURI
549 U.S. COURTHOUSE
811 GRAND AVENUE
KANSAS CITY, MO 64106

TO: ALL U. S. ATTORNEYS THROUGHOUT THE UNITED STATES

RE: UNITED STATES SENTENCING COMMISSION

JUDGE WILKINS SOLICITS WRITTEN VIEWS OF "WHAT 'OFFENDER CHARACTERISTICS' SHOULD AFFECT SENTENCING, BUT SPECIFICALLY, THE IMPACT A DEFENDANT'S PRIOR CRIMINAL RECORD SHOULD HAVE ON SENTENCING."

THE SENTENCING COMMISSION WILL HOLD A HEARING ON MAY 22, 1986, DURING WHICH A LIMITED NUMBER OF FEDERAL OFFICIALS HAVE BEEN INVITED TO APPEAR AND TESTIFY ON THE "AVAILABILITY, RELIABILITY AND USE OF OFFENDER BACKGROUND INFORMATION RELEVANT TO SENTENCING."

AFTER REVIEWING THIS TELETYPE, IF YOU WISH TO MAKE WRITTEN COMMENTS IN RESPONSE TO JUDGE WILKIN'S LETTER, PLEASE SEND YOUR COMMENTS TO MANUEL RODRIGUEZ, EXECUTIVE OFFICE FOR U. S. ATTORNEYS, WASHINGTON, D.C. PLEASE SEND A COPY TO ME. UPON RECEIPT OF YOUR COMMENTS THEY WILL BE SUBMITTED TO RONALD GAINER, ASSISTANT DEPUTY ATTORNEY GENERAL, THE ATTORNEY GENERAL'S REPRESENTATIVE TO THE COMMISSION, FOR SUBMISSION TO THE COMMISSION.

ALTHOUGH THE DATE OF THE LETTER IS APRIL 25, 1986, I RECEIVED THE LETTER ONLY RECENTLY. THE COMMISSION REQUESTS RESPONSE BY MAY 12, 1986, BUT IF IT ISN'T POSSIBLE TO SUBMIT ANY COMMENTS YOU DESIRE TO MAKE BY THAT DATE, PLEASE SUBMIT YOUR COMMENTS WHEN YOU CAN.

THE FOLLOWING IS A COPY OF THE LETTER THAT I RECEIVED FROM JUDGE WILKINS, CHAIRMAN, UNITED STATES SENTENCING COMMISSION.

PART 1. TO BE CONTINUED.

NNNN

0001 14:22:17 05/05/86

**AHHOU RR AA ATERM .
UNITED STATES ATTORNEY
WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI 64106**

TO: ALL U. S. ATTORNEYS THROUGHOUT THE UNITED STATES

RE: UNITED STATES SENTENCING COMMISSION

PART 2 (CONTINUATION FROM PART 1)

"APRIL 25, 1986

**"HON. ROBERT G. ULRICH
UNITED STATES ATTORNEY
WESTERN DISTRICT OF MISSOURI
549 UNITED STATES COURTHOUSE
811 GRAND AVENUE
KANSAS CITY, MISSOURI 64106**

DEAR MR. ULRICH:

AFTER A PRODUCTIVE HEARING ON OFFENSE SERIOUSNESS APRIL 15, THE U.S. SENTENCING COMMISSION IS SCHEDULING A SECOND HEARING TO FOCUS ON HOW A DEFENDANT'S CRIMINAL RECORD SHOULD AFFECT HIS SENTENCE. A LIMITED NUMBER OF FEDERAL OFFICIALS WHO WORK IN THE CRIMINAL JUSTICE SYSTEM HAVE BEEN INVITED TO TESTIFY AT THE HEARING, SCHEDULED FOR MAY 22, 1986.

IN CONNECTION WITH THE HEARING, THE COMMISSION IS ASKING YOU TO SUBMIT YOUR VIEWS IN WRITING NOT ONLY ON THE BROAD ISSUE OF WHAT "OFFENDER CHARACTERISTICS" SHOULD AFFECT SENTENCING, BUT SPECIFICALLY, THE IMPACT A DEFENDANT'S PRIOR CRIMINAL RECORD SHOULD HAVE ON SENTENCING. AMONG THE ISSUES PRESENTED UNDER PRIOR RECORD ARE THE FOLLOWING QUESTIONS:

+HOW SHOULD THE SENTENCING COMMISSION DEFINE FELONY AND MISDEMEANOR OFFENSES IN VIEW OF THE DEFINITIONAL DISPARITY AMONG STATES, AND BETWEEN STATES AND THE FEDERAL SYSTEM? FOR GUIDELINE PURPOSES, SHOULD THE DETERMINING FACTOR BE THE NATURE OF THE OFFENSE, THE LENGTH OF THE SENTENCE IMPOSED, THE STATUTORY MAXIMUM OF THE OFFENSE OR SOME OTHER VARIABLE?

END OF PART 2 (TO BE CONTINUED)

NNNN

AUMDU RE AA ATERN .
FROM: ROBERT E. ULRICH
UNITED STATES ATTORNEY
WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI 64106

TO: ALL U. S. ATTORNEYS THROUGHOUT THE UNITED STATES

RE: UNITED STATES SENTENCING COMMISSION

PART 3 (CONTINUED FROM PART 2)

+ HOW SHOULD PRIOR FELONY CONVICTIONS BE WEIGHTED?
SHOULD SERIOUS PREVIOUS OFFENSES COUNT AGAINST THE OFFENDER MORE
IN ESTABLISHING THE CURRENT SANCTION THAN RELATIVELY LESS SERIOUS
PRIOR OFFENSES? HOW SHOULD SERIOUSNESS OF PRIOR OFFENSES BE
DELINEATED?

+ WHAT DECAY FACTOR, IF ANY, SHOULD THE COMMISSION
BUILD INTO THE GUIDELINES WHEN CONSIDERING A DEFENDANT'S PRIOR
CRIMINAL HISTORY? FOR EXAMPLE, SHOULD A PRIOR FELONY CONVICTION
FACTOR INTO A DEFENDANT'S POSSIBLE SENTENCE IF HIS PREVIOUS
CONVICTION OCCURRED 10 YEARS EARLIER? SHOULD THE STARTING POINT
IN A DECAY PERIOD BE THE CONVICTION DATE, PRISON RELEASE DATE OR
SUPERVISION RELEASE DATE?

+ SHOULD PRIOR JUVENILE OFFENSES BE CONSIDERED IN
ESTABLISHING SENTENCES FOR ADULT OFFENDERS? SHOULD THEY BE GIVEN
THE SAME WEIGHT AS ADULT CONVICTIONS? IF SO, WHAT DECAY FACTOR,
IF ANY, SHOULD BE BUILT IN?

+ HOW SHOULD THE COMMISSION HANDLE MILITARY
CONVICTIONS? WHAT ABOUT FOREIGN CONVICTIONS OR TRIBAL
CONVICTIONS?

+ SHOULD THE COMMISSION CONSIDER PREVIOUS ARRESTS OR
ONLY CONVICTIONS WHEN DETERMINING A DEFENDANT'S PRIOR CRIMINAL
RECORD?

+ SHOULD THE FACT THAT A DEFENDANT WAS ON PROBATION OR
PAROLE AT THE TIME OF THE OFFENSE OF CONVICTION BE CONSIDERED,
AND IF SO, HOW SHOULD IT BE WEIGHTED?

+ WHAT LEVEL OF SENTENCE AGGRAVATION SHOULD BE GIVEN
FOR WHAT LEVEL OF PRIOR RECORD?

END OF PART 3 (TO BE CONTINUED)

NNNN

AUMDU RR AA ATERM .
FROM: ROBERT G. ULRICH
UNITED STATES ATTORNEY
WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI 64106

TO: ALL U. S. ATTORNEYS THROUGHOUT THE UNITED STATES

RE: UNITED STATES SENTENCING COMMISSION

PART 4 (CONTINUATION OF PART 3)

THE COMMISSION HAS PREVIOUSLY SOLICITED YOUR OPINIONS AND THOSE OF A BROAD GROUP OF INDIVIDUALS AND ORGANIZATIONS CONCERNING THE OFFENDER CHARACTERISTICS A JUDGE SHOULD AND SHOULD NOT CONSIDER WHEN SENTENCING. THIS WAS DONE IN PARTIAL FULFILLMENT OF THE STATUTORY REQUIREMENT THAT THE COMMISSION "SHALL CONSIDER WHETHER THE FOLLOWING MATTERS, AMONG OTHERS, WITH RESPECT TO A DEFENDANT, HAVE ANY RELEVANCE... AND SHALL TAKE THEM INTO ACCOUNT ONLY TO THE EXTENT THAT THEY DO HAVE RELEVANCE." THE STATUTE GOES ON TO LIST ELEVEN SPECIFIC FACTORS FOR THE COMMISSION'S CONSIDERATION: AGE; EDUCATION; VOCATIONAL SKILLS; MENTAL AND EMOTIONAL CONDITION TO THE EXTENT THAT SUCH CONDITION MITIGATES THE DEFENDANT'S CULPABILITY OR TO THE EXTENT THAT SUCH CONDITION IS OTHERWISE PLAINLY RELEVANT; PHYSICAL CONDITION INCLUDING DRUG DEPENDENCE; PREVIOUS EMPLOYMENT RECORD; FAMILY TIES AND RESPONSIBILITIES; COMMUNITY TIES; ROLE IN THE OFFENSE; CRIMINAL HISTORY AND DEGREE OF DEPENDENCE UPON CRIMINAL ACTIVITY FOR A LIVELIHOOD.

THIS LETTER, THEN, IS AN INVITATION TO PROVIDE THE COMMISSION WITH YOUR DETAILED THOUGHTS ON THE TOPIC OF PRIOR RECORD AND OTHER OFFENDER CHARACTERISTICS BEFORE THE NEXT HEARING. THE COMMISSION WILL STUDY EACH SUBMISSION AND MAKE IT PART OF THE HEARING RECORD. IT WOULD BE MOST HELPFUL TO THE COMMISSION IF YOUR WRITTEN VIEWS COULD BE RECEIVED ON OR BEFORE MAY 12, 1986.

END OF PART 4 (TO BE CONTINUED)

NNNN

0004 15:26:50 05/05/86

AWHOU RR AA ATERM .
FROM: ROBERT C.ULRICH
UNITED STATES ATTORNEY
WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI 64106

TO: ALL U. S. ATTORNEYS THROUGHOUT THE UNITED STATES

RE: UNITED STATES SENTENCING COMMISSION

PART 5 (CONTINUED FROM PART 4)

THE COMMISSION HAS INVITED FEDERAL PROSECUTORS, PUBLIC DEFENDERS, PROBATION OFFICERS, JUDGES AND AN FBI RECORDS EXPERT TO TESTIFY AT THE THURSDAY, MAY 22 HEARING ON THE AVAILABILITY, RELIABILITY AND USE OF OFFENDER BACKGROUND INFORMATION RELEVANT TO SENTENCING. THE HEARING WILL BEGIN AT 10 A.M. IN THE COMMISSION'S HEARING ROOM, 14TH FLOOR OF THE NORTH OFFICE TOWER AT NATIONAL PLACE, 1331 PENNSYLVANIA AVENUE, N.W. WASHINGTON, D.C. 20004. WE INVITE YOUR ATTENDANCE.

IN THE MONTHS TO COME, THE SENTENCING COMMISSION IS PLANNING TO HOLD HEARINGS IN WASHINGTON, D. C. ON SENTENCING OPTIONS, CORPORATE SANCTIONS, PLEA NEGOTIATIONS AND OTHER TOPICS. COMPLETE INFORMATION WILL BE DISTRIBUTED UPON CONFIRMATION OF SPECIFIC HEARING TOPICS AND DATES. THE SENTENCING COMMISSION LOOKS FORWARD TO YOUR INPUT AND CONTINUED INTEREST IN OUR WORK.

SINCERELY,

/S/ WILLIAM W. WILKINS, JR.

WILLIAM W. WILKINS, JR.
CHAIRMAN"

END OF PART 4 AND END OF MESSAGE.

NNNN

0005 15:49:10 05/05/86



U.S. Department of Justice

United States Attorney
District of Kansas

May 13, 1986

306 United States Courthouse
401 North Market
Wichita, Kansas 67202
316/269-6481
FTS/752-6481

Topeka Office
444 Quincy
Topeka, Kansas 66683

Kansas City Office
812 North 7th
Kansas City, Kansas 66101

Manuel Rodriguez
Executive Office for U. S.
Attorneys
U. S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: U. S. Sentencing Commission

Dear Mr. Rodriguez:

I am writing in response to Bob Ulrich's teletype dated May 5, 1986, regarding "offender characteristics" to be considered in sentencing of federal defendants in criminal cases. As I understand, a hearing is scheduled for May 22, 1986, and these, together with others, will be submitted to Ronald Gainer, Assistant Deputy Attorney General, to submit to the Sentencing Commission.

I have prepared remarks corresponding with separate questions set out in Judge Wilkin's letter to Bob Ulrich, which was recopied in Bob Ulrich's teletype message. They are as follows:

1. The Sentencing Commission, in view of the definitional disparity between states, and between states and the federal system, should define felony and misdemeanor cases by the nature of the offense and the statutory maximum sentence that can be imposed.

The length of the sentence imposed should be given little, if any, weight or consideration. As it appears to me, a principle purpose for the Sentencing Commission guidelines is to eliminate disparate sentences such as have existed in the past.

Manuel Rodriguez
Page Two
May 13, 1986

2. Prior felony convictions should be weighted on the basis of the seriousness of the offense of which one is convicted. Seriousness, per se, should be delineated based on the severity of the offense; i.e., the nature of the offense vis a vis the statutory maximum sentence that can be imposed.

3. It would be desirable to factor in guidelines with respect to a defendant's prior criminal history. Although I have no specific recommendations to make, this should take into account the length of time from the previous supervision release date to the date of the present offense being considered.

4. Juvenile adjudications, considering that the juvenile justice system is designed to allow for certain youthful indiscretions without having a permanent criminal record, should be considered only when the adjudication is for an act of violence or in circumstances where the juvenile has been certified to be prosecuted as an adult.

5. Military and Tribal offenses should be dealt with by making a comparison between the defined military or tribal crime with its federal or state counterpart.

6. Consideration should not be given previous arrests that did not result in conviction. To take other arrests into account, it seems to me, would undermine the Constitutional presumption of innocence and requirement of proof beyond a reasonable doubt.

7. The fact a defendant was on probation or parole at the time of the commission of the offense being considered for sentencing - not the date of conviction, but the date of the offense - should be considered cause for a mandatory jail term.

Yours very truly,


BENJAMIN L. BURGESS, JR.
United States Attorney

BLB:hs



U.S. Department of Justice

United States Attorney
District of Nebraska

8000 United States Post Office & Courthouse
Omaha, Nebraska 68101-1228
402/221-4774
FTS/864-4774

Post Office Box 1228
Downtown Station

May 15, 1986

Robert G. Ulrich
United States Attorney
Western District of Missouri
549 U.S. Courthouse
811 Grand Avenue
Kansas City, MO 64106

Dear Bob:

You had sent a letter regarding sentencing guidelines that I would like to address even though it is past the May 12th date. With regard to the questions asked, I would like to give you my opinion based upon 25 years of prosecution experience.

1. A felony should be defined as any crime for which a person could be sent to prison (not jail) for a period in excess of one year. A misdemeanor should be defined as any offense punishable by a sentencing to jail.

2. Prior felony convictions should be weighted in categories as follows: (1) where death occurred, (2) where serious personal injury resulted, (3) where serious injury could have been the result, (4) crimes resulting in large monetary loss or no personal injury but still a crime of violence, (5) minor monetary loss.

3. Decay factor should be built into the system wherein a prior felony conviction should not be counted if the conviction occurred 10 years earlier. The starting point in the decay period should be the conviction date for those not incarcerated or the prison release date for those incarcerated. These factors, however, should not apply for crimes of violence involving serious personal injury or death.

Page Two
May 15, 1986

4. Prior juvenile offenses should be considered in establishing an offense with adult offenders. This would be difficult, however, as many state statutes, I believe, require juvenile records to be purged or sealed at some point in time. If they are not, they should be given the same weight as adult offenders with the same factor built in as I previously indicated.

5. I see no reason that military convictions should be handled any differently than offenses in the non-military system except for offenses that are strictly military in nature such as being AWOL. Crimes of violence and monetary losses should be treated the same. That should apply to foreign convictions or tribal convictions as well.

6. I do not know if any weight for previous arrests could be considered for sentencing purposes unless prosecution was declined for a previous arrest because of other prosecution. I think this area would be extremely difficult to delineate by statute.

7. If a defendant commits a crime while on probation or parole it should be considered as an additional factor to the weighting considerations I have listed previously. A greater weight should be attributed to the offenses if there is a crime of violence.

8. Sentencing aggravation should be given for two misdemeanors equaling the lowest level of weight for felony offenses. For three or more prior felony offenses of any kind a substantial aggravation factor should be added and a substantial aggravation factor should be added for any prior offenses involving violence. Property crimes should be given a lesser aggravation factor.

While these comments are somewhat general in nature, I hope they express to some degree my feelings in dealing with the recidivist, as well as important standards to be applied with the sentencing of any individual.

My best regards,



RONALD D. LAHNERS
United States Attorney

/dms



U.S. Department of Justice

United States Attorney
District of Hawaii

Room C-242, United States Courthouse
300 Ala Moana Blvd., Box 50183
Honolulu, Hawaii 96850

808/546-7170

May 15, 1986

Robert G. Ulrich
United States Attorney
W.D.-Missouri
549 U.S. Courthouse
811 Grand Avenue
Kansas City, Missouri 64106

Dear Mr. Ulrich:

Attached is a memo from one of my assistants containing his comments about the proposed Sentencing Commission guidelines. I hope you find it of some use.

Yours very truly,

DANIEL BENT
United States Attorney
District of Hawaii

Encl.

Memorandum

**Subject**

U.S. Sentencing Commission Criteria

Date

May 13, 1986

To

Daniel Bent
United States Attorney

From

Robert J. Hackman RJH
Assistant U.S. Attorney

Several weeks ago you forwarded to me the stack of materials from the Sentencing Commission which solicited our views on the proposed categorization and proposed penalties for offenses under the new Crime Control Act. Unfortunately, this stack managed to find its way to the bottom of my In box and I failed to notice that our suggestions were supposed to be forwarded by April 25. In any event, what follows are a few of my thoughts regarding the proposals.

As to the categorization of offenses, it's hard to make a complete and meaningful comment without taking a six-month Sabbatical to study the proposed classifications and the instructions sent to us by the Sentencing Commission, therefore I won't make any suggestions in this regard.

My only comments refer to the proposed penalties which in many cases are lower than those currently set by the individual sentencing sections in Title 18. I will simply run through a few representative examples, but it seems to me, on the whole, proposed maximum terms of imprisonment to be used by the Sentencing Commission are too low.

Arson has been downgraded from a twenty year maximum to a ten year maximum term. Similarly, extortion, presumably including Hobbs Act offenses, has also been reduced from the present twenty year maximum to a ten year maximum. Indeed, it appears that extortion under color of official right, as opposed to extortion by threat of injury, has been downgraded from a twenty year maximum to a five year maximum. This seems to be one of the more extreme examples of inappropriate maximum terms which the Sentencing Commission is proposing to use. Witness tampering and obstruction of justice seems to have been reduced from a current fifteen year maximum to a ten year maximum in some cases and as low as a two year maximum in other cases. Retaliating against a witness or informant has been reduced from a five year maximum to a two year maximum. This seems to be contrary to the spirit of the victim-witness protection program. Criminal

Memorandum to Daniel Bent
Page 2
May 13, 1986

contempt is now a Class B misdemeanor which carries a six-month maximum sentence. False statements, including those coming under Section 1001 will be reduced from the current five year maximum to a two year maximum. Bribery of a public official has been reduced from the current fifteen year maximum to a ten year maximum. You will be happy to know that trafficking in contraband cigarettes will remain a five year offense. However, trafficking in Schedule I or Schedule II controlled substances seems to have been reduced from the present thirty year maximum to a twenty year maximum. The maximum penalties for tax evasion have actually increased depending upon the size of the tax payment involved. In the event the tax payment is in excess of \$100,000, the maximum penalty will go from five years to ten years. However, for amounts less than \$100,000, the maximum term of imprisonment will remain five years. Failing to file remains a one year misdemeanor.

I suspect these new maximum figures were based upon the parole guidelines and sentences actually imposed over the years as well as the amount of time defendants have actually spent in prison. However, I still feel that the higher maximum periods of incarceration should still be available to judges in the event of aggravated cases.

RJH/dh

RECEIVED MAY 23 1986

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
PROBATION OFFICE

MELVIN C. SMITH
CHIEF PROBATION OFFICER

May 19, 1986

U.S. COURTHOUSE
BOX 3327, GREENSBORO 27402
919-378-5341

Reply to:
P. O. Box 108
Durham, NC 27702-0108
919-541-5494
cc: Greensboro, NC

The Honorable William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
Washington, D. C. 20530

Dear Judge Wilkins:

My responses to your letter of April 25, 1986, are as follows:

Group #1 Questions:

Although plea bargaining or "justice without trial" has become a necessary evil in our system of justice, I have problems with the issues raised in this first group of questions. In various geographic locales and jurisdictions, some District Attorneys "overcharge" a defendant with a crime just as some "give away" a true aggravative charge for the easy way out via a defendant's "copping to a lesser charge." Therefore, I favor the determining factor being the nature of the offense. When available, the Probation Officer should provide the sentencing court with such facts from the indictment and police report. On most serious charges, one or both should be available. I can't go with length of sentence because there is such disparity in sentencing.

Group #2 Questions:

Prior felony convictions involving Breaking and Entering, weapons, assaults, and drugs should be counted most serious and should weigh in the current sentence given.

Group #3 Questions:

Decay factor consideration should be given only where there has been no new criminal activity for 10 years following supervision release date.

Group #4 Questions:

Juvenile offenses should be considered in establishing sentences for adult offenders. Serious offenses (Breaking and Entering, weapons, assaults, and drugs) should be given the same weight because unless a juvenile continued criminal behavior into adulthood, there would be no reason to consider same. Decay factor same as Group #3 Question.

The Honorable William W. Wilkins, Jr.

Page 2

May 19, 1986

Group #5 Questions:

If offenses are comparable to a civilian offense, they should be counted the same. Same for foreign or tribal if relevant case/offense material is available.

Group #6 Questions:

This is a loaded question. Guilty until proven innocent is an ideal. However, today I was told by an Assistant State District Attorney that the fifth charge this year is being dropped against one of my parolees. She acknowledged her involvement in the offense but her attorney had the case continued until the witnesses and evidence were no longer available. This type of situation should ideally be counted but I don't see any fair way of being able to differentiate between legal loopholes/snafus and clear cut innocence. So, I say a "reluctant" "no" to considering arrest.

Group #7 Questions:

Committing a new offense (serious and/or violent; offense same as one on supervision for) while on probation or parole should double the sentence imposed (with a mandatory fine) and double the period of confinement required prior to release. An active sentence should be mandatory.

Group #8 Questions:

Four or more prior serious crime convictions should require a mandatory 10 year-no parole, no mandatory release, no good time sentence. A subsequent conviction should require a mandatory 20 year-no parole, no mandatory release, no good time sentence.

I realize that by my answers to the above questions I have taken somewhat of a "hard-line" approach. I believe that if an individual continues to commit serious crimes he or she should be incarcerated and, as a deterrent, there should be a certainty of incarceration.

I appreciate the opportunity to respond to your questions and please be assured of my continued support and interest in the Sentencing Commission.

Sincerely,



STEPHEN F. CONRAD
U. S. Probation Officer/
Officer In Charge

SFC/pg

WASHINGTON LEGAL FOUNDATION

1705 N STREET, N. W.
WASHINGTON, D. C. 20036
202-857-0240

May 20, 1986

The Honorable William W. Wilkins, Jr.
Chairman
The U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Chairman:

Thank you for again requesting the views of the Washington Legal Foundation on matters before your Commission. WLF herewith provides its comments on the relevance of the eleven offender characteristics, including the offender's prior criminal record to the sentencing process. Where we do draw distinctions between non-violent and violent crimes in applying these characteristics, we include in the category of violent crime those crimes where there is actual as well as potential for physical or psychological harm, including all crimes relating to drug dealing.

Age:

WLF believes that age should not serve as a mitigating factor at the sentencing stage. As for juveniles, insofar as age was already considered by the judge in determining whether the juvenile offender should be tried as an adult, the judge already balanced the age of the offender against other aggravating factors. Thus, the age of the offender should not be considered at the later stage of sentencing. If it were deemed proper to try the offender in adult court, it is likewise proper to sentence the offender as an adult. However, the juvenile status of the offender may be considered in determining what facility the offender will serve his sentence in. But outside of this juvenile context, the age of the offender should not be utilized as either a mitigating or aggravating factor.

The current parole board does consider old age to be a factor, suggesting that older defendants should be given more of a break than younger offenders in the 20-29 year-old bracket. This means that convicted spy, 46-year old John Walker gets more of an advantage on the age factor than will his 20-year old son who was also convicted. This distinction is ridiculous.

The Hon. William W. Wilkins, Jr.
May 20, 1986
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Education:

WLF believes that the level of education attained by the offender should not serve either as a mitigating or aggravating circumstance. WLF submits that the consideration of one's educational background both undermines the objectives of fairness and deterrence. It is fundamentally unjust for an uneducated factory worker to receive a harsher punishment than a well-educated professional for committing the same crime. If an offender with a high level of education will be more lightly treated, the goal of deterring future well-educated offenders will be seriously jeopardized.

Similarly, there is no reason, for example, to punish a college educated murderer any harder than his high school drop-out counterpart. They both are educated enough to know that they broke the law. It is patronizing to other less educated but law-abiding citizens to know that they need or deserve special consideration in order to conform their conduct to the law. Thus the low or high level of education of an offender should not be utilized as a mitigating or aggravating factor in any circumstance.

Vocational Skills:

The degree of vocational skills possessed by an offender is likewise an inappropriate factor to utilize in mitigating the offender's sentence in most situations. Only where the committed offense was a non-violent misdemeanor may the vocational skills of the offender be considered insofar as the offender may utilize his skills to gain meaningful employment to pay restitution to the victim.

Mental and Emotional Condition:

Clearly, our system of justice does not hold an individual responsible for offenses committed while the offender was insane. Such a defense by reason of insanity, if successful, precludes prison incarceration.

However, barring a finding of insanity, the critical issue to be addressed is whether mere mental or emotional instability falling short of insanity should mitigate or aggravate one's sentence. We think not. Furthermore, since forms of mental illness are not rare but rather afflict many Americans in varying degrees, consideration of such illness would generally prove unworkable as a mitigating factor. To suggest that punishment should be mitigated because a person was under "stress" or some other nebulous concept is to discredit millions of law-abiding

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Americans who are under "stress" or suffer emotional problems but nevertheless remain law-abiding because of their free will.

Physical Condition/Drug Dependency:

WLF submits that the offender's physical condition and/or drug dependency is not an appropriate factor to consider when determining the length of sentence. It may however be utilized in determining which facility the offender is to be placed in. For example, a convicted murderer who is terminally ill and hospitalized should nevertheless be sentenced to a life term even though he may never leave the hospital. Similarly, an offender with a severe drug dependency should not be sentenced to a lighter prison term as a result of his condition but rather should receive the sentence which is normally in accordance with the offense. If possible, the offender should be able to receive the medical treatment necessary to alleviate his condition.

Previous Employment Record:

WLF maintains that evidence of a good employment history may be utilized in sentencing offenders convicted of non-violent, misdemeanor offenses insofar as some form of restitution is provided to the crime victim by the offender. An egregious but all too typical example of the improper reliance on an offender's previous employment history involved St. Louis Circuit Court Judge Koehr who, citing an offender's good employment record, sentenced an admitted child rapist with a prior felony record to only two years' probation. Criminals should not be rewarded simply because they have a job.

Family Ties and Responsibilities:

An offender's responsibility to his/her family should only be considered as a mitigating factor in a non-violent crime where the family requires the continued employment of the offender in order to subsist. However, the availability of other resources to the family such as governmental transfer payments would negate consideration of this factor. In addition, if the nature of the non-violent offense warrants a prison sentence, but the family needs the offender's income to subsist, the offender should be ordered to serve his jail sentence during non-working hours and on weekends.

Community Ties:

WLF submits that under no circumstances should an offender's degree of community ties influence the sentencing decision. Such

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favorable treatment of offenders serves no worthy objective but rather undermines the confidence of the citizenry at large as to the impartiality of our judicial system.

Role In The Offense:

WLF believes that the degree of the offender's participation is likewise an inappropriate factor for consideration at the sentencing stage. Who is to say what "role" is relevant or not? Is the get-away driver or lookout less culpable than his accomplice inside the bank? Were it not for the lookout, the robber would likely not have decided to commit the crime in the first place. Society should make punishment for aiders and abettors just as tough so that criminal enterprises that need the help of two or more confederates would less likely occur.

For reasons explained below, WLF urges that the prior criminal history should absolutely be considered as an aggravating factor in the sentencing of offenders.

The prior criminal record of an offender must serve as one of the paramount criterion in sentencing. The offender's criminal history and the gravity of the actual offense have been relegated to a disproportionately small role in the determination of sentence. Conversely, mitigating factors, some of which are discussed above, have received undue weight. In support of its position that an offender's prior criminal record should impact more greatly on the imposition of sentence, WLF makes the following recommendations.

First, all prior felony convictions, especially those of violence or risk of violence including drug related offenses, should weigh heavily in the judge's determination of sentence. In particular, WLF would suggest that where crimes for which the offender was previously convicted were similar to the present offense, those past convictions should receive especially significant consideration, as they demonstrate the recidivist tendencies of the offender.

WLF further believes that parole violators are especially egregious and indicative of the prospect for recidivism and lack of remorse. A recent U.S. Department of Justice report highlighted this fact by reporting that 47 percent of those Federal inmates who violated their parole were convicted of a new offense.

Second, WLF believes that prior juvenile convictions should be considered in the sentencing of adult offenders. The commission

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of crimes as a juvenile indicates a greater criminal tendency in the individual's adult life. A study conducted by Marvin E. Wolfgang revealed that:

The chances of becoming an adult offender are much higher for persons who had a delinquency record than for those who did not. The probability of being arrested between eighteen and twenty-six years of age, having had at least one arrest under age eighteen, is three-and-one-half times higher than the probability of being arrested as an adult, having had no record as a juvenile.

"Crime in a Birth Cohort," Proceedings of the American Philosophical Society, Vol. 117, No. 5, Dec. 1973, pp. 404-411.

WLF would, however, limit the consideration of juvenile offenses to convictions as opposed to arrests. But WLF does recommend that an offender's prior history of criminal felony arrests as an adult may be considered in sentencing although not necessary on the same par as prior convictions. Arrests may be particularly considered where the offender was not prosecuted because of some technicality, such as the use of the exclusionary rule which kept out otherwise incriminating evidence.

Third, WLF recommends against the utilization of any "decay" factor for prior felony convictions. Any prior felony convictions, regardless of when they occurred, should be considered as an aggravating factor in the determination of sentence. Exemplifying the improper use of the "decay" factor was the Missouri judge's actions in the child rape case previously discussed. Judge Koehr, in sentencing the convicted rapist to two years' probation, emphasized the rapist's good employment record and disregarded the offender's three prior felony convictions which had occurred over 10 years before. WLF would however have no objections to a 10 year decay factor for non-violent misdemeanor convictions to commence at the supervision release date.

As for the comparison between various state felony and misdemeanor offenses, we suggest that the court look at the statutory maximum sentence in that state to determine the relevancy to the sentencing process. Why should a federal court compound the error of a state judge who released rapists and other violent criminals on probation?

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WLF further recommends that prior military convictions resulting in a court-martial or undesirable discharge be considered as well as prior convictions in foreign tribunals, but closer attention should be placed on the nature of the underlying offense.

It is essential that we endeavor to restore the confidence of the law-abiding citizenry in the integrity and impartiality of our criminal justice system. When the Department of Justice reports that inmates in our federal prisons are being released after serving only a little more than half of their sentences, justice for crime victims and society in general is being circumvented. A solid first step would be to strengthen the sentencing guidelines as WLF has heretofore suggested.

Degree Of Dependence Upon Criminal Activity For A Livelihood:

WLF believes that the degree of dependence by the criminal upon criminal activity for a livelihood should weigh against the criminal. Obviously implicit in this question is the assumption that the underlying crime involved economic benefit, whether robbing banks, dealing in drugs, or embezzlement. However, WLF does not mean to suggest that the nature of the underlying offense should be ignored either. Thus, in our view, a drug dealer who relies on his illegal trade to support his lifestyle should be treated more severely than an embezzler who relies on embezzling to support his livelihood, since embezzling is not as severe a crime as drug dealing.

Thank you for the opportunity to provide our views on this important subject.

Sincerely yours,



Paul D. Kamenar
Executive Legal Director

PDK:jab



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RECEIVED MAY 23 1986

May 22

May 20, 1986

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

Re: Criminal History

Dear Judge Wilkins:

NLADA wishes to formally adopt the position expressed by the Federal Public Defenders, on February 14, 1986, regarding the issue of how a defendant's criminal history should affect his sentence.

We agree with the Federal Defenders that a narrow definition of the term "criminal history" will result in achieving the goals of minimizing sentencing disparity and lessening the burden befalling courts faced with litigants challenging the quality of information considered in the exercise of sentencing prerogatives. We therefore recommend that the Commission adopt the definition of "criminal history" as outlined in the Federal Defender's position paper.

Please let us know if there is additional information you require. We look forward to continuing to work with the Commission.

Cordially,

Mary Broderick

Mary Broderick
Director, Defender Division

MB:am