Contact Person	Source	Central File Number
	Federal Public Defenders	PCA00108
Alex, Robert J.	U.S. Parole Commission	PCA00006
Alschuler, Albert W.	University of Chicago Law School	PCA00027
Arcara, Richard J.; District Attorney	National District Attorneys Association	PCA00102
Ayers, Gary F.; federal prisoner		PCA00180
Bailey, L. W.; Capt. USN		PCA00203
Bamberger, Phyllis S.	Legal Aid Society	PCA00037
Barr, Robert L. Jr.; U.S. Attorney	United States Attorney's Office; Northern District of Georgia	PCA00019
Beck, John A.; private citizen		PCA00192
Becker, Edward R.; Judge	U.S. Court of Appeals; Third Circuit	PCA00100
Bergman, Martin W.		PCA00172
Birdsell, Dale E.	Federal Correctional Institution	PCA00139
Blake, Stephen F.	Advocates Advisory Service, Inc.	PCA00064
Blanco, Cicely Woods		PCA00173
Bonner, Robert C.; U.S. Attorney	Central District of California	PCA00053
Bowles, J. William; private citizen		PCA00195
Bownes, Hugh H.; Federal judge	U.S. Court of Appeals; First Circuit	PCA00051
Brennan, Dottie; President	California League of Alternative Servic Programs	PCA00183

Contact Person	Source	Central File Number
Brewster, Louis G.; Chief Probation Officer	U.S. District Court; Southern District of Texas; Probation Office	PCA00090
Brieant, Charles L.; Chief Judge	U.S. District Court; Southern District of New York	PCA00092
Brockett, William A.		PCA00048
Broderick, Mary	National Legal Aid and Defender Association	PCA00002
Broome, William D.; Chief Probation Officer	U.S. District Court; District of North Dakota; Probation Office	PCA00082
Brown, Cliff		PCA00005
Brown, Jeff	Federal Public Defender's Office; San Francisco	PCA00066
Brown, Joe B.; U.S. Attorney	U.S. Attorney's Office; Middle District of Tennessee	PCA00157
Brown, Stephen A.	Grocery Manufacturers of America	PCA00069
Burger, Edward J. Jr.; Member of Board of Directors	Council for Court Excellence	PCA00083
Burns, James M.; federal judge		PCA00131
Callahan, Evelyn; private citizen		PCA00184
Campbell, Lucien B.; Federal Public Defender	Western District of Texas	PCA00086
Carlson, Norman; Director	Federal Bureau of Prisons	PCA00101
Chambers, J. Bruce; Chief U.S. Probation Officer	U.S. District court; Southern District of Illinois; Probation Office	PCA00161
Chamlee, Donald L.; Chief of the Division of Probation	Administrative Office of the U.S. Courts	PCA00174
Cheever, Kenneth; federal prisoner		PCA00076
Chin, Frank; private citizen		PCA0018

Contact Person	Source	Central File Number
Clarke, Judy; Executive Director	Federal Defenders of San Diego, Inc. Federal Defenders of San Diego	PCA00150 PCA00056
Cobb, Howell, Judge	U.S. District Court; Eastern District of Texas	PCA00093
Crane, Mark	Hopkins and Sutter	PCA00039
Curtin, John T.; chief judge	U.S. District Court; Western District of New York	PCA00166
Dean, James M.; Chief Probation Officer	U.S. District Court; District of Vermont; Probation Office	PCA00079
Deegan, Oliver J.; U.S. Probation Officer	U.S. District Court; Northern District of California; Probation Office	PCA00044
DiGenova, Joseph E.; U.S. Attorney	U.S. Attorneys Office; District of Columbia	PCA00123
Easterbrook, Frank H.; federal judge	U.S. Court of Appeals; Seventh Circuit	PCA00148
Ellis, Alan; Vice President	National Association of Criminal Defense Lawyers	PCA00071
Ellis, James W.; Professor of Law	American Association on Mental Deficiency; Association for Retarded Citizens of the United States	PCA00073
Everett, Robinson O.; Chairperson	Federal Bar Association; Council on Administration of Justice Law Observance Committee	PCA00125
Feinberg, Kenneth R.		PCA00030
Feldman, Barry Jay; federal prisoner		PCA00084
Feldman, James F., Jr.; Staff Attorney	Central Committee for Conscientious Objectors	PCA00116
Forbes, Kirk A.; private citizen		PCA00193
Foster, William T.; Chief Probation Officer	U.S. District Court; Northern District of Illinois; Probation Office	PCA00126

Contact Person	Source	Central File Number
	Office	
Frank, Raymond L.; Chief U.S. Probation Officer	United States District Court; Eastern District of Michigan	PCA00063
Frankel, Marvin E.; Former U.S. District Court Judge		PCA00029
Genovese, Tom	Waste Management, Inc.	PCA00169
Gosso, Linda; private citizen		PCA00189
Gottlieb, David J.	University of Kansas Law School	PCA00062
Grafman, Stephen W.	Kirkpatrick and Lockhart	PCA00001
Graves, William D.; Chief U.S. Probation Officer	United States District Court; District of Colorado	PCA00024
Greacen, John M.; Chair-Elect, Criminal Justice Section	American Bar Association	PCA00109
Green, Ivan T.; Supervising U.S. Probation Officer	Central District of California; U.S. Probation Office	PCA00087
Greenberg, Reuben M.; Chief	City of Charleston Police Department	PCA00121
Groshon, Robert F. Jr.; Federal prisoner		PCA00042
Grossman, Gene M.; Katz, Michael	Princeton University; Woodrow Wilson School of Public and International Affairs	PCA00176
Hanley, Richard T., CPA	W. Hanley and Associates	PCA00007
Harjo, Suzan Shown; Executive Director	National Congress of American Indians	PCA00111
Havenstrite, Al; Chief Probation Officer	U.S. District Court; Northern District of Texas; Probation Office	PCA00074
Heaney, Gerald W.; federal judge	U.S. Court of Appeals for the Eighth Circuit	PCA00158
	U.S. Court of Appeals for the Eighth Circuit	PCA00137

Contact Person	Source	Central File Number
	Office	
Hudson, Henry E.; U.S. Attorney	U.S. Attorney's Office; Eastern District of Virginia	PCA00098
Hughes, Johnny L.; Legislative and Congressional Affairs	National Troopers Coalition	PCA00177
Hughes, Robert C. Jr.; Supervising Probation Officer	U.S. District Court; Middle District of Georgia; Probation Office	PCA00046
Indritz, Tova	Federal Public Defender; District of New Mexico	PCA00040
Ingram, Gail		PCA00198
Iredale, Eugene G.; Attorney	Eugene G. Iredale; Attorney at Law	PCA00107
J. Robert Steegstra; federal prisoner		PCA00186
Johnson, Daniel; Federal Prisoner		PCA00054
Johnson, David E.; Chief Probation Officer	U.S. District Court; District of Maryland; Probation Office	PCA00145
Johnston, Sheri; private citizen		PCA00194
Jones, John B., Jr.; Chair	American Bar Association; Section of Taxation	PCA00114
	American Bar Association; Section of Taxation	PCA00115
Kamenar, Paul D.; Executive Legal Director	Washington Legal Foundation	PCA00155
Kane, John L. Jr.; Federal judge	United States District Court; District of Colorado	PCA00043
Katz, Michael G.	Federal Public Defender; District of Colorado	PCA00041
Kazen, George B., Judge	U.S. District Court; Southern District of Texas	PCA00072
Kearns, Stephanie; Executive Director	Federal Defender Program, Inc.; U.S. District Court; Northern District of Georgia	PCA00153

Contact Person	Source	Central File Number
Knapp, Whitman; federal judge	U.S. District Court; Southern District of New York	PCA00178
Kramer, John H.; Executive Director	Pennsylvania Commission on Sentencing	PCA00170
Krohn, Janice; private citizen		PCA00187
Kulis, Chester J.	Illinois Council Against Handgun Violence	PCA00012
Kusserow, Richard P.; Inspector General	Department of Health and Human Services	PCA00036
Kusserow, Richard P.; Vice Chairman	Department of Health and Human Services; President's Council on Integrity and Efficiency	PCA00105
LaPierre, Wayne R., Jr.; Executive Director	National Rifle Association of America	PCA00162
Lasker, Morris E., Judge	U.S. District Court; Southern District of New York	PCA00081
Laurell, David M.		PCA00197
Lawn, John C.; administrator	U.S. Department of Justice; Drug Enforcement Administration	PCA00181
Leary, Thomas B.	Hogan and Hartson	PCA00013
Leary, Thomas B.; Counsel for the Business Roundtable	Business Roundtable	PCA00133
Lee, Duane R.; Chief of the Division of Magistrates	Administrative Office of the United States Courts	PCA00143
Leval, Pieere N.; federal judge	U.S. District Court; Southern District of New York	PCA00127
Longshore, Robert P.; Supervising U.S. Probation Officer	U.S. District Court; Middle District of Alabama	PCA00035
Loux, Gordon D.; President	Prison Fellowship Ministries	PCA00103
MacCarthy, Terence	U.S. District Court; Northern District of Illinois; Federal Defender Program	PCA00122

Contact Person	Source	Central File Number
Martin, John; Former U.S. Attorney		PCA00028
Mathis, Perry D.; Chief U.S. Probation Officer	U.S. District Court; District of Kansas	PCA00038
Mayne, Roy D.		PCA00008
McGuigan, Patrick M.	Institute for Government and Politics	PCA00096
McMahon, Rory J.; Secretary FPOA	Federal Probation Officers Association	PCA00068
McPhillips, Jane; U.S. Probation Officer	U.S. District Court; Northern District of Texas	PCA00065
Merritt, , Gilbert S.; federal judge	U.S. Court of Appeals; Office of the Circuit Executive	PCA00163
Middleton, Roger E.; Administrative Law Attorney	U.S. Chamber of Commerce	PCA00058
Mikva, Abner J.; federal judge	U.S. Court of Appeals; District of Columbia	PCA00119
Milburn, Henry N.; Chief Probation Officer	U.S. District Court; District of Maine; Probation Office	PCA00130
Miller, David E.; Supervising U.S. Probation Officer	U.S. District Court; Southern District of Ohio; Probation Office	PCA00144
Moore, Lee A.		PCA00025
Moore, Thomas G.	Executive Office of the President; Council of Economic Advisors	PCA00136
Munson, Steven; Federal Prisoner		PCA00004
Myers, Eugene A.		PCA00011
Nevares, Dora		PCA00049
Newman, Jon O.; Federal judge	U.S. Court of Appeals, Second Circuit	PCA00003
Newman, Jon O.; Second Circuit	U.S. Court of Appeals; Second	PCA0010

Contact Person	Source	Central File Number
O'Brien, Donald E.; federal judge	U.S. District Court; Northern District of Iowa	PCA00117
Oberdorfer, Louis F.; federal judge	U.S. District Court	PCA00118
Otto G. Obermaier	Obermaier, Morvillo & Abramowitz, P.C.	PCA00138
Partridge, Anthony	Federal Judicial Center	PCA00014
Partridge, Anthony; Associate Director of Research	Federal Judicial Center	PCA00152
Perelman, David S.; U.S. Magistrate	U.S. District Court; Northern District of Ohio	PCA00045
Quie, Albert, Honorable; Utter, Robert, Honorable	Justice Fellowship	PCA00080
Quinn, Thomas J.	Delaware Criminal Justice Council	PCA00033
Ragonese, Louis J.		PCA00168
Ramage, Lamont; U.S. Probation Officer	United States District Court; Western District of Texas	PCA00020
Rambaldi, Lynn; private citizen		PCA00185
Rathke, Stephen C.	Office of the County Attorney; Crow Wing County, Minnesota	PCA00199
Reed, Edward C., Jr.; federal judge	U.S. District Court; District of Nevada	PCA00167
Resnick, Stewart R.; U.S. Probation Officer	U.S. District Court; District of New Jersey; Probation Office	PCA00147
Root, Reverend Elmer S.		PCA00196
Roper, Kenneth H.		PCA00202
Rosenfeld, Steven B.	Association of the Bar of the City of New York	PCA00159
Rothstein, Alan	Association of the Bar of the City of New York; Committee on Anti Trust and Trade Regulations	PCA00164

Contact Person	Source	Central File Number
Attorney	District of California	7
Saylor, Jack R.; Chief Probation Officer	U.S. District Court; District of South Dakota; Probation Office	PCA00075
Sears, Daniel J.	Daniel J. Sears, P.C.	PCA00026
Seiden, Glenn	Glenn Seiden and Associates	PCA00077
Seidman, L. William; Chairman	Federal Deposit Insurance Corporation; FDIC	PCA00179
Sentelle, David B.; Federal Judge	United States District Court; Western District of North Carolina	PCA00018
Serrano, Anthony F.; Assistant Attorney General	Office of the Attorney General; State of West Virginia	PCA00078
Shehane, Mirian		PCA00021
Shein, Marcia	National Legal Services, Inc.	PCA00023
Shevlin, John M.; Supervising U.S. Probation Office	U.S. District Court; Southern District of Florida; Probation Office	PCA00095
Shields, Pete; Chairman	Handgun Control, Inc.	PCA00112
Silets, Harvey M.	Silets and Martin, Ltd.	PCA00060
Spaeder, Roger C.	Zuckerman, Spaeder, Goldstein, Taylor, and Kolker	PCA00070
Sprizzo, John E.; federal judge	U.S. District Court; Southern District of New York	PCA00132
Stearns, Charles; Supervising U.S. Probation Officer	Central District of California; U.S. Probation Office	PCA00088
Stephenson, Oscar J., Jr.; Supervising U.S. Probation Officer	U.S. District Court; Northern District of Alabama	PCA00055
Stull, Marilyn; Stull, Daniel	Jail House Lawyers Society	PCA00154
Sullivan, Charles	Citizens United for	PCA0009

Contact Person	Source	Central File Number
	Rehabilitation of Errants (CURE)	1
Sweet, Robert W.; federal judge	U.S. District Court; Southern District of New York	PCA00146
Tang, Thomas (Hon.); Aarcon, Arthur L. (Hon.); Nielson, Leland C. (Hon.); Burns, James M. (Hon.); Varnon, Charlie; Maddox; Hillyer	Ninth Circuit Committee	PCA00059
Tashima, A. Wallace; Federal Judge	U.S. District Court; Central District of California	PCA00061
Thomas, R.L.; Chief U.S. Probation Officer	United States District Court; District of Arizona; Probation Office	PCA00017
Thompkins, John W.; federal prisoner		PCA00160
Thompson, Larry D.; U.S. Attorney	United States Attorney's Office; Northern District of Georgia	PCA00022
Travisono, Tony; Executive Director	American Correctional Association	PCA00104
Tripati, Anant Kumar		PCA00120
Trott, Stephen S.	U.S. Department of Justice; Office of the Associate Attorney General	PCA00182
Trott, Stephen S.; Associate Attorney General	U.S. Department of Justice	PCA00156
	U.S. Department of Justice	PCA00110
Troutt, Jeffery D.	Institute for Government and Politics	PCA00097
Tryles, Fred S.; Senior U.S. Probation Officer	U.S. District Court; Eastern District of Michigan	PCA00034
Tuite, Patrick A.	Patrick A. Tuite, Ltd	PCA00085
Tveit, Marie		PCA00200
Tyler, Harold R. Jr.	Patterson, Belknap, Webb and Tyler	PCA00050

Contact Person	Source	Central File Number
Valukas, Anton R.; U.S. Attorney	United States Attorney for the Northern District of Illinois	PCA00016
Varnon, Charles E.; Chief U.S. Probation Officer	U.S. District Court; Eastern District of California	PCA00067
Varnon, Charlie E.; Chief Probation Officer	U.S. District Court; Eastern District of California; Probation Office	PCA00151
Vietor, Harold J.; Chief Judge	U.S. District Court; Southern District of Iowa	PCA00047
Walker, John M., Jr.; federal judge	U.S. District Court; Southern District of New York	PCA00165
Walker, Owen W.	Federal Public Defender; District of Massachusetts	PCA00031
Weber, Joel; U.S. Probation Officer	U.S. District Court; Southern District of New York	PCA00010
Weinstein, Jack B.; Chief Judge	United States District Court; Southern District of New York	PCA00032
Weinstein, Jack; Federal Judge	U.S. District Court; Eastern District of New York	PCA00009
Westman, Richard J.; Supervising U.S. Probation Officer	U.S. District Court; Central District of California; Probation Office	PCA00089
White, H. Blair; President; Darst, Richard L.; Chairman of Criminal Law and Procedure Committee	Seventh Circuit Bar Association	PCA00171
Whitehill, H.H.; Chief U.S. Probation Officer	U.S. District Court; Western District of Texas; Probation Office	PCA00091
Whitelaw, Lorena S.; private citizen		PCA00190
Willcox, Breckinridge L.; U.S. Attorney	U.S. Attorneys Office; District of Maryland	PCA00113
Williams, Richard M.; Supervising U.S. Probation Officer	U.S. District Court; Middle District of Florida; Probation Office	PCA00140
Winter, Gloria		PCA00142

Contact Person	Source	Central File Number
	Office	
Wright, Joseph R; Chairman	President's Commission on Integrity and Efficiency	PCA00124
Young, Don J.; federal judge	U.S. District Court; Northern District of Ohio	PCA00129
Young, Joseph H.; U.S. District Judge	U.S. District Court; District of Maryland	PCA00175
Young, Marlene A.	National Organization for Victim Assistance	PCA00015

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October 7, 1986

STEPHEN W. GRAFMAN
(202) 452-7057

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

Attn: Guideline Comments

Re: 18 U.S.C. § 1365
Tampering with Consumer Products

Gentlemen:

In my review of the recently released preliminary draft of the Sentencing Guidelines, I was unable to locate any reference to the so-called Federal Anti-Tampering Act passed by Congress in 1983 and codified as 18 U.S.C. § 1365 ("Tampering with consumer products"), although I did find reference to 18 U.S.C. § 1365 ("Destruction of an energy facility").

It occurred to me that there may be some confusion, because of the apparent overlap in codification at 18 U.S.C. § 1365 (see, e.g., enclosure attached referencing two separate enactments codified under this section). In any event, we believe the anti-tampering act to be of considerable importance, and urged your careful consideration of this provision in connection with the Sentencing Guidelines.

Should you desire, we would be happy to assist in gathering relevant data in connection with guidelines for the offenses set out in the anti-tampering act. On the other hand, if you have already set forth in the preliminary draft proposed guidelines for these offenses, we would appreciate you advising where these particular guidelines can be located in the preliminary draft.

Thank you for your attention to this letter. I look forward to hearing from you.

Sincerely yours,

Stephen W. Grafman

SWG:jlh
Enclosure

§ 1364. Interference with foreign commerce by violence

Whoever, with intent to prevent, interfere with, or obstruct or attempt to prevent, interfere with, or obstruct the exportation to foreign countries of articles from the United States, injures or destroys, by fire or explosives, such articles or the places where they may be while in such foreign commerce, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

Revision Notes

Based on title 18, U.S.C., 1940 ed., § 381 (June 15, 1917, ch. 30, titles IV, XIII, § 1, 40 Stat. 221, 231; Mar. 28, 1940, ch. 72, § 4, 54 Stat. 79).

Mandatory punishment provisions were rephrased in the alternative.

Definition of the term "United States" was omitted and incorporated in section 5 of this title.

Minor verbal changes were made.

See Also Next Page

§ 1365.[1] Tampering with consumer products

(a) Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate or foreign commerce, or the labeling of, or container for, any such product, or attempts to do so, shall—

(1) in the case of an attempt, be fined not more than $25,000 or imprisoned not more than ten years, or both;

(2) if death of an individual results, be fined not more than $100,000 or imprisoned for any term of years or for life, or both;

(3) if serious bodily injury to any individual results, be fined not more than $100,000 or imprisoned not more than twenty years, or both; and

(4) in any other case, be fined not more than $50,000 or imprisoned not more than ten years, or both.

(b) Whoever, with intent to cause serious injury to the business of any person, taints any consumer product or renders materially false or misleading the labeling of, or container for, a consumer product, if such consumer product affects interstate or foreign commerce, shall be fined not more than $10,000 or imprisoned not more than three years, or both.

(c)(1) Whoever knowingly communicates false information that a consumer product has been tainted, if such product or the results of such communication affect interstate or foreign commerce, and if such tainting, had it occurred, would create a risk of death or bodily injury to another person, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

(2) As used in paragraph (1) of this subsection, the term "communicates false information" means communicates information that is false and that the communicator knows is false, under circumstances in which the information may reasonably be expected to be believed.

(d) Whoever knowingly threatens, under circumstances in which the threat may reasonably be expected to be believed, that conduct that, if it occurred, would violate subsection (a) of this section will occur, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

(e) Whoever is a party to a conspiracy of two or more persons to commit an offense under subsection (a) of this section, if any of the parties intentionally engages in any conduct in furtherance of such offense, shall be fined not more than $25,000 or imprisoned not more than ten years, or both.

(f) In addition to any other agency which has authority to investigate violations of this section, the Food and Drug Administration and the Department of Agriculture, respectively, have authority to investigate violations of this section involving a consumer product that is regulated by a provision of law such Administration or Department, as the case may be, administers.

(g) As used in this section—

(1) the term "consumer product" means—

(A) any "food", "drug", "device", or "cosmetic", as those terms are respectively defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321); or

(B) any article, product, or commodity which is customarily produced or distributed for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which is designed to be consumed or expended in the course of such consumption or use;

(2) the term "labeling" has the meaning given such term in section 201(m) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(m));

(3) the term "serious bodily injury" means bodily injury which involves—

(A) a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and

(4) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary.

(Added Pub.L. 98–127, § 2, Oct. 13, 1983, 97 Stat. 831.)

[1] So in original. Another section 1365 is set out post.

EDITORIAL NOTES

References in Text. Section 201 of the Federal Food, Drug, and Cosmetic Act, referred to in subsecs. (c)(2) and (g)(1)(A), is classified to section 321 of Title 21, U.S.C.A., Food and Drugs.

§ 1365.[1] Destruction of an energy facility

(a) Whoever knowingly and willfully damages the property of an energy facility in an amount that in fact exceeds $100,000, or damages the property of an energy facility in any amount and causes a significant interruption or impairment of a function of an energy facility, shall be punishable by a fine of not more than $50,000 or imprisonment for not more than ten years, or both.

(b) Whoever knowingly and willfully damages the property of an energy facility in an amount that in fact exceeds $5,000 shall be punishable by a fine of not more than $25,000, or imprisonment for not more than five years, or both.

(c) For purposes of this section, the term "energy facility" means a facility that is involved in the production, storage, transmission, or distribution of electricity, fuel, or another form or source of energy, or research, development, or demonstration facilities, relating thereto, regardless of whether such facility is still under construction or is otherwise not functioning, except a facility subject to the jurisdiction, administration, or in the custody of the Nuclear Regulatory Commission or interstate transmission facilities, as defined in 49 U.S.C. 1671.

(Added Pub.L. 98–473, Title II, § 1011(a), Oct. 12, 1984, 98 Stat. 2141.)

[1] So in original. Another section 1365 is set out ante.

CHAPTER 67—MILITARY AND NAVY

Sec.

1381. Enticing desertion and harboring deserters.
1382. Entering military, naval, or Coast Guard property.
1383. Restrictions in military areas and zones.[1]
1384. Prostitution near military and naval establishments.
1385. Use of Army and Air Force as posse comitatus.

[1] Section repealed without amending chapter analysis to reflect such repeal.

EDITORIAL NOTES

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, as amended, set out as a note under section 3551 of this title.

§ 1381. Enticing desertion and harboring deserters

Whoever entices or procures, or attempts or endeavors to entice or procure any person in the Armed Forces of the United States, or who has been recruited for service therein, to desert therefrom, or aids any such person in deserting or in attempting to desert from such service; or

Whoever harbors, conceals, protects, or assists any such person who may have deserted from such service, knowing him to have deserted therefrom, or refuses to give up and deliver such person on the demand of any officer authorized to receive him—

Shall be fined not more than $2,000 or imprisoned not more than three years, or both.

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 94 (Mar. 4, 1909, ch. 321, § 42, 35 Stat. 1097).

Mandatory punishment provisions were changed to alternative.

Words "armed forces" were substituted for repeated references to military service, naval service, soldier and seamen.

Minor changes were made in phraseology.

§ 1382. Entering military, naval, or Coast Guard property

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—

Shall be fined not more than $500 or imprisoned not more than six months, or both.

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 97 (Mar. 4, 1909, ch. 321, § 45, 35 Stat. 1097; Mar. 28, 1940, ch. 73, 54 Stat. 80).

Reference to territory, Canal Zone, Puerto Rico and the Philippine Islands was omitted as covered by definition of United States in section 5 of this title.

Words "naval or Coast Guard" were inserted before "reservation" and words "yard, station, or installation"

Chapt. 63 - Mail Fraud

18 U.S.C. §1341	Frauds and swindles by mail	5 yrs.	§F211
18 U.S.C. §1342	Fraudulent use of fictitious name or address	5 yrs.	§F211
18 U.S.C. §1343	Fraud by wire, radio or television	5 yrs.	§F211
18 U.S.C. §1344	Bank fraud	5 yrs.	§F211

Chapt. 65 - Malicious Mischief

18 U.S.C. §1361	Willful injury to government property or contracts > $100; if ≤ $100	10 yrs. 1 yr.	§B213
18 U.S.C. §1362	Willful or malicious injury to communication lines, stations or systems	10 yrs.	§B213
18 U.S.C. §1363	Malicious injury to buildings or property in federal jurisdiction; if a dwelling or life endangered	5 yrs. 20 yrs.	§B213
18 U.S.C. §1364	Interference with foreign commerce by violence	20 yrs.	Part A, §B213
18 U.S.C. §1365(a)	Damaging an energy facility, causing more than $100,000 in damages or causing a significant interruption	10 yrs.	§B213
18 U.S.C. §1365(b)	Causing damages to an energy facility in excess of $5,000	5 yrs.	§B213

Chapt. 69 - Nationality and Citizenship

18 U.S.C. §1423	Misuse of evidence of citizenship or naturalization	5 yrs.	§L222
18 U.S.C. §1424	Personation or misuse of papers in naturalization proceedings	5 yrs.	§L222
18 U.S.C. §1425	Procurement of citizenship or naturalization unlawfully	5 yrs.	§L221, §L222
18 U.S.C. §1426	Unlawful reproduction or use of naturalization or citizenship papers	5 yrs.	§L221
18 U.S.C. §1427	Sale of naturalization or citizenship papers	5 yrs.	§L221
18 U.S.C. §1428	Failure to surrender a-canceled naturalization certificate	5 yrs.	§L225

NATIONAL LEGAL
AID & DEFENDER
ASSOCIATION

1625 K STREET, N.W.
EIGHTH FLOOR
WASH., D.C. 20006
(202) 452-0620

October 7, 1986

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

Dear Chairman Wilkins:

I am writing in response to your August 20th letter concerning the proper role of plea agreements in a sentencing guidelines system.

NLADA supports the positions taken on this issue by the Federal Public Defenders in a paper submitted to the Sentencing Commission on September 16th.

Specifically, NLADA submits that the proper role for the Commission in regard to plea bargaining is to issue general policy statements pursuant to 28 U.S.C. Sec. 994(a)(2)(D) to assist judges in distinguishing between the appropriate exercise of prosecutorial power under Federal Rule of Criminal Procedure II and the abuse of that power. Moreover, cooperation on the part of the defendant should be rewarded in appropriate cases (although an admission of guilt should not be considered as a form of cooperation), and a specific downward sentence adjustment for cooperation should be determined through plea bargaining with judicial oversight. However, we agree with the Federal Defenders that it is neither feasible nor just to institute a system of graduated discounts for fixed objective levels of cooperation built into the guidelines.

As with the Federal Defenders, NLADA is adamantly opposed to the idea of the guidelines containing an explicit, automatic reduction from the guideline sentence for those defendants who plead guilty. Such a mechanism denigrates the right to a jury trial and provides an inducement to forego a constitutional protection which enjoys a position of particular prominence in our system of justice.

Please let us know if there is any other information you require. We look forward to continuing to work with the Commission.

Sincerely,

Mary Broderick

Mary Broderick
Director
Defender Division

MB/pl

00005
Rec'd 10/17/86
(for NY hearing)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
450 MAIN STREET
HARTFORD, CONN. 06103

October 16, 1986

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

Dear Billy:

Your staff asked me to try to provide a copy of my testimony to the Commission in advance of the hearing next Tuesday. A copy is enclosed.

These are preliminary thoughts hurriedly prepared in the limited time available. I hope to have some additional comments later on.

Sincerely,

Jon O. Newman
United States Circuit Judge

Encl.

Statement of
Judge Jon O. Newman
U.S. Court of Appeals for the Second Circuit
before the U.S. Sentencing Commission
New York, New York October 21, 1986

My name is Jon O. Newman. I am a judge of the United States Court of Appeals for the Second Circuit. I have served on that court for seven and one-half years. I previously served for seven and one-half years as a judge of the United States District Court for the District of Connecticut, and before that for five years as United States Attorney for the District of Connecticut.

As the Commission knows, the Judicial Conference of the United States has asked the Chief Judge of each circuit to designate one circuit and one district judge from each circuit to be in contact with the Commission. I was so designated by Chief Judge Wilfred Feinberg of the Second Circuit. I hasten to add, however, that in the short time between publication of the Commission's preliminary draft of the sentencing guidelines and my appearance here today, it has not been possible to ascertain the views of the members of the Second Circuit. The views I express here today are entirely my own.

As some members of the Commission know, I have long supported the idea of guideline sentencing and am generally supportive of the Commission's effort. The criticisms and suggestions I offer today are presented not to oppose what you have done but to aid in making your final product more workable.

Broadly speaking, there are two sets of issues presented by

your preliminary draft. The first concerns methodology. The second concerns severity of punishment. My analysis of your proposal has thus far been confined almost entirely to issues of methodology. I do not know whether the sentences that will result from application of your guidelines are too severe, too lenient, or just right. Perhaps at some future time, I will have an opportunity to express my reactions to issues of severity of punishment, but for now my sole concern is with methodology, particularly the consequences for the administration of criminal justice that will arise from the methodology currently embodied in your proposal.

I start with the fundamental principle that appears to underlie your entire proposal: every aspect of a criminal's conduct and the harm resulting from such conduct should be reflected in the sentence imposed. More particularly, the premise seems to require not only reflection of all conduct and all harm, but a finely tuned correlation between harm inflicted and punishment imposed. For every increment of harm, there must be an increment of punishment. I have some doubt whether that principle ought to play so dominant a part in the selection of punishment. It seems to elevate retribution to primacy among the legitimate purposes of punishment. But even if punishment is to be scaled to harm inflicted, I am opposed to the degree to which the Commission proposes to apply this principle. In my view, it is a major mistake to force judges to assign specific point values for every increment of harm inflicted, with a resulting increase in punishment. Wholly apart from moral considerations, such precise

computations will encounter either of two unfortunate consequences. Either courts will become burdened with hundreds, perhaps thousands of hearings to make factual determinations as to a host of matters now assessed in the sentencing process only in an unquantified manner, or hearings will be avoided by stipulations between prosecutors and defense counsel, thereby moving critical aspects of the sentencing decision away from the courts and into the hands of counsel, primarily the prosecutor. However necessary plea bargaining is thought to be, sentence bargaining ought never to become the standard procedure for selection of sentences.

My primary criticism is that the proposed guidelines are far too detailed, and my primary suggestion is that the Commission inject some leeway into the system it has proposed. I recognize that in developing a guideline system, you are responding to the criticism that discretion of sentencing judges, bounded only by statutory maximums, has resulted in a degree of disparity in sentencing that many find unacceptable. I am not suggesting that district judges should retain broad sentencing discretion. I suggest only that the degree of rigidity and detail the Commission has proposed be somewhat relaxed. To reach that objective, I submit for your consideration three basic suggestions. In addition, this statement includes a number of specific comments and raises several specific questions.

Basic Suggestions

My three basic suggestions are these: First, I suggest that sentencing judges be permitted either to disregard certain factors now

listed for precise quantification or at least to take certain factors into account by assigning a point value between a range prescribed by the Commission. Second, I suggest that appellate courts, at least during the first year of the new system, be authorized to affirm sentences, despite an error in application of the guidelines, if the sentence imposed is within an acceptable range of discrepancy. Third, I suggest that before the guideline system is put into operation, it be extensively "field tested" in a series of mock sentence hearings in which the roles of prosecutor, defense counsel, and sentencing judge are vigorously played. Let me expand briefly on each suggestion.

1. Leeway at sentencing. Leeway for the sentencing judge to disregard some aggravating (and perhaps mitigating) factors could be accomplished either by reference to an articulated standard or to a mathematical formula. The judge could be permitted to disregard designated aspects of aggravating conduct or harm upon a finding that the sentence to be imposed without regard to such factor is "just and reasonable" under the circumstances. Or the judge could be permitted to disregard designated aspects of aggravating conduct or harm whenever the incremental point value for such harm is less than a stated number of points or a stated percentage of the base point value. As to some factors the judge sometimes should be able to say, "It is just not worth the time of a hearing to determine whether a particular fact is established." Examples are whether a murder victim was "vulnerable" (to what?) because of "mental condition" (page 22, section A212(a)(2)) or whether the number of bodily functions impaired by an

assault and battery was one or more than one (page 27, section A225, commentary 1 and 2).

As an alternative to leeway to disregard completely some designated factors, the judge could be permitted, with respect to certain factors, to select within a range specified by the Commission the number of points to be added (or subtracted), instead of using the precise point value designated by the Commission. The Commission has adopted this flexible approach for some post-offense conduct, e.g., permitting the judge to multiply by between 1.1 and 1.4 for obstruction of justice (page 122, section B311) and reduce by up to 20% for acceptance of responsibility (page 124, section B321). This leeway should be extended to some aspects of the determination of conduct and harm. For example, instead of requiring the judge to make the precise determination of whether there was "severe bodily injury" or "permanent bodily injury) (page 27, section A225, commentary 1 and 2), let the judge add points between a stated range depending on the judge's assessment of the seriousness of the injury. Another example is the requirement that the judge determine whether there was "extreme psychological injury" or "significant psychological injury" (page 34, section A251 (a)(1) and (2). Let the judge add points between a specified range to reflect the severity of psychological injury. Use of a range would not eliminate the need to determine whether the relevant factor is established, but it would avoid the need to determine precisely which sub-category applied.

2. Leeway on appeal. Leeway for appellate judges could be

provided by permitting them to affirm any sentence, notwithstanding errors in guideline application, when the sentence satisfies either some articulated standard or some mathematical formula. If a verbal standard is used, it might be "fair and just under all the circumstances." If that is thought too vague, then appellate courts could be authorized to affirm any sentence that was no more than a stated percentage of the statutory maximum (50%, for example) or any sentence where the calculation error complained of would not reduce the sentence by more than a stated length of time or a stated percentage of the length of the sentence imposed.

At least for the first year of the new system, it does not make sense to have appeals and reversals in every case where an error in guideline calculation will mean no more than two or three months added to the sentence. It may seem unfair to require one defendant to serve those extra months when it can objectively be said that the extra months were "incorrectly" imposed. However, at present defendants who appear to have committed equivalent crimes now receive sentences that vary by a number of years, and appellate courts regularly disclaim any authority to "correct" that type of unfairness. The fact that a system is now to be infused with mathematical precision is not a sufficient reason to require correction of all mistakes.

Some leeway at the appellate levels is needed to partially stem the tide of appeals that can be expected under a system that now makes every sentence entered after a guilty plea subject to appeal. Though appealable sentences outside the guidelines may not be numerous,

appeals may be expected every time there is a claim of misapplication of the guidelines. See 18 U.S.C. § 3742(a)(2).

A transition period with relaxed standards of compliance was adopted when the Speedy Trial Act went into effect, see 18 U.S.C. § 3163(c), and a similar approach is needed with the far more fundamental and complex set of changes proposed by the Commission. Appellate leeway, at least during a transitional period, probably requires a statutory amendment.

3. "Field-testing." "Field-testing" with mock prosecutors, defense counsel, and judges is essential to flush out the numerous problems that are bound to arise once the new system is used in an adversary context. It is not enough for the Commission staff to apply the guidelines and see if they can agree on the correct score applicable to facts as disclosed by numerous pre-sentence reports. The real unknown is the extent to which the Commission's plan will be skewed by the realities of the adversary process. Only in an extensive series of "field tests" can we learn to what extent the prosecutor and defense counsel will stipulate to key facts, to what extent hearings will be required, and how judges will be obliged to react when faced with stipulations. This "field-testing" will very likely demonstrate the need to clarify many aspects of the guidelines and perhaps relax some aspects of the mathematical rigidity before the system is put into effect.

In addition to these three basic suggestions, I offer the following specific comments and also raise a few specific questions.

Specific Comments

1. The problem of multiple counts and cumulative punishment is one of the most difficult the Commission faces. The problem of cumulating sentences arises not only with respect to sentences on several counts within a single indictment, but also with respect to sentences imposed upon a defendant already sentenced for another crime. Though the system currently in use is imprecise, it accomplishes a reasonably workable blending of the discretion of the prosecutor, the judge, and the Parole Commission. The prosecutor can threaten with prosecution under numerous counts, but he cannot assure increased sentencing by doing so. He can also induce a guilty plea by limiting counts, but most federal offenses still leave the judge sufficient leeway to give a substantial sentence even if only a single count remains. The judge can impose consecutive sentences or not, thereby permitting wide disparity, but decisions to cumulate sentences can always be substantially mitigated by the Parole Commission. The difficulty posed by the guidelines is that they appear to force a choice between either cumulating the points for every convicted offense or prohibiting such cumulation. Neither choice is satisfactory. The position of the Sentencing Commission is not clear; it appears to require cumulation at page 10, items 5 and 6, but then proposes some leeway at page 149, section A422(b).

One solution is to <u>permit</u> the judge to cumulate points for several convicted offenses <u>but not require</u> such cumulation. Even where cumulation is permitted, there probably should be some outside

limit (measured in points or a percentage of the points for the most serious convicted offense for which punishment is imposed) beyond which cumulation could not occur. In the absence of parole, cumulation without some restriction permits a prosecutor to force a sentencing judge to impose extremely severe sentences. The risk is not only that such sentences will be imposed, but also that some innocent offenders will be coerced into pleading guilty to a single offense simply to avoid what would otherwise be a mandatory cumulation of punishments if conviction results on several counts.

2. It would be helpful to have some indication of whether the Commission wishes to encourage or discourage efforts to have the jury make some of the determinations on which application of the guidelines depend, in addition to deciding guilt on the offenses charged. At the top of page 13, the possibility of special verdicts is mentioned but left hanging. If special verdicts are used, is it contemplated that the preferences of the parties matter, should the defendant be able to resist such verdicts, or should he be able to insist on them? If used, what is contemplated for the judge who is asked to decide whether some disputed conduct occurred, using a standard of preponderance of the evidence, after a jury has decided that such conduct was not proved beyond a reasonable doubt? See United States v. Ruggiero, 726 F.2d 913, 925 (2d Cir. 1984) (Newman, J., concurring) (discussing special verdicts in criminal cases).

3. The "modified real offense" approach appears to require a disproportionately severe penalty upon the co-conspirator compared to

the defendant who acts alone. On page 17, example 8 states that if the offense of conviction is conspiracy to forge one check, and the judge at sentencing finds that 20 checks were forged, all are used to determine the point score. However, on page 26, example 3 states that a second bank robbery is ignored if the offense of conviction is one other bank robbery commited by the defendant alone. Perhaps conspiracy is worth some added punishment (but see section A422(c)), but it should not be the determinant of whether a person is punished for just one or many crimes. The Pinkerton rule is a device for obtaining convictions; though it permits consecutive sentences for all crimes committed in furtherance of a conspiracy, it has never been thought to require such consecutive sentencing.

4. Section C211. Imposition of a 30% penalty for attempting to evade taxes not yet due appears to create a new statutory offense. An element of the present offense of attempted tax evasion, 26 U.S.C. § 7201 is a tax due and owing.

5. Section D211(A). The increments of punishment for gradations of amounts appears to be too steep in the low and middle ranges. For example, possession with intent to sell 90 grams of heroin produces a punishment (unadjusted for other factors) of 5 years; if the quantity is 250 grams, the punishment (again unadjusted) is 11 years.

6. Section D211(b)(3). The aggravating factor of "special skill" seems likely to prove mischievous. No doubt many people who cut and package drugs have a special skill. There seems little point in increasing a sentence by 20% for an attribute common to many who traffic in drugs.

7. Section D211(b)(4). The doubling of punishment for any prior conviction listed in section D211 is excessive. Possession with intent to sell one marijuana cigarette would count, thereby increasing the penalty for subsequent sale of 250 grams of heroin to 22 years.

8. Section B251. The properly table of monetary values is still too stratified. Fact determinations whether an amount was above or below $2,000 or above or below $5,000 are just not worth the extra punishment of 2 or 4 months. Appropriate ranges might be up to $10,000, $10,000 to $100,000, $100,000 to $1,000,000, and above $1,000,000. The judge can take into account variations within these layers in selecting a sentence within the guideline range.

9. Section A313. There is no reason not to add some increment for a supervisory role just because the offender and one other "shared comparable responsibility."

10. Section A314. The substantial discount (30% to 50%) for playing a "minor" role is certain to be difficult to apply and a source of constant litigation and appeal. This is the sort of factor that should not be assigned a mathematical consequence (even one expressed within a numerical range). Let the judge use the bottom of the range if the role was minor or even sentence below the range is the role was probably so minor that the Commission was unlikely to have given adequate consideration to mitigation for such inconsequential conduct. But to make so much turn on the meaning of "minor" is a mistake. Is the driver of the getaway car from a bank robber playing a "minor" role? Does "minor" relate to the importance of the role in

the success of the crime or the relationship of the role to the infliction of injury? If the role is sufficient to establish criminal liability, there should be no mathematical discount; aggravation for supervisory roles is sufficient distinction.

11. It is highly undesirable to give the prosecutor the absolute authority to effect the reduction of a sentence, beyond the existing authority to determine the maximum exposure by selecting the counts to which a plea will be accepted. The mandatory discount for cooperation certified by the prosecutor makes the prosecutor part of the sentencing decision and gives the prosecutor excessive power to coerce a guilty plea. Cooperation, as reported to the judge by the prosecutor, should simply be a basis on which the judge is permitted to reduce the point score by some degree (either up to a number of points or up to a percentage of the point score).

12. Section A411(e). It may be helpful to provide an explanation of the relationships between the point scores and the sentences, in addition to the conversion table on page 140. Users of the guidelines will want to have a general idea of how the point score generally translates into time to be served, how the point score relates to the bottom and top of the range, and how increases in point score effect increases in the bottom and top of the ranges. Attached as Appendix A is a suggested analysis of the relationships based on the table at page 140.

13. Section A411, commentary. There seems little point in requiring a judge to state specific reasons for imposing a particular

sentence within the guideline range. Such statements will be nothing more than identification of factors already taken into account in the calculation of the point score.

14. Section A422(c). The Commission had made a sensible choice in prohibiting cumulation of conspiracy and substantive offenses, but there seems to be no reason to limit this prohibition to substantive offenses that were the "sole" object of the conspiracy. It is too easy for prosecutors to manipulate the sentence by describing the object of a conspiracy to include more than one substantive offense.

Specific Questions

1. Is the test for determining what constitutes punishable conduct under the "modified real offense" approach (a) a verbal formula or (b) only the conduct listed in the guidelines to which each statute is indexed plus the conduct cross-referenced in the applicable guideling?

2. If a verbal formula is contemplated, which is it? Page 5 says "conduct necessarily involved in the offense of conviction, plus the conduct done in furtherance of the offense of conviction and any injuries resulting from such conduct," but page 15 says "those real elements (not necessarily found as elements of the crime charged) that are importantly bound up with the conduct that constitutes the crime charges." The phrases "done in furtherance" and "importantly bound up with" are not necessarily the same.

3. If conduct is outside the category of "modified real offense," is the judge precluded from giving any consideration to such

conduct, or may such conduct be considered in deciding how high up in the guideline range a sentence may be and in deciding whether to sentence above the guideline range? In other words, is the "modified real offense" approach a limit only on the selection of the applicable guideline or also a limit on the selection of an appropriate sentence?

4. To illustrate all of the above questions, consider the not uncommon case of an armed bank robber who is permitted to plead guilty to bank larceny, 18 U.S.C. § 2113(b). Does the conduct of displaying a weapon in the bank count in determining the point score, in selecting a sentence within the pertinent range, or in exceeding the guideline range. Note that the index for section 2113(b) refers only to the theft guideline, with a cross-reference to "Offenses Involving the Person" only if a victim suffered death, physical injury, or psychological injury." Not every person at whom a weapon is pointed suffers extreme or even significant psychological injury.

5. Section B231(a)(1). Does "used" mean the weapon was discharged or is using it as a threat sufficient?

6. Section B231(a)(2). Does using threats to "take control over . . . any persons" mean removing them from the facility or is it sufficient that the bank robber waved a weapon and instructed all the customers to lie down on the floor or assemble in a back room?

7. Section C211. Are the deficiencies only those in the tax years for which conviction was obtained or do they also include the deficiencies that the I.R.S. is prepared to prove by fraud standards?

8. Criminal history score (1)(A)(1). Are the 3 points for an

offense involving imprisonment of less than three years added to the 3 points for each prior sentence of imprisonment, or does the instruction in A. mean that the three points for each prior sentence is satisfied if the offender served less than 3 years?

9. Criminal history score (1)(C). Does this category include a sentence of probation?

10. Section A422(b). This instruction is not clear. Page 10, items 5 and 6 instruct that point values for all convicted offenses are to be totaled. But section A422(b) purports to tell the judge how to exercise discretion concerning cumulation, implying that cumulation is not required. How does a judge know what makes a sentence "consistent" with the applicable guideline range?

Minor Items

1. Page 12, second full paragraph, line 9: "Parole Board" should be "Parole Commission".

2. Page 124, section B321: It seems odd to express just this one discounting factor as a percent, when all the other factors, both discounting and aggravating, are expressed as less or more than 1.0. Perhaps all should be expressed as percentages, which are more readily understandable.

3. Page 130, last paragraph, 5th line: In a document so happily devoid of jargon, it seems a shame to be told that the Commission does not assume that "replicating" past practices is "optimal." Perhaps the Commission does not assume that "following" past practices is "the best approach."

APPENDIX A

To understand the relationship between point score (sanction units) and the range of imprisonment, the following may be helpful:

I. Relationship of Point Score to Sentence Range.

Below 60 points, the point score is always slightly more than the number of months of the entire sentence range.

Above 66 points, the point score is always within the sentence range.

II. Relationship of Point Score to Bottom of Sentence Range.

The point score is always 12 more than the number of months at the bottom of each sentence range.

Below 42 points, each 2-point increase in point score increases the bottom of the sentence range by 2 months.

Above 72 points, each 6-point increase in point score increases the bottom of the sentence range by 6 months.

III. Relationship of Point Score to Top of Sentence Range.

As the point score increases, the number of months at the top of each sentence range increases, faster at the higher point scores: below 42 points, the point score is 6 more than the number of months at the top of the sentence range; above 72 points, the point score is less than the number of months at the top of the sentence range by from 2 to 76 months, with the difference increasing as the point score increases.

Below 42 points, each 2-point increase in point score increases the top of the sentence range by 2 months.

Above 72 points, each 6-point increase in point score increases the top of the sentence range usually by 8 months, sometimes by 6 months.

Recd 10-20-

10/13/86

Gentlemen,

I've just been reading, in the Law Journal, a article, concerning a Commission being formed, on Sentencing Guidelines. I think its a very good idea, and hope something fruitful comes out of your meetings + forums. Then maybe, horror stories like mine, won't happen! I received a five year Sentence, on one Count of embezzlement. No money, was taken at all, in fact, the sum, in question was only ten dollars. I was a postal employee, who was arrested because of a repaired envelope, found in my Jeep. The Contents were intact having never been removed! The Jury found me guilty, after coming back three times, for information, on just what entails embezzlement. What makes matter's worse, in my case, is that my Guidelines are 0-8. But because, I was sentenced as a Adult, I must serve, at least one-third, which comes to twenty months. So the low guidelines of 0-8, doesn't help me, one bit. Something is wrong, the Sentence Imposed, is way out of line. And yet, the Judge has also turned down, my appeal, for reduction of sentence. Hopefully, your Commission will correct, cases like this, and install, some proper System, Concerning, Guidelines + proper Sentencing, by the Federal Courts.

Yours Truly,

Steven Munson #19208-001
PO Box 7096
Federal Prison Camp
1900 Simler Ave
Big Spring, Texas 79720

P.O. Box 1626

FPC

1900 Simler Ave

Big Spring TX 79720

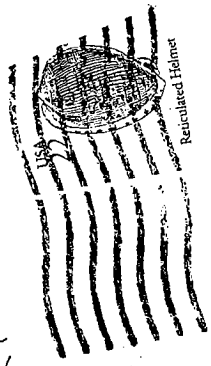
UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL PRISON CAMP
BIG SPRING, TEXAS 79721-0000

10-14-92

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Rec'd 10-20

10/13/86





RECEIVED OCT 20 1986

COMMISSION
SENTENCING
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SUITE
UNITED STATES
1331 PENNSYLVANIA AVE
WASHINGTON, DC 20004

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PRISON CAMP
1900 SIMLER AVE
BIG SPRING, TEXAS 79720

from the desk of

CLIFF BROWN

10/17/86

TO U.S. SENTENCING COMMISSION

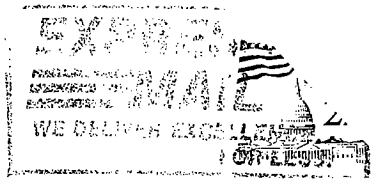
RE: LONGER PRISON TERMS FOR TAX EVADERS.

I AM STRONGLY IN FAVOR OF RESTITUTION VS PRISION FOR NON-VIOLENT CRIMES. OUR PRISIONS ARE PRESENTLY OVER-CROWDED AND EACH PRISIONER IS A BURDEN ON THE TAXPAYERS. (I BELIEVE THE COST IS ABOUT $20,000 EACH YEAR).

I BELIEVE THAT FINES, WAGE GARNISHMENT ETC ARE MUCH MORE EFFECTIVE AND COST EFFECTIVE DETERRENTS.

CLIFFORD A. BROWN CPA
313 ARBOR W. CHICAGO 60185





U.S. SENTENCING COMMISSION
1331 PENNSYLVANIA AV N.W.
SUITE 1400
WASHINGTON DC 20004

ATTN: GUIDELINE COMMISSION

00006
rec'd 10-22-86

U.S. Department of Justice
United States Parole Commission

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

October 17, 1986

United States Sentencing Commission
1331 Pennsylvania Avenue, N. W. - Suite 1400
Washington, D.C. 20004

ATTN: Guideline Comments

Dear Sirs:

I write this as one who has spent his entire career of 35 years in the field of corrections. That includes experience as a probation/parole officer on a county, state, military and federal level, the latter being an eight year stint as a U.S. Probation Officer. For the last fifteen years, I have been an Examiner with the U.S. Parole Commission where I am the senior man in terms of time. Now at the end of my career, I have no axe to grind and offer the enclosed criticisms and suggestions in the most constructive light possible.

I have read and re-read the "Preliminary Draft" of your sentencing guidelines, on which you solicit comment. I firmly believe that if they are promulgated in anything close to their present form, the following three things will happen:

1. Due to their extreme complexity, they will prove unworkable;

2. Due to their harshness, they will quickly overload the federal prison system;

3. Due to the many-tiered and often judgmental nature of their decision making process, disparity in sentencing will increase rather than decrease.

Let me discuss each one of the above separately and, if I may, make comparisons with my experiences on the Parole Commission. Incidentally, I was an examiner here before there were any guidelines, when we had relatively simple guidelines and on into our present quite complicated operation.

However, with regard to point #1, above (complexity) our guidelines pale in comparison to yours. If I understand your "road-map" system correctly, there are at least five steps which one must complete before arriving at a guideline range. They are:

1. Assay the substantive elements of the crime itself;

2. Assess the subject's role in the offense;

3. Evaluate his post offense conduct (including any obstructional conduct, level of acceptance of responsibility and possible "cooperation");

4. Determine a point score for his criminal and drug abuse history; and

5. Convert all of this into total "sanction units" and then into a guideline range expressed in months.

How some 2,000 U.S. Probation Officrs and 600 federal judges are going to be able to do all of this with any uniformity and accuracy is beyond me, since here at the Parole Commission we often have difficulty getting our forty or so examiners to uniformly implement our comparitively simple procedures.

Point #3, sentence disparity. Most of the same arguments made under point #1 apply here also. Due to the multi-step, overly complex and often judgmental nature of your decision making process, the guidelines arrived at by different officials will vary greatly. This is despite the fact that the new crime bill has classified most offenses in terms of severity in an attempt to lend uniformity and decrease disparity. The many elements you have included in making even the first calculation - the unit score for the crime itself - have made it most cumbersome (and we are here talking only about one of the two most concrete parts of your system, the other being past criminal and drug history).

If your present system is retained, which I recommend against, allow me to make the following generalized suggestions for improvement:

1. Simplify greatly your system for assessing the unit score for the crime itself;

2. Drop "Role In the Offense" (often impossible to determine), Post Offense Conduct (except for cooperation, which should be factored in separately), and especially drop "Acceptance of Responsibility" (an important item, but one that is difficult to assess and can easily be feigned).

Your system of assessing criminal and drug history appears to be essentially on target, but has also been made unnecessarily complex. My only comment regarding probation and supervised release is that the terms of one-two-and three years specified in the latter are too brief - but I realize this is in the new law and is not your doing.

Though the release decision function of parole, in which I have spent most of my career, appears moribund I nonetheless retain a keen interest in corrections in general and, therefore, your work in particular. I do not envy you in your difficult task. I sincerely wish you both eventual success and the contentment which comes from a job well done.

Sincerely,

Robert J. Alex
Parole Hearing Examiner
U.S. Parole Commission
Washington, D.C.

cc: Benjamin F. Baer, Chairman
U.S. Parole Commission

Norman Carlson, Director
Bureau of Prisons

Donald L. Chamlee, Chief
Division of Probation

RJA:mam

00006
addendum
rec'd 10-24-86

U.S. Department of Justice
United States Parole Commission

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

October 17, 1986

C O R R E C T E D C O P Y

United States Sentencing Commission
1331 Pennsylvania Avenue, N. W. - Suite 1400
Washington, D.C. 20004

ATTN: Guideline Comments

Dear Sirs:

I write this as one who has spent his entire career of 35 years in the field of corrections. That includes experience as a probation/parole officer on a county, state, military and federal level, the latter being an eight year stint as a U.S. Probation Officer. For the last fifteen years, I have been an Examiner with the U.S. Parole Commission where I am the senior man in terms of time. Now at the end of my career, I have no axe to grind and offer the enclosed criticisms and suggestions in the most constructive light possible.

I have read and re-read the "Preliminary Draft" of your sentencing guidelines, on which you solicit comment. I firmly believe that if they are promulgated in anything close to their present form, the following three things will happen:

1. Due to their extreme complexity, they will prove unworkable;

2. Due to their harshness, they will quickly overload the federal prison system;

3. Due to the many-tiered and often judgmental nature of their decision making process, disparity in sentencing will increase rather than decrease.

Let me discuss each one of the above separately and, if I may, make comparisons with my experiences on the Parole Commission. Incidentally, I was an examiner here before there were any guidelines, when we had relatively simple guidelines and on into our present quite complicated operation.

However, with regard to Point #1, above (complexity), our guidelines pale in comparison to yours. If I understand your "road-map" system correctly, there are at least five steps which one must complete before arriving at a guideline range. They are:

1. Assay the substantive elements of the crime itself;

2. Assess the subject's role in the offense;

3. Evaluate his post offense conduct (including any obstructional conduct, level of acceptance of responsibility and possible "cooperation");

4. Determine a point score for his criminal and drug abuse history; and

5. Convert all of this into total "sanction units" and then into a guideline range expressed in months.

How some 2,000 U.S. Probation Officers and 600 federal judges are going to be able to do all of this with any uniformity and accuracy is beyond comprehension, since here at the Parole Commission we often have difficulty getting our forty or so examiners to uniformly implement our comparatively simple procedures.

Point #2, harshness. Let me take just two examples of very common types of federal commitments: bank robbery and drugs. According to my calculations, a first offender who robs a bank of less than $1,000 through the use of a weapon would, under your rubric, spend an average of 124 months in prison. That same offender under U.S. Parole Commission procedures (which are considered quite harsh in many circles) would be facing only 24-36 months, or roughly one-fourth of your requirements. Your first offender who distributes one kilo of less than 100% pure heroin faces 180 months, whereas ours will likely serve an average of 40-52 months - again about one-fourth. It does not take very much calculation to see how rapidly your procedures will overpopulate our already strained federal prisons.

Point #3, sentence disparity. Most of the same arguments made under Point #1 apply here also. Due to the multi-step, overly complex and often judgmental nature of your decision making process, the guidelines arrived at by different officials will vary greatly. This is despite the fact that the new crime bill has classified most offenses in terms of severity in an attempt to lend uniformity and decrease disparity. The many elements you have included in making even the first calculation - the unit score for the crime itself - have made it most cumbersome (and we are talking here about only one of the two most concrete parts of your system, the other being past criminal and drug history).

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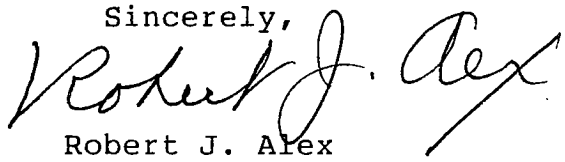
1. Simplify greatly your system for assessing the unit score for the crime itself;

2. Drop "Role In the Offense" (often impossible to determine), Post Offense Conduct (except for cooperation, which should be factored in separately), and especially drop "Acceptance of Responsibility" (an important item, but one that is difficult to assess and can easily be feigned).

Your system of assessing criminal and drug history appears to be essentially on target, but has also been made unnecessarily complex. My only comment regarding probation and supervised release is that the terms of one-two-and three years specified in the latter are too brief - but I realize this is in the new law and is not your doing.

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Sincerely,



Robert J. Alex
Parole Hearing Examiner
U.S. Parole Commission
Washington, D.C.

cc: Benjamin F. Baer, Chairman
U.S. Parole Commission

Norman Carlson, Director
Bureau of Prisons

Donald L. Chamlee, Chief
Division of Probation

Director
General Accounting Office
Washington, D.C.

RJA:mam

W. Hanley and Associates

Executive Recruiters, Management and Merger Consultants

230 Park Avenue - New York, N. Y. 10169 - (212) 661-6061

October 16, 1986

U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, D.C. 20004
Att: Guideline Comments

Gentlemen:

I think that whenever possible tax evaders should be punished by larger fines and penalties vs. prison terms.

The purpose of the internal revenue code is to raise funds for the U.S. Treasury and larger fines and penalties will help the treasury. On the other hand, prison terms causes loss of government income in two ways: (1) The individual imprisoned is not earning taxable income to pay current and back taxes, and (2) The cost to the government to house, feed, and guard an inmate is in the range of $30-50,000 per year.

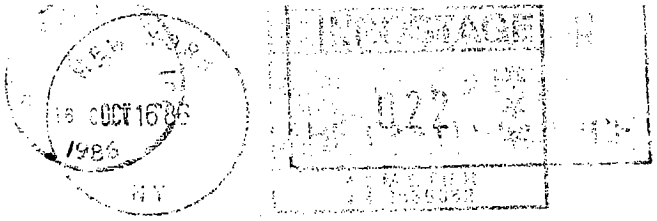
Since these people (tax evaders) are not a danger to society the government should not waste its money on imprisonment, and instead should try to realize additional income from convicted tax evaders.

Sincerely,

Richard T. Hanley, CPA

RTH/ja

SUITE 1424
230 PARK AVENUE
NEW YORK, N. Y. 10169



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

Att: Guideline Comments

RECEIVED OCT 22 1986

00008
Rec'd 10-22-8

Roy D. Mayne
P.O. Box 154
Riderwood, MD 21139

18 October 1986

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

Attention Guideline Comments

Gentlemen:

Reference the preliminary draft recommendations proposing longer prison terms for convicted tax evaders, don't you gentlemen realize that to imprison a person who is not a violent threat to society punishes the taxpayers, who are honest, as well as the tax evader.

This form of punishment increases taxes for the rest of us taxpayers without any resulting benefits.

Punish the tax evader? By all means and severely.

But collect the taxes due with adequate interest plus a penality equal to the taxable income on which the taxes were evaded. And if you want the tax evader debased a little further, give the individual a sentence of 24 hours. It would have the same result and save the taxpayers the expense of a longer jail term.

Under the new tax bill especially, this could have the effect of obtaining, possibly, one year's taxable income, or more, from the individual which, in my opinion, is a whole lot better than one year of that person's life. Just think the amounts the government would have received from some of the recent tax evaders.

Honestly, I can't see the logic of your recommendations, unless it is just your desire for vengeance.

Very truly yours,

Roy D. Mayne

additional information.

Longer Prison Terms Recommended for Tax Evaders—Preliminary draft recommendations of the U.S. Sentencing Commission call for longer prison terms for convicted tax evaders. "Under current practices the sentence lengths tend to be relatively unrelated to the amount of tax evaded," according to the draft report.

"The [proposed] guidelines should result in moderate increases [in length] for the great majority of cases that involve less than $100,000 in tax evaded [and] the most significant change is that fewer cases will result in probation or fines without any imprisonment."

The preliminary draft recommendations were published in the October 1 issue of the *Federal Register* and comments are due by December 3 at the U.S. Sentencing Commission (attention: Guideline Comments), 1331 Pennsylvania Avenue, N.W., Suite 1400, Washington, D.C. 20004.

SEC Issues New Staff Accounting Bulletin—SAB no. 64, issued by the commission this month, sets forth the staff views in four areas: applicability of guidance contained in staff accounting bulletins; reporting of income or loss applicable to common stock; accounting for redeemable preferred stock; and issuance of shares prior to an initial public offering. For further information, contact Wayne G. Pentrack of the SEC at 202/272-2138.

The CPA Letter

American Institute of Certified Public Accountants, Inc.
1211 AVENUE OF THE AMERICAS, NEW YORK, N.Y. 10036—8775

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

RECEIVED OCT 22 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

JACK B. WEINSTEIN
CHIEF JUDGE

October 6, 1986

My dear Chairman Wilkins:

I have received your excellent Preliminary Draft on Sentencing Guidelines dated September 1986. It addresses this most difficult set of problems with great skill and imagination. I note a few of the problems I had with the draft.

Even the low preponderance of evidence standard will not prevent a great many defendants from requesting a hearing on the facts which now become vital predicates for a precise sentence. It is hard to know how much of a burden on the courts this new set of hearings will require. Presumably the rules of evidence will not be rigidly applied. See pp. 17-18. I favor such hearings. See United States v. Fatico, 441 F.Supp. 1285 (E.D.N.Y.), rev'd, 579 F.2d 707 (2d Cir.); on remand 458 F.Supp. 388 (E.D.N.Y.); aff'd, 603 F.2d 1053 (2d Cir. 1979). I would estimate that somewhere in the order of a 10% increase in criminal work load will result. This will require one more judge in our district since our criminal caseload is high.

If pleas of guilty are given no weight in reducing sentences and the number of pleas are then substantially reduced--as I think is likely--the increased criminal work load in our district will be in the order of more than double. This will require at least four more judges in our district.

On page 16, example 6, you give no weight to the finding of a shotgun in a convicted cocaine distributor's apartment. I believe all our judges would consider possession of such a weapon aggravating and would impose a heavier sentence.

You give, as I read the report, 180 points for almost all common 1 kilo drug offenses. See p. 56. Would this apply to "mules"? Our sentences for such carriers are in the order of three years, which means service of less than two. Your plan would lead to sentences of 168-210 months. See p. 140. This seems very harsh. Many of these mules are ignorant women from undeveloped countries who cannot resist the lure of a few thousand dollars in view of the extreme poverty of their families. I doubt that heavy sentences will deter them.

The point value assigned to political crimes seems very light. See pp. 88-89. These crimes seem more corrosive of our values and more dangerous in the long run than some of the drug and other crimes.

As I read the report, prison sentences will not be mandatory even though the report says probation will be "in addition to any other sanction." See p. 143. I assume this means that probation is an alternative to prison. Any other interpretation would be intolerable. I find probation highly useful in many cases. Our community service and probation training and control programs are, I believe, useful in our district. I doubt that we have the prisons to hold the long-term prisoners the proposals would generate. Moreover, I doubt whether we should emphasize prison so much. Home detention, half-way houses, strictly supervised probation, community service and the like should be utilized in more, not fewer, cases.

One of the serious flaws in the 1985 criminal law reforms was the elimination of the split sentence. As you know, before this we could provide a "slight sentence" such as "five years to serve six months, the rest on probation." This gave the defendant a taste of prison and gave the court and probation control during the probationary period by the threat of the remaining term being served if the terms of probation were violated. This technique was widely used. In a multiple count conviction we can still obtain much the same effect by a short prison term on one count, and a consecutive long-term on the other counts with execution suspended with probation. As I read your proposals this program would no longer be open to us because the first term would be required to be quite long in many cases. Should this problem be addressed?

What will be the rule on multiple count convictions? Will consecutive or concurrent sentences be mandatory or discretionary and under what guidelines? Any decision by the Commission on this point will be of great significance to the courts.

I will want to think further about these matters. Could you please schedule my appearance at your New York session as early as possible since I have a heavy calendar? Please let me know when I should appear.

With all best wishes,

Sincerely yours,

Chief Judge

The Honorable William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1330 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

cc: All E.D.N.Y. Judges

Rec'd 10-22-86

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PROBATION OFFICE

MICHAEL J. LUCIANO
CHIEF PROBATION OFFICER

207 U.S. COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007
(212) 791-0088

October 15, 1986

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

Dear Chairman Wilkins:

I am writing in response to your request for comment on the September 1986 Preliminary Draft of the Commission's Sentencing guidelines. Although I have only begun to study the guidelines, some issues seem clear enough for me to share with you my observations at this point. This may be the first of a series of letters.

[See enclosed pages]

Yours truly,

Joel Weber

JOEL WEBER
U.S. Probation Officer
(212)791-0227/0218

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
PROBATION OFFICE

MICHAEL J. LUCIANO
CHIEF PROBATION OFFICER

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Chapter One

I am a firm supporter of modified real offense sentencing, but I have major problems with some of the examples which appear on pages 16 and 17.

#3 This example seems to go against the principle of modified real offense sentencing and, taken in conjunction with example #8, muddies the issue of a serial offense versus a conspiratorial one. To cite one example: if Count One involves an unarmed bank robbery wherein $1,000 was taken whereas Count Two involves an armed bank robbery in which a teller was terrorized and $50,000 was taken, then #3 clearly flies in the face of modified real offense sentencing. Or, looked at in the context of example #8, why is a series of bank robberies less deserving of treatment as a "real offense" than a series of check thefts?

#4 It seems unfair to punish the cocaine distributor for the death of the user unless there is some showing that the seller had reason to believe that such a result would occur. In addition, should this example remain as it is in the final draft, it would be a nightmare to research in a situation where, for example, an individual has been convicted of selling 1,000 "bags" of heroin a day for a six-month period.

#6 I would have much less trouble with this example if the shotgun was a legal one. The offender's possession of an illegal short-barrel shotgun would normally yield an offense value of 12 (§K221(2)). Why should he be rewarded simply because the weapon he possessed illegally was not shown to be integral to the drug offense? The example is particularly disturbing to me because a short-barreled shotgun is a weapon used against persons, not for hunting or target practice and it would not be a farfetched argument at all to contend that the only reason the offender possessed such a weapon was to further his or her drug trafficking business. I would be far more comfortable with this example if the shotgun was an otherwise legal weapon which the offender was known to use in skeet shooting competitions.

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§S211, §S213, §S214 **Securities Offenses**

In a number of security offenses, but especially in stock manipulation cases, a standard based upon "amount of loss to investors" may be difficult, at best, and often impossible to determine. The "special minimum value for loss" appears to apply only to new issues and does not seem to be helpful on manipulations of stocks which had initially been traded legitimately.

§S212 The "amount of gain to the offender . . ." seems to be a good standard, but the specific offense characteristics omit harm done (if any) to the company from which the information was leaked (in an extreme case, a small company was forced out of business due to the disclosures that significant personnel were untrustworthy) or, to the companies whose stock was traded (a takeover was aborted because the leaks drove the stock up well above the offering level).

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§A314 Minor participant. In the Commentary, a change from "or" to "and" might be useful in the sentence including "not in a position to make decisions affecting the offense ~~of~~ and not in a postion to benefit substantially from its commission." Specifically, sophisticated offenders in the sales of stolen securities will allow the person who negotiates the securities to keep most of the profits (as this person is most likely to get caught) while the sophisticated offender is content to take a smaller percentage for himself or herself. I know of more than one career dealer in stolen securities who has argued before a sentencing Court that he should be treated more leniently than the dupe he got to negotiate the stolen bonds because he received less of the profits than the dupe did.

JOEL WEBER
(212)791-0227/0218

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SOUTHERN DISTRICT OF NEW YORK
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§D211 **Drug Offenses.** (Also §A314, minor participant and §B331 cooperation). This standard seems unduly harsh for "mules" especially for those mules who were seduced into importing heroin or cocaine. For example, the offender was seduced while traveling overseas and induced to carry a package back to the United States which the offender had reason to suspect contained drugs. The three pounds of heroin seized from the offender (who has never before been arrested) may well result in a seven and one-half year sentence even if the .5 multiplier of §A314 is applied, as the offender has too little information to supply for §B331 to apply. (See also enclosed page on Chapter Three Generally). If the mule was to get $10,000 for his/her efforts, would the offender qualify for a minor role deduction? (I think not by the current standards). If the offender does not qualify for the minor participant multiplier, is he or she likely to risk his or her life and the lives of the offender's family to reduct the sentence to be imposed from 15 years to 9 years by cooperating as per §B333? Again, I think not and this could pose a serious problem in obtaining cooperation in major drug trafficking cases.

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Chapter Three, Generally

An offender could qualify for reduction of his or her Chapter Two score under §A314 and §B321 and §B333. However, as each of these refer back to the total offense value from Chapter Two, if a .5 multiplier was used under A314 then the offender would get no benefit from §B321 or §B333. It appears to me that perhaps these would have to apply sequentially and the order in which they apply would have to be specified.

JOEL WEBER
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Criminal History (pp 126-131)

Actual time served is a difficult standard even with the one-third assumption rule. Problems include the fact that many jurisdictions have or had "zero to 20" year sentences where the offender may have spent far less than one-third of 20 years in prison, but the actual amount of time served 35 years ago is very hard to determine. What about overlapping sentences as opposed to purely consecutive or concurrent ones?

The preliminary draft seems to be unclear as to how probation and parole violations (especially for "technical reasons") are to be treated. Are these part of the original sentence or to be looked at as separate sentences if the individual has been given a custodial sentence? If the imposition of sentence was orginally suspended and the probation term imposed is violated and the offender is sentenced to nine years for technical violations (I am thinking of an actual example; the offender had two years "jail time" before the probation term was imposed), how is this to be scored? If the offender now serves one year after the violation of probation, arguments could be made for scoring three points, four points or five points.

JOEL WEBER
(212)791-0227/0218

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
PROBATION OFFICE

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Chapter Three, Part D. (Also Chapter Six, Part C)

Plea Agreement. Perhaps an overly simple solution to the problems of charge bargaining, sentence bargaining, stipulations of underlying fact (when such stipulations are clearly contrary to the actual occurrence) and the judicial acceptance of a plea might be that if such a plea clearly will yield a sentence outside the guidelines that the Court will have the responsibility for treating such a sentence as one that is outside the guidelines. Essentially, if a misdemeanor plea is accepted for a case that was clearly a felony offense, the Court would have to justify the sentencing as outside the guidelines.

In accepting pleas, the Court in addition to outlining the statutory maximum sentences to the offender may need to outline the possible guideline ranges as well. For example, to use to the illustration of the seduced "mule" cited in the attached discussion of §211, the acceptance of a plea may include some of the following:

You understand that by entering a plea of guilty to Possession With Intent to Distribute two kilograms of heroin, the maximum penalty under 21 USC 841(b)(1)(A) is 20 years and/or $250,000 fine and that the base guideline range for such an offense would be 168 to 210 months of imprisonment. Your counsel and the U.S. Attorney's Office have agreed that you were a minor participant in this scheme thus qualifying you for a reduction in half of the 180 sanctioned units on which the months of imprisonment of 168 to 210 months is based and that you have fully accepted responsibility for your actions by voluntarily admitting your guilt and assisting law enforcement authorities, thereby qualifying you for an additional [if the draft is changed to allow this] reduction of up to 20 percent of the number of sanction units and your attorney and the U.S. Attorney's Office have agreed that you have supplied significant information regarding criminal activities of others, thereby qualifying you for a .8 additional reduction in the sanction units for a total number of sanction units of 57.6 which translates into a sentence of 44 to 54 months. If information is provided to the Court prior to sentencing which would compel the Court to sentence you to more than 25 percent more than the minimum 44 months, then you will be allowed to withdraw your plea of guilty. This could occur if it was determined that in fact you are not a minor participant or if it was determined that you did not truly accept responsibility for your offense or your cooperation was disingenious.

Paul K. Martin, Communications Director
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
10/17/86

RE: PRELIMINARY SENTENCING GUIDELINES

Dear Mr. Martin:

First, and foremost, I wish to express my gratitude for your prompt reply to my earlier letter. You have renewed my faith in what I was perceiving to be a lost art, expedience.

The law library here did receive a copy of the Commission's Preliminary Guidelines, which has prompted this letter. Included in same was a request by the Commission for comments from interested parties, along with a request "to attempt to apply this draft to actual cases." I will, herewith, attempt to comply with that request. Hopefully my attempt will impart some insight into an issue which I am sure must be causing the Commission considerable confusion. The issue that I wish to address is the Continuing Criminal Enterprise Statute, Title 21 U.S.C. § 848.

Some of the remarks that were made in the Commission's Preliminary Sentencing Guidelines papers have left me with the distinct impression that the Commission has not been fully apprised as to how this Statute has been interpreted and applied by both prosecutors and courts alike. In an effort to conform to the Commission's request to apply actual cases I will set forth the following:

1. the Commission, in its commentary on Section D212, makes the erroneous distinction that "a conviction (under 848) will have already established that the offender controlled and exercised decision-making

authority over one of the most serious forms of ongoing criminal activity." To have control and decision-making power is not a prerequisite for conviction under 848. The mere introduction of people can be termed "organizational" in nature, and used as a basis for an 848 charge and conviction. No degree of decision-making is necessary. See U.S. v. Phillips, 664 F.2d at 1034.

2. The continuing series of events that constitutes an 848 has been deemed to mean three (3) or more events. See U.S. v. Johnson, 575 F.2d 1347, 1357 (5th Cir. 1978). those three (3) events can take place in as short a period of time as a few days. See U.S. v. Bergdoll, 412 F. Supp. at 1317.

3. Equal protection under the law for people charged and convicted pursuant to 848 was thrown out the window when a federal judge allowed the Department of Justice to dismiss an indictment under 848 after the person who had been indicted had already been convicted under 848, and sentenced to life in prison; in direct conflict with the Statute itself. See U.S. v. Gallo, et al, 763 F.2d 1504 for conviction by jury and life sentence imposed upon Angelo Lenardo.

4. It has been ruled that a person does not have to have control or exercise decision-making authority in more than one violation of Title 21, only that they must have even minimal control at any point of a continuing series of violations of Title 21. See U.S. v. Phillips, supra. In other words, even if a person were considered to be an underling within the organization, if that person were asked to look after something while the real manager went to the bathroom, that person could be charged under 848. One does not have to control or maintain decision-making powers during a continuing series of violations, the Statute is dis-junctive in

that respect.

5. After using considerable space to expound on the dangers of a "charge" system, and demonstrating a need for a "modified real offense" type system", the Commission, in its commentary on Section D212, seems to completely ignore the "real offense" system in determining the points to be assigned to violators of 848, and revert back to the "pure charge" system. §A311 goes on to state that "if the offender is convicted under 21 U.S.C. §848, the total offense value from Chapter Two should be multiplied by 2." Further, in its commentary, the Commission states "Convictions under that Statute automatically establishes the applicability of a multiplier of 2." By using the term "automatically" the Commission totally ignores its earlier discussion of the need to form a "modified real offense system" for all persons convicted under 21 U.S.C. § 848.

The cases cited above conclusively demonstrate the arbitrary manner in which 848 can be applied by both prosecutors and courts alike. As such, the only possible way to create any degree of parity where sentencing such offenders is concerned would be through a "modified real offense" type of system. The variables which might arise out of the diverse types of situations which prompted a conviction under 848 should require as complete a review as any other type of offender and offense. An "automatic" multiplier of 2 precludes any determination of the conduct of the accused regarding the overall offense itself. for example: take the group of people that constitutes a Continuing Criminal Enterprise that, after reviewing all of the empirical evidence regarding marijuana, decides that they would still like to partake of same, and begins importing same. That same group refuses to become involved in any other controlled substances as they believe all other controlled substances may be dangerous. Should

they be treated the same as all others? See U.S. v. Phillips, supra, where all of the substantive offenses were marijuana related. Admittedly, marijuana is against the law; but, the empirical evidence concerning its use is extremely conflicting, and a very large percentage of the population of the United States has accepted its use for personal consumption. (ie., decriminalization, and see Presidential Commission Report on Marijuana, commissioned by President Nixon; as well as the upcoming constitutional amendment being voted on by the voters of Oregon next month). Again, should this group be treated the same as a group that supplies heroin or cocaine?

Violations of 21 U.S.C. § 848 are serious offenses. Congress has mandated severe penalties for such violations. But even in its mandate for severe sentences the congress left a wide range of sentences for a judge to apply; ie., 10 years to life for a first conviction under 848. One can only infer that congress was aware of the potential wide range of diverse offenders that might be brought to justice under such a Statute, and, therefore, gave the trial judge such latitude for framing a sentence for same. The Sentencing Commission's Preliminary Guidelines appears to have severly limited that discretion by "automatically" applying a multier of 2. Such "automatic" application of a multiplier precludes any consideration of mitigating circumstances that might apply to an offender.

Thanking you in advance for any considerations that you might give this reponse. I remain

Sincerely,

Eugene A. Myers

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P.O. Box 34550
Memphis, TN 38184-0550
(4).

Illinois Council Against Handgun Violence • 108 N. State St. • Suite 608 • Chicago, IL 60602 • 312.641.5575

October 17,1986

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

Dear Mr. Wilkins:

I appreciated very much the opportunity to testify before the U.S. Sentencing Commission today regarding its proposed guidelines pertaining to Firearms violations for federal offenders.

A scheme to regulate the criminal misuse of firearms must recognize that 20,000 deaths occur every year in the United States due to handguns. Handgun deaths among children now are the fifth leading cause of death for our kids. Homocide, often with a handgun, is the leading cause of death among young black men. Handguns not only cause physical harm in terms of death and serious injury, but the fear of handgun crime has paralyzed many urban neighborhoods.

I have attached a recent Gallup poll in which the public indicates its desire to have tougher regulation of handguns.

Our organization specifically recommends the following two modifications of your guidelines:

(1) The overall base value of firearm violations, especially relating to handguns, should be dramatically increased.

The base value of firearm violations is 6, and the specific offense characteristics allow some slight aggravation for firearms such as handguns. By contrast, mere possession of any illegal drug involves a base range of 12-18. Like illegal drugs, illegal handguns destroy communities and young lives. More importantly, the primary physical harm with drug abuse is to the abuser himself, while handguns primarily hurt innocent victims. Possession of an illegal handgun should be made as least as serious as possession of heroin, since more innocent people get shot with bullets than opium.

You might also include a new section under firearms for an individual trafficking in handguns. I mentioned in my testimony that I have worked in state and federal law enforcement for fifteen years. A year ago I worked on a case involving an offender who sold both marijuana and handguns from his Chicago apartment to street people. He got illegally from Mississippi twenty handguns. Ironically, the federal sanction for dealing marijuana would have been much more severe than dealing handguns, although a nickel bag of marijuana represents far less of a danger to the community and law enforcement than an unregistered, illegal handgun which cannot be traced!

(2) Subsection (a)(3) should delete language requring "knowledge of such prohibition" for there to be aggravation when a firearm is possessed contrary to federal, state or local law. Such a condition thwarts federal, state and local regulation of firearms, especially handguns. No other law places such a difficult burden on the prosecutor to show that the offender knew the prohibition existed in law. For example, in a drug case all that must be proven is that the offender knowingly or intentionally possessed drugs --- not that he knew a federal law existed concerning such conduct. The same is true about federal income tax violators, where there is no requirement to show the defendant's knowledge of the law.

Every citizen is presumed to know the law. In the case of firearms, especially handguns, numerous jurisdictions at the local and state level regulate weapons. States like Illinois and also the federal government permanently bar felons from possession of any firearm, unless a special exemption is applied for. Cities like Chicago and Washington, D.C. have passed handgun freezes, while three communities in the Chicago area (Morton Grove, Evanston and Oak Park) have banned private ownership of handguns with limited exceptions.

Since Illinois has no firearm manufacturer, all of our firearms (including legal and illegal handguns) come through interstate transfers. It is therefore imperative that federal law regarding illegal firearm possession and sales be enforced to the hilt, if local and state regulation is to have any effect.

In conclusion, your guidelines as they pertain to firearms, especially handguns, must recognize that handguns (like illegal drugs) are not only a criminal justice problem but a major public health issue which hits mostly at young people and terrorizes entire neighborhoods. Meaningful deterrence and punishment in the case of illegal firearms should not rest on preconceived notions of "them criminals who should be punished" versus "law-abiding citizens to be excused for 'technical' violations." Rather, the focus should be, as in drug offenses, on the victims and communities who have been exploited by the offender. Punishing the handgun user after a death or serious injury ignores the prevention function of criminal law. We have a duty to try to get illegal firearms, especially handguns, off the street before they do damage, just as we try to intercept drugs before they are abused.

Thanks for your kind attention and good luck in your formidable task.

Sincerely yours,

Chester J. Kulis
Member, Board of Directors
Illinois Council Against Handgun Violence

Public still backs strict handgun curbs

American Institute of Public Opinion

PRINCETON, N.J.—Despite recent congressional action easing the federal restrictions on handguns, the American people continue to favor stringent curbs on the sale and possession of these weapons.

In the latest poll, conducted April 11-14, 60 percent said the laws covering the sale of handguns should be made stricter.

Although handgun owners—comprising about one-fifth of the adult population—understandably are more reluctant to endorse stricter

GALLUP POLL

curbs on the sale of these weapons, 41 percent nonetheless do so.

The trend is shown in the following chart:

LAWS ON HANDGUN SALES

	More strict	Less strict	Kept same	No opinion
1986	60%	8%	30%	2%
1983	59	4	31	6
1981	65	3	30	2
1980	59	6	29	6
1975	69	3	24	4

Stronger public backing for stricter laws is found in all population groups and regions, with somewhat stronger support from women, blacks, the college-educated and Easterners.

These results are spelled out in the following two charts:

LAWS ON HANDGUN SALES

	More strict	Less strict	Kept same
NATIONAL	60%	8%	30%
Men	53	14	32
Women	66	4	27
Whites	58	9	31
Blacks	76	9	15
College grads	65	8	25
Some college	64	8	28
High school grad	57	8	33
Not H.S. grads	55	10	31
East	70	7	22
Midwest	58	9	31
South	54	11	32
West	58	5	35
All gun owners	44	13	41
Handgun owners	41	15	43
Non-owners	70	6	22

COMMUNITY BAN ON HANDGUNS

	Favor	Oppose
NATIONAL	47%	47%
Men	39	57
Women	55	38
Whites	45	49
Blacks	59	34
College grads	54	43
Some college	47	48
High school grads	45	44
Not H.S. grads	44	49
East	62	34
Midwest	45	49
South	40	51
West	43	56
All gun owners	31	64
Handgun owners	26	71
Non-owners	58	36

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September 18, 1986

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

Dear Judge Wilkins:

It was a pleasure to meet with you yesterday morning and to discuss some issues in the work of the Sentencing Commission which affect business. The enclosed memorandum, which addresses some of those concerns and others, may be helpful to you. It is not a work of legal scholarship, but rather based on my practical experience as a former employee of a large corporation (General Motors) and as an outside lawyer for others. I understand that more formal comments may be appropriate when your draft guidelines are circulated.

Yours respectfully,

Tom Leary

Thomas B. Leary

TBL:llb
Enclosure

cc: Hon. Emory Sneeden

M E M O R A N D U M

September 17, 1986

This memorandum will discuss some of the particular characteristics of substantial business organizations that affect the appropriate sentences for criminal offenses.

I

The business community should welcome guidelines that promote greater uniformity in criminal sentencing. There are vast differentials between the sentencing approaches in individual jurisdictions and of individual judges for exactly the same criminal offenses. These differentials affect people charged with so-called "white collar" crimes as well as people charged with "street" crimes. Individuals guilty of the same antitrust offenses, for example, may be sent to jail by one judge and ordered to do charitable work by another. This can undermine respect for the law and make it more difficult for corporations to obtain full compliance from their employees.

On the other hand, any effort to achieve greater uniformity across different crimes, based perhaps on some measure of economic impact, must take account of the real-world problems which corporations face. Employees have to be educated about their legal responsibilities. When dealing with offenses by organizations who are vicariously liable, as opposed to offenses by individuals, there may also be differences in moral culpability and in the deterrent effect of criminal punishments. If punishments for certain crimes are too draconian in the circumstances, corporations may be impelled to contest even well-founded charges, and judges or juries will be more reluctant to convict.

II

There are some special characteristics of substantial business organizations that affect the appropriate sentences for criminal offenses. For one thing, in these organizations there are large numbers of people who can put themselves and their employers in criminal jeopardy in a variety of ways. Inevitably mistakes will be made. From the standpoint of individuals the offense may be deliberate, but from the standpoint of the company as a whole the offense is more likely to be a mistake. Corporate offenses are not necessarily "intentional" in the same sense that individual offenses are.

Offenses may well result from imperfect supervision and criminal penalties can foster closer supervision, but it is important to recognize that no system of supervision will ever be perfect. A corporate chairman can no more guarantee the complete honesty of all company employees than the President can guarantee the complete honesty of all government employees. Moreover, whatever the degree of fault, criminal penalties applied to corporations are likely to fall on shareholders who are entirely innocent people -- who may not even be the same people who held shares at the time the offense was committed. If penalties are severe enough to weaken the corporation in a substantial way, they can also hurt equally innocent employees and creditors.

This does not suggest, of course, that corporations be absolved from criminal penalties. We simply point out that the people who act criminally may not be the only ones who bear the criminal consequences. An increase in the punishments that affect innocent people may not have the desired deterrent effect and if these punishments are perceived as "unfair" it may be more difficult for prosecutors to obtain convictions.

It is also true that many corporate offenses involve conduct that is, in the ancient phrase, malum prohibitum rather than malum in se. This does not mean that corporate offenses are trivial; some of them can have severe consequences indeed. But, it does mean that a company cannot just rely on an

employee's normal human instincts to produce the right answer, and that the burden of education and supervision can be considerable. For example, employees may recognize without being told that it is illegal to label merchandise with an inflated "list" price for the purpose of advertising a fictitious "sale." They have to be educated to realize that it is an antitrust felony for a group of companies to agree that they will avoid such a deceptive practice. To take another example, in most commercial contexts it is entirely proper to benefit from superior knowledge. If you do so when trading on a securities exchange, however, you may commit a serious crime. People don't recognize the distinction instinctively, and they may not appreciate its seriousness even after they are taught.

Judges have always recognized intuitively that the degree of moral culpability associated with an offense may not bear any necessary relationship to its financial impact, and this perception may partially explain the differential in the traditional sentences for "white collar" crimes and for "street" crimes. The appropriate sentence for a business organization, however, must also take account of the fact that its owners may be vicariously liable for the actions of people who themselves may not have fully understood the consequences of their conduct. Draconian penalties levied on corporations in these circumstances serve no useful purpose.

III

A punishment is particularly likely to be perceived as draconian if there are readily available civil remedies to supplement the criminal penalties. In the antitrust field, for example, people who show they were injured by violations can recover threefold damages and attorneys' fees. This treble-damage remedy was not widely employed until about 1960 when the massive and highly publicized recoveries in the Electrical Equipment cases alerted potential plaintiffs all over the country to the benefits of private antitrust actions. There was a dramatic increase thereafter in the number of cases filed and in the overall amounts recovered. Independent studies have confirmed that criminal antitrust prosecutions against funded defendants invariably result in private actions for treble damages.

In situations like this, it is unfair to consider criminal penalties in a vacuum, and assume that they should be measured by the impact of the claimed offense. A further increase in the damage multiplier paid by a corporation -- to four or five or more -- will not deter potential wrongdoers because they don't pay the damages anyway. It will only further penalize shareholders who have done nothing wrong.

Greater deterrence of antitrust crimes can best be achieved by greater certainty and uniformity of punishment for individuals. Jail sentences are normally appropriate for

people who are found guilty of fixing prices or rigging bids. The sentences would not need to be very long to achieve the desired deterrent effect and corporate employers would benefit along with society as a whole.

If jail sentences become the norm for people who willfully engage in per se offenses like price fixing, however, there is a particular problem for corporations that needs to be addressed. It is very common for corporations to settle antitrust cases by pleas of nolo contendere. Settlement is facilitated by the often surprising commonality in the response of government lawyers and corporate lawyers to antitrust offenses. They may learn about the offenses at roughly the same time; they share a pro-antitrust ethic; and they may have similar feelings of outrage or sympathy depending on the circumstances.

There are practical advantages to negotiated pleas as well: the corporation avoids a damaging evidentiary presumption in subsequent civil litigation and the government avoids a complex and costly antitrust trial. Individual defendants, however, are not normally directly interested in the outcome of civil cases, and they have a different calculus of advantages and disadvantages when considering a plea.

This inevitably creates potential conflicts in the joint representation of corporations and of individual defendants, as antitrust cases proceed. The conflict problem

is a particularly difficult one for corporations, because a corporation can only act through individuals and its liability is determined by the liability of those individuals. If the conflict requires that individual employees be separately represented, and if separate representation means (as it so often does) that people don't talk to one another, corporate counsel have no way of finding out what the facts are. This means that corporate shareholders can be, for all practical purposes, unrepresented in critically important litigation.

A practical accommodation has to be found. Typically, a corporation and individual defendant employees will be represented by the same counsel during the investigation stage. When criminal proceedings follow and the corporation is contemplating a nolo plea, separate counsel will be retained to advise the individuals about the consequences of a plea from their point of view. If jail sentences are the norm, however, the consequences for individuals will be far more serious than they have been in the past, and non-litigated judgments will be much more difficult to negotiate. The potential for conflicts between a corporation and its defendant employees may be heightened to the point where even early cooperation becomes impossible.

The Sentencing Commission needs to take account of this particular problem in establishing guidelines for antitrust offenses. Jail sentences which may be entirely

appropriate for people who have been tried and found guilty may not be appropriate for people who have pleaded nolo contendere, and perhaps affirmatively cooperated in the prosecution. If individuals have no incentive to cooperate, both the government and corporate defendants may be forced to try complex cases that are now terminated by negotiated pleas.

IV

In conclusion, it is clear that the proper guidelines for sentencing involve many complex considerations with which large corporations have no special familiarity. What this memorandum has tried to do is focus on the problems which particularly affect these corporations.

Corporations face criminal liability for the actions of large numbers of individuals who may have agendas of their own. Deterrence measures aimed at corporations as an entity do not necessarily deter individuals. The offenses charged may be based on laws that are not intuitively obvious; people have to be educated about their responsibilities and some mistakes are unavoidable. Judges have always recognized intuitively that the degree of appropriate opprobrium for entirely different kinds of crime is not necessarily related to the magnitude of the harm, and this is particularly true when liability is vicarious.

Finally, any effort to increase deterrence by exposing corporations to higher multiples of liability would be unfair and unavailing. It is entirely appropriate to make jail sentences the norm for willful antitrust violators, but special accommodations should be made for individuals who are willing to plead nolo contendere and cooperate with the prosecution.

00014
rec'd 10-24-86

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August 20, 1986

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

Dear Judge Wilkins:

As you requested, I have devoted some time to studying the revised proposed guidelines that you dropped off last week.

Once again, I emphasize that my comments reflect nobody's views but my own. Neither the Research Division nor the Judicial Center has an institutional position on any of the issues I raise here.

I feel obliged to say early on that I regard many of the value judgments reflected in the draft guidelines as very questionable. I have for the most part refrained from commenting on them because it is my understanding that, at this stage, you are more interested in issues of guideline structure. But as a general proposition, I think there is too much emphasis on the objective harm done and not enough attention paid to the offender's culpability as measured by knowledge or intention. For example, if you recklessly take someone's life, your guideline is heavily dependent upon the victim's status even if you were unaware of it. If you injure somebody short of taking his life, your guideline is entirely dependent upon the degree of harm and the victim's status, without regard even for whether the injurious conduct was intentional or negligent. In addition to thinking that this is a questionable approach, I think some very surprising values have been placed on the lives of various people in implementing it: that the life of a government official is worth more than that of a private citizen, for example, or that the life of a senior citizen is more valuable than that of a young adult.

Putting the specific harm values aside, however, I think this draft represents a substantial forward step. I believe the new format should facilitate the policy-making task of the Commission by presenting relatively well defined cases for discussion and decision. I also think this format is an improvement in terms of making the guidelines comprehensible to those who will use them.

Since I haven't seen the sections that deal with conversion of harm units to actual punishments, it may be premature of me to comment on the extent to which the guidelines would limit judicial discretion. But I would like at least to sound a warning about what appears to me to be excessive specificity. In my view, this manifests itself in two ways.

The first way in which it seems to me that the draft is too specific is in defining the categories of offenses. As an example, consider the four pages on "Abduction or Unlawful Restraint." I am not aware that this is a very common feature of Federal crimes. But the Commission is being asked to make a great many decisions about how various combinations of possible facts should affect the punishment. This is of course repeated in other contexts, and the total number of decisions you are apparently expected to make is getting quite impressive. I doubt very much that any collection of humans can deal with such numbers of situations in the abstract and make considered judgments about what punishments are appropriate. The very number of decisions you are being asked to make will encourage you to be less responsible about them--and you will sometimes find yourselves going along with somebody's number because you really haven't thought about it but you know its practical impact is small. I think the solution, generally, is to reduce the number of categories and accompany the guidelines with policy statements suggesting what kinds of aggravating factors should influence a judge to go over guidelines or to move toward the high end of a guideline range (if there is a range).

Consider the attention devoted in sections 231, 233, 234, and 235 to abduction of various government employees. Is it really important for the Commission to decide in detail what the punishment will be if the victim is the President, a person in the line of succession, a Congressman, a judge, or another official? I believe it could well be left to the sentencing judge, starting from the baseline of the guideline punishment for abduction and restraint of ordinary mortals, to determine the precise amount of additional punishment called for as a result of the victim's official status. Since we are dealing with distinctly rare events, the risk of disparity in sentences in similar cases would be quite small. I submit that sentencing judges, dealing in the context of particular cases, can make decisions about these matters at least as well as the Commission can. The Commission would benefit greatly if you could clear your agenda of them.

Apart from whether the Commission can wisely determine the punishments for so many categories of offenses, the large number of categories inevitably presents the question whether they are properly defined. The answer is bound to be no: It simply can't be done. You will be nitpicked to death with questions like why

abducting the Secretary of Energy (fifteenth in the line of presidential succession) warrants substantially more punishment than abducting the Chief Justice of the United States. In my view, the only way to avoid that kind of silliness is to step back from the degree of detail that is reflected in this draft.

It will be an immense accomplishment if you can deal wisely with the common situations that sentencing judges face. The chance of doing so will be reduced, it seems to me, if you permit yourself to get distracted by issues like these.

The other way in which it seems to me that the draft is too specific is in attaching precise consequences to particular offense or offender characteristics. It is a pervasive characteristic of the draft that small differences in factual situations produce large differences in punishments. Some examples:

(1) In section 202, the difference between killing a child the day before his twelfth birthday and the day after it is the equivalent of more than eleven years in prison.

(2) In sections 213 and 214, the difference between inflicting "serious bodily injury" and "bodily injury"--which will sometimes be a close call--is the equivalent of three and one-third years in prison.

(3) In several sections involving abduction, the twenty-fifth hour of holding somebody hostage is quite expensive, but when you have passed that threshold you can hold somebody for up to a month without additional penalty.

(4) In the memorandum about enhancement for prior record, the difference between spending a year in prison on a previous conviction and spending thirteen months is 20 points, a difference that could result in a three-year enhancement of the guideline sentence on the new offense (e.g., by raising your point score from 36 to 56).

I think it is important to develop a system in which minor differences do not have major consequences. My instinct is to say that there should be guideline ranges, accompanied by policy statements about what factors should affect the judge's discretion within the range or the discretion to go outside the range. You could have a range covering "bodily injury" and another range--contiguous if not overlapping--covering "serious bodily injury." If the facts were close to the borderline, the judge would be in a position to impose a sentence close to the the borderline, a plainly sensible outcome.

However, it isn't clear to me that this solution is consistent with the magnitude of enhancements of punishment contemplated by the draft. For example, if the harm value of 20 for bodily injury were used as the midpoint of the bodily injury range, the range could not be wider than from 17 to 23 (six months). If the harm value of 60 were taken as the midpoint of a range for serious bodily injury, the range could only be from 53.3 to 66.7 (25 percent). Thus, if the midpoints are to be as far apart as the draft guidelines suggest, there doesn't seem to be much possibility of designing a system in which the borderline case draws a borderline sentence. Short of quarreling with the harm values in the draft guidelines, I don't know how to deal with this. One could add a number of other categories of degree of injury, but that is a solution that has little appeal to me.

Perhaps this difficulty should cause one to quarrel with the harm values. It may suggest that the severity of punishment is increasing more rapidly than is warranted by differences in the harm done. If "serious bodily injury" is only marginally worse than "bodily injury," maybe the penalty for inflicting it should not be three times as great. If it is not viewed as only marginally worse, maybe some intermediate categories would be appropriate, after all. Here, it seems to me, issues of guideline structure become very closely tied to the values you settle on.

Finally, I urge the Commission to shun the use of the word "knowingly" in describing criminal conduct for guideline purposes. The word is a persistent source of ambiguity in criminal statutes because it is often unclear what it is that a defendant has to have known in order to fit the statutory language. Its use often masks a failure to think things through in the course of drafting. One example among many is 18 U.S.C. § 1084, which provides, "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . ." Does the defendant have to have known that the transmission was interstate? (Yes in the First Circuit; no elsewhere.) If not, what does the defendant have to have known in order to have committed the crime? (That it was a telephone he was using?)

In some of the draft guidelines, I think the word "knowingly" is used with similar lack of clarity. What does it mean, in section 201(5), that a victim was "knowingly killed to silence potential testimony or cooperation with government officials," particularly when first-degree murder is already covered by 201(1)? Indeed, what does it mean that someone's death was "knowingly caused"? I think you should avoid this word (and "willfully" as well), and strive to be more precise about what knowledge or other state of mind is relevant in determining the guideline category.

I hope you find these reactions helpful. I have some fear that they will appear to be unconstructive sniping. That may even be the universal way in which authors regard reviewers. Please be assured that nothing could be further from my intentions.

Sincerely,

Tony

Anthony Partridge
Research Division

rec'd 10-28-86

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October 27, 1986

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

Dear Judge Wilkins,

I have read with interest, considerable enthusiasm, and some concern the Commission's Preliminary Draft sentencing guidelines, and am responding to your general invitation for comments.

Attached hereto are such comments in the form of a memorandum to me from my staff. Time will not permit a policy review on the issues raised by the board of the National Organization for Victim Assistance, but I hope you find our staff notes useful if not an official expression of NOVA's views.

At the same time, I am confident that I am speaking for NOVA's board and membership in making the following general observation:

The Sentencing Commission has clearly perceived the victim's legitimate interest in the sentence to be handed down by Federal judges. Indeed, I believe that the Commission's draft breaks new ground in the jurisprudence of sentencing through its formal recognition of victim harm as a basis for weighing enhancements or mitigation of a sentence to be imposed.

But the stress we place on the procedures for communicating the victim's interest to the sentencing judge -- a stress which was at the heart of my July 24 letter to you -- does not seem to be fully reflected in the draft guidelines.

That puts us in a disorienting position. The thrust of my earlier letter was to urge the Commission to understand the reasoning behind the victim-oriented procedures found in the Victim and Witness Protection Act of 1982, and thus to build on that legislated framework. I write now to express to the Commission our sincere thanks for advancing so creatively the spirit of that law, while urging the Commission to make more use of the letter of that law.

At times, the Commission's draft seems to suggest that key features of the Victim and Witness Protection Act were superseded by

the Comprehensive Crime Control Act, notably as to the earlier statute's near-insistence that restitution be ordered in every case and that such order be a mandatory condition of probation and parole (or its administrative successor, post-release supervision).

Since the Commission has suggested that the "mandatory restitution" features might be adopted as a reflection of Commission policy -- if not as a requirement of law -- we certainly hope that the Commission will adopt such a policy, and will indeed cite its grounding in the Victim and Witness Protection Act.

We also hope that the Commission will cite some of the key procedures of that statute -- notably the requirement that victims be consulted in respect to plea negotiations and that the Probation Service prepare a victim impact statement for the sentencing judge -- and then explicitly weave those procedures into the fabric of the final guidelines, commentaries, and explanatory text.

One can understand why the Commission might not want to make reference to every Federal statute that affects the sentencing process. But we hope that it will make exception to that pattern in respect to the Victim and Witness Protection Act. For these are the tools to effectuate the victim-oriented goals of justice that the Commission has embraced, and were designed to give force to that philosophy. And regrettably, if they are not made part of what will soon become every Federal judge's "sentencing deskbook", they may continued to be devalued or ignored.

In short, we hope the Commission will incorporate the tools of the Victim and Witness Protection Act for assuring equal justice in the sentencing process. Indeed, we would like to believe that it would elect to create the idea of mandatory plea consultation, mandatory restitution, the victim impact statement, and the like even had there been no statutory inducement to do so.

Finally, we hope that in its discussions of the use of fines, the Commission will remind Federal judges of the significant social benefits that Federal fines and penalty assessments now achieve, in that these are the principle sources of revenue of the Crime Victims Fund that subsidizes compensation and assistance programs for victims of Federal and state crime alike.

Sincerely,

Marlene A. Young

Marlene A. Young, Ph.D., J.D.
Executive Director

00016
rec'd 10-27

STATEMENT

OF

ANTON R. VALUKAS
UNITED STATES ATTORNEY
FOR THE NORTHERN DISTRICT OF ILLINOIS

BEFORE THE

UNITED STATES SENTENCING COMMISSION

October 17, 1986

UNITED STATES SENTENCING COMMISSION

Friday, October 17, 1986

MR. CHAIRMAN, AND MEMBERS OF THE COMMISSION:

I appreciate the opportunity to welcome you to Chicago and to present my view of the mandatory guidelines for the sentencing of defendants in federal criminal cases.

The views I express are my own and not that of the Department of Justice.

I would like to address two issues that are important to your consideration and central to the proposed guidelines.

The first deals with the deterrence as a factor in the sentencing process. The second deals with the role of sentencing in vindicating the values of our community.

Let me begin with the deterrent function of sentencing.

Currently, a substantial amount of the resources expended by the federal government in law enforcement activities are focused in two areas.

The first is **White Collar Crime and the second is** Drug **and** Drug Related offenses.

These two areas of prosecution and law enforcement share a common denominator. They are crimes committed in a rational, calculating manner by individuals who weigh the potential benefits against the risk of possible punishment.

Simply translated, they are deterrable criminal acts.

Turning first to the problem of **White Collar Crime**, the United States

Attorney's Office in Chicago has had considerable experience in the past 15 years in the prosecution of **White Collar** crimes such as **Mail Fraud, Bank Fraud,** and **Securities Fraud.** These and other types of economic crime are typically predicated upon the abuse of trust or abuse of a fiduciary relationship.

Similarly, in the public sector, we have had numerous prosecutions involving the abuse of public trust by elected officials at the federal, state, and local levels as well as by enforcement personnel and government employees.

It could be said that, with few exceptions, each of these cases involved a criminal defendant who calculated that he could abuse his position for his own gain and without significant risk of prosecution or a substantial jail sentence.

In my opinion this has undermined the public's confidence in the institutions of government, as well as the law enforcement process itself.

This same theme is evident in other areas of White Collar crime. For example, the national statistics involving bank fraud reveal an appalling situation. The vast majority of bank failures that have occurred in the United States in the last four years involve some element of abuse by bank employees or those associated with them.

This can only serve to undermine the public's perception of the entire banking and financial community.

Similarly, we have seen an increasing number of cases involving the abuse of fiduciary relationships within the securities industry — cases that underscore the fact that privileged and intelligent individuals often believe that they can commit criminal acts and abuse their trust and positions of responsibility without having to ultimately pay the consequences.

I believe that you will find in the course of your hearings that this is a common theme voiced by law enforcement officials in all of the major

metropolitan areas in the United States.

If the sentencing function is to deter criminal activity as well as to punish the individuals who have committed the crimes then it must serve that function realistically.

When individuals engage in this type of criminal activity they obviously believe that they will not get caught. The crimes they commit are frequently so complicated that the likelihood of detection and successful prosecution may appear remote.

Equally important, I believe, is that many White Collar criminals come to believe that these crimes, even if detected, and even if prosecuted at great expense by the government, will not result in substantial jail sentences or severe financial consequences.

All of this serves to emphasize that the sentences that we currently impose in White Collar criminal cases do not deter others from committing these crimes.

In part, this is due to the heightened prospects for material gain through criminal activity. Because of modern computer technology, and the ability of individuals to control vast amounts of money or have access to large resources the magnitude of White Collar crimes is significantly greater than it has been in the past.

This means that the rewards garnered through criminal activity are all the more tempting to those who would consider such activity.

Similarly, the complexity of modern business and financial transactions often makes the detection of these crimes much more difficult and may delay the successful prosecution of individuals.

Thus, while the rewards of White Collar crime are increasing, the risk of

detection is often decreasing. This makes the deterrent function of sentencing all the more important to the effective prevention of White Collar crime.

The second type of criminal activity that I wish to address is the problem of Drugs.

The potential profits available to the would be drug dealer are so enormous that only the most severe sentences will have any deterrent effect at all.

Assistant United States attorneys across this country will tell you that they frequently re-prosecute individuals who have been previously prosecuted by earlier generations of Assistant United States Attorneys in the same district.

These defendants are part of a newly-emerging class within our society -a cadre of individuals whose "job" in life is to deal drugs or to be involved in drug-related activities.

These individuals would not under any circumstances be able to garner the type of money that they make in their drug activity in any legitimate form of work.

It is critical that we not blind ourselves to the economic facts of life in dealing with the drug problem. To suggest that an individual who is making hundreds of thousands of dollars dealing drugs is going to refrain from that activity because he faces a moderate jail sentence is not realistic.

This point applies not just to the dealers who peddle drugs on the streets of our cities but also to other individuals who play a critical role in the narcotics trade.

Currently, the success of many large-scale narcotics operations is fundamentally dependent on those who "launder" the profits of the narcotics trade or who provide a legitimate business "front" for trafficking activity.

While such individuals are often insulated from the actual business of drug dealing, they are no less important to the success of the over-all operation.

Furthermore, they often share in the enormous profits of drug activity and thus have a powerful motive to continue in their criminal ways.

Accordingly, if sentencing is to play any role in the reduction of narcotics crimes, the sentencing process must satisfy two criteria:

First, the sentences must be sufficiently severe to outweigh the attractiveness of the potential profits; and second, such sentences must be meted out to all participants in the narcotics trade -- the money-launderers no less than the drug peddlers.

Let me turn now from deterrence to another function of the sentencing process: the vindication of the shared values of our community.

While this function is much more abstract than deterrence, it is important nonetheless.

Each time a convicted defendant is subjected to punishment, the sentence stands as a vindication of the values underlying the criminal law. In addition, the severity of the sentence reflects to some extent the importance of the underlying value.

Thus, if a corrupt politician is sentenced to a substantial period of incarceration, the sentence serves to reinforce the importance of honesty and integrity in a democratic government.

Conversely, if the politician receives only a light sentence or a fine, the sentence does little to strengthen the values of public integrity.

On another level, the sentencing process implicates certain values of fairness and equality. If a white collar criminal defrauds the public of hundreds of thousands of dollars and yet receives only a sentence of probation, the sentence cannot be squared with the stiff jail terms imposed on street criminals who do not

occupy a position of privilege or status.

The obvious disparity can only contribute to perceived inequities in the criminal justice system.

Finally, there is yet another value served by the sentencing process: It forces the convicted defendant to suffer consequences that approximate the harm done to the victims.

In many crimes, the wrongdoer not only causes physical or economic harm, but also inflicts psychological damage on the victims of the crime. This is true not only of crimes of violence, but also of white collar crimes such as fraud and corruption.

Accordingly, in such a case, the sentencing process serves to "balance the scale" by imposing punishment on the wrongdoer for the harms done to the victims of his acts.

In short, the sentencing process not only plays an important role in the deterrence of crime, but also operates to vindicate the values of our community.

To recognize this is to recognize the importance of this Commission and the work it is doing.

00017
rec'd 10-28-86

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William W. Wilkins, Jr., Chairman
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1331 Pennsylvania Ave. N. W. #1400
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Dear Judge Wilkins:

RE: GUIDELINES COMMENTS

The following observations resulted from my review of the Commission's preliminary draft of sentencing guidelines. My purpose here is not to "tilt windmills" but offer a probation officer's perspective on those areas which will dramatically impact on probation. I'm sure others will be more eloquent but I prefer to approach the guidelines from the position of one who must implement them, not merely pontificate their philosophical or believed shortcoming - although there are one or two areas where I weaken in that resolve.

First, some general comments. Since "rehabilitation" is acknowledged, however weakly, through educational and treatment programs as conditions of probation and/or conditional release, I strongly recommend that the Commission, by its good offices, give concrete support by whatever means deemed appropriate, including financial, to insure the Probation Division has adequate staff and training resources to facilitate congressional intent and Commission guidelines into reality.

I am pleased some individualization of sentences will occur, i.e., because the Court may still consider aggravation and mitigation factors. The preponderance of evidence standard is realistic for sentencing and prosecution disparity is somewhat contained by a modified real offense approach.

I do not support a contrived set of potentially suspect "cross references" that may or may not identify conduct "often associated with statutory elements charged in the Indictment."

The real offense approach, attendant to a preponderance of evidence standard, is fairer to the victim and society plus, in my view, it more nearly meets congressional intent.

There is concern about time and staff needed to hear and resolve pre-sentence disputes re implementation of guidelines. Revocations of probation and conditional release procedures, or lack thereof, are discussed later.

A 212 Homicide-Level 2(a)(3) @ p. 22

What is accepted definition for "malice." Why are points subtracted when "...reckless conduct that supports a finding that the offender acted with malice"? Should malice be tied to a lower level?

A 251 Psychological Injury @ p. 34

The problems with psychological definition is hard enough but when splitting hairs between "extreme" and "significant," no two qualified psychiatrists will agree, much less two paid out of different pockets.

How do we, i.e., the Court and probation officer, judge impact of psychological harm when the results may not be readily apparent until several months, years later? Is there concern for potential victim abuse when monetary reimbursement is a factor? For defense-prosecution mischief in manipulating guidelines?

In sum, these are issues that must be resolved early on, not on the day of judgment.

D 211 Drug Offense Tables @ p. 56

The amount of illegal substance, i.e., ounce, pound, dose, etc., to measure base offense value is more appropriate than fluctuating dollar amounts or purity estimates. Easier to score.

Chapter 3 - B 322 - Acceptance of Responsibility @ p. 124

If the purpose of the guidelines is to close the door on judicial sentencing disparity, it does little good to reopen the door with the 20% rule. Where possible, cannot good behavior be given the same numerical consideration as aggravation-mitigation?

Nor should "credit" be given for pleading guilty, generally to a lesser included offense, since even under a modified real offense approach the reward or credit is there, i.e., lowers base. The majority of criminal defendants, particularly repeaters, are repentant because they got caught, not because they did the crime.

B 333 - Cooperation @ p. 125

If the judge gives 20% and the U. S. Attorney "certifies" cooperation for 40%, the most involved criminals could get off relatively light. It is an exception rather than rule proposition, but the so-called exception is what gives sentencing a bad name. This rule could result in abuse by prosecutor and defense in attempt to manipulate the guidelines as you note @ p 126. Why help them?

Effect of Criminal History Score @ p. 130

While it may be correct no "valid" formula exists for determining how much a criminal record should matter when fixing blame, "reliable" experience has proven that the one consistent inhibitor of criminal activity is old age. For repeat offenders, habitual offender statutes take them off the streets; it is a matter of eliminating a particular part of a specific problem (a singular defendant) or merely putting resolve off to another day or another and another crime. It provides job security but not much else.

In this country where the lowest bidder mentality prevails, we forget there is, in this case, prison cost and then there is more direct cost to each of us in the form of higher insurance, high cost for consumer products, etc. Policy makers can't have it both ways in dealing with people who have made a conscious decision to violate the law - over and over.

Part E Offender Characteristics @ p. 136

Offender characteristics are unique, as are offenders, in that all or none may apply in aggravation or mitigation. This is an area where the judge, with help from the probation officer and others, must be allowed to exercise discretion in determining relevancy to a disposition (but not 20% worth).

Conversion of Sanction Units @ p. 142

The option discussed has built-in problems and may be inconsistent with the Victim Witness Protection Act and Criminal Fine Enforcement Act - unless the sentencing guidelines control. In sum, I object to a numerical approach to non-imprisonment sanctions.

The third option (in small print @ p. 143) is best. It takes care of the legislative intent (imprisonment and conditional release) and would let the Court take care of non-prison sanctions as defined in Title 18 (A-412).

Under conditions of probation (p. 143) and conditions of supervised release (p. 146), include a specific statement addressing payment of restitution, fines and community service since in felony cases all or some will be imposed.

Chap 5 Supervised Release @ p. 152

From a probation officer's view, contempt of Court is a non-sanction. I realize congressional intent was to eliminate parole as presently practiced in the Federal System; however, if there is to be community supervision, make it meaningful and enforceable, otherwise its only purpose is to give the Parole Commission a reason to survive, and take up valuable probation officer time and resources.

Contempt of court proceedings will burden judges, encourage flagrant disregard for release conditions by defendants and ultimately result in willful failure to pay fines, restitution and, in some cases, absconding. Is there extradition for contempt of court?

The Commission proposal @ p. 155 is more reasonable, but what about subsequent revocation action, i.e., same ratio apply for initial term, or that reduced by imprisonment?

As for comment on street time - I recommend no credit is given. That goes against conventional opinion, but in effect it is a positive reward for negative behavior, i.e., subsequent technical or new law violations.

Note: fines collected by probation officers should be used to offset supervision cost, support alcohol-drug aftercare programs and enhance training opportunities for officers and support personnel. If not all of the fine, then perhaps a percentage (20%-40%) not unlike a probation fee.

Fines: Harm Based Deterrent @ p. 159

Support is offered for this approach over the "ability to pay" proposal; further, it is consistent with guideline philosophy and, I suspect, legislative intent.

The cost of investigation and prosecution offering (Additional Issues @ p. 161) should include probation's role and reimbursement by the defendant whenever possible, even to the extent of minimal "good faith" payments.

For those organizations convicted of Class A-B Felonies, and probation is precluded, the fine should be sufficient to close them down (see p. 165) or put them in IRS receivership.

Plea Agreements - Part C @ p. 166

Judicial presentencing scrutiny must not end until after the probation officer's report is available - then make an informed decision as to the suitability of the plea bargain. The modified real offense approach will impact on these agreements and require even closer judicial oversight.

Community Confinement Part D @ p. 167

Recommend the Court (and probation officer) decide the need for this sanction since it is very individualized. However, if the Commission adjusted the Sanction Units Guideline Table to allow home detention or community confinement for units up to 18 (6-12 months), you might respond to a particular group of offenders not in need of prison or jail (just yet). Think about it.

In a conditional release program, community confinement or home detention will result from a modification hearing prompted by some event not anticipated, generally, at the time of sentencing, thus independent judgment-discretion by the Court is required. Also, these options can be used as a "halfway-in" alternative, in lieu of contempt of court.

Multiple Crime Offenses @ p. 167

I support your Rule 6, but "add offense values of all injuries or crimes." In your example (car vs. bus) @ p. 168, conduct is not the same because of the personal injury factor (was it a school bus?). Perhaps the sentence should not rise directly in proportion to the number of victims, but there is a correlation of significant value, a cumulative responsibility factor inherent in the real world and throughout the guidelines.

Also, the argument @ pp. 168-169 begs the question since deterrence is not the issue, punishment is.

Numerical considerations aside, there is a prevailing community attitude that must be considered. The resolve of crime and criminal behavior is not a factor of 1 + 1; it is a people problem as you note in the conclusion.

It has been my pleasure to work with Your Honor and the Commission. I look forward to other opportunities to enhance the Federal Criminal Justice System.

Best regards.

R. L. THOMAS
CHIEF U. S. PROBATION OFFICER

vi

cc: Susan Smith, FPOA
Legislative Chairperson

00018
rec'd 10-31-8

THE UNITED STATES SENTENCING COMMISSION
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Ronald L. Gainer (ex officio)

October 30, 1986

MEMORANDUM

TO: All Commissioners and Staff

FROM: Billy Wilkins

SUBJECT: Guidelines Comments

I have also sent this to Charles Betsey in accordance with our procedures.

United States District Court
Western District of North Carolina
United States Post Office & Courthouse
Asheville, NC 28802

Chambers of
David B. Sentelle
Judge

October 23, 1986

Honorable William W. Wilkins, Jr.
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 440
Washington, DC 20004

ATTENTION: Guidelines Comments

Re: Preliminary Draft, Sentencing Guidelines
United States Sentencing Commission

Dear Judge Wilkins:

You will find enclosed a memorandum of my comments on the proposed guideline system. I want to make one overall comment that I admire, commend, and compliment the Commission's excellent product on an overwhelmingly difficult task.

With kindest personal regards, I am

Very truly yours,

David B. Sentelle

Enclosure

MEMORANDUM OF COMMENTS
ON PRELIMINARY DRAFT, SENTENCING GUIDELINES

CHAPTER ONE: INTRODUCTION AND OVERVIEW

VII. Application of Modified Real Offense Sentencing, p. 11, ¶ 4:

The question posed, "To what extent should power to influence the sentence vest in the prosecutor rather than the judge?" is one that I am sure the Commission is aware pervades many other topics besides the determination between "offense of conviction" and "real offense" systems. While I will make further reference in later comments, I feel sure the Commission confronted this at various points, and I feel constrained to say I think we should all keep that question much in our minds throughout any study of the guideline sentencing system.

The discussion in the draft from pages 12 through 18 illustrates the problem, as an offense of conviction system, for the reasons explored specifically in the tax-evasion example set forth on pages 14 and 15, would, to a devastating degree, transfer the Article III function to the Executive Branch as well as result in gross unfairness.

So far as the specific application of the modified real offense system, the rule set forth on page 17 in the paragraph beginning with the words, "A more promising possibility" seems to me to adopt the philosophy least likely to result in unfair disparity of treatment and, at the same time, reduce the transfer of judicial authority to the Executive. The guidelines referenced in that paragraph would seem to solve the inherent problems referred to in its second sentence.

CHAPTER TWO: OFFENSE CONDUCT

Homicide--§§ A211-A216:

I would take issue with one specific guideline. I would move the specific offense characteristics set forth in subparagraph 1 under § A212(a) up to § A211(2) and treat the murder of any other government official in the performance of his official duties or because of the same just as the death of the President or President-elect is treated; that is, make it a capital or life crime. Further, while I understand that the presence or absence of capital punishment is not within the scope

of the Commission's grant, I do hope that someone somewhere in the system is making progress toward establishing a system for the imposition of capital punishment in the federal laws that would survive constitutional tests under the post-Furman decisions of the Supreme Court.

Assault and Battery--§§ A221-A225:

I have a couple of piddling comments on these sections. First, as to subparagraph 6 of § A221, I believe the reference here should be to "3 above" rather than "2 above."

Next, with reference to the Commission's invitation for comment on an aggravating factor for family violence, I would discourage the inclusion of such aggravating factor. Paragraph 7 of § A221 accomplishes many of the good results to be accomplished by the inclusion of that proposed aggravating factor, and subparagraph (a)(3) could be borrowed from § A235 to accomplish most of the rest. For any other purposes, it would appear to me that the family relationship is not much more likely to be an aggravator than a mitigator. In support of this, it is not necessary to spend much time in a state misdemeanor court observing the repeated, withdrawn, and contradictory cross-complaints of family members to see that we may be opening a can of worms we are better off leaving closed.

Finally, with reference to the definitions of "severe bodily injury," "permanent bodily injury," and "serious bodily injury," I wonder if we don't need some form of definition of the term "bodily function" or some further explanation of what we mean by that. I can envision prosecutors and defense attorneys engaging much of a trial court's time in determining whether or not the loss of use of, for example, a little finger constitutes the impairment of a bodily function.

Criminal Sexual Conduct:

In general, I have a reaction that the offense values and specific offense characteristic values are lower than I would assign. I recognize that this is a matter of diverse opinion and do not want to belabor the point.

With specific reference to § A233, understanding that this is beyond the grant of the Commission, I would suggest that 18 U.S.C. § 2032 needs to be amended by Congress to accomplish two results: (1) to decriminalize conduct where the offender and the victim are of the same approximate age, to accomplish a furthering of the philosophy contained in the Commission's commentary on page 31 and recognized in offense characteristic §

A233(a)(1); and (2) to include sexual misconduct with males under the age of 16 within the protection of the law, since experience should teach us that boys also need protection from this sort of abuse.

If the first of these objectives was accomplished, I would then strongly favor raising the offense value from 12. I do think the appropriate specific offense characteristics are given weight. I would, perhaps, give them more weight.

I would offer similar thoughts with reference to § A235.

This area also gives rise to some concern with reference to how we will deal with assimilated crimes under 18 U.S.C. § 13. For example, within my own district, the presence of the Cherokee Indian Reservation results in a spate of assimilated crime prosecutions. In the area of sexual abuse of children, the assimilative crimes provisions make available North Carolina's General Statute 14-27.4. That assimilated act, coincidentally, accomplishes the results of protecting male as well as female children and conditions its application on an age difference of at least four years between the perpetrator and the victim. More germane to the purposes of the Sentencing Commission, this assimilated offense carries a mandatory life sentence. Not only does this create a problem in that disparity of sentence will result according to the choice of the prosecutor between Title 18 § 2032 and Title 18, § 13 (the choice perhaps depending upon the sex of the victim) but also creates a problem in that North Carolina set its penalty for the act assimilated based on the assumption that parole eligibility would exist determined by state law, while our use of the statute by assimilation will place it in a system which will have no parole rights.

While the area of sexual offense is only illustrative of the circumstances under which this sort of problem might exist, I suggest that the Commission does need to address the assimilated crime problem in some fashion, probably by proposing legislation to Congress which would either adopt the parole provisions of any state whose act was assimilated or striking from § 13 the words "subject to a like punishment" and substituting some language to the effect of "subject to a punishment equivalent to the most nearly equivalent offense defined under federal law."

Sexual Exploitation of a Minor (p. 72, § E261):

I do not believe the base value or the specific offense characteristic value assigned under (a)(1) are high enough. Again, I recognize that this is a matter of difference of opinion.

PART R - ANTITRUST OFFENSES (p. 110):

I wish to especially applaud the statement in the commentary, "The Commission believes that the best way to deter individuals from committing this type of economic crime is through prison sentences of short to moderate length, coupled with large fines." I believe that this same philosophy has application to most white-collar economic crimes, including tax offenses and first offense mail fraud. I spent a large part of my pre-judicial legal career defending white-collar criminals and found that the punishment they feared most was imprisonment, almost without regard to the length of incarceration. Fines alone, unless they are enormous, are viewed as not much more than the cost of doing business.

Post-Offense Conduct (p. 122, § B311):

I suggest that the multiplier for aggravated obstruction of justice and perjury should be greater, as this conduct goes directly to the heart of the criminal justice system.

Cooperation (§§ B331-B333):

I am disturbed that the requirement of the United States Attorney's certification for cooperation places too much of the discretion relating to the mitigating circumstances in the hands of the Executive rather than in the Judiciary. One United States Attorney's idea of "truthful and significant information" may vary wildly from another's. I can envision an obstinate or inexperienced United States Attorney withholding the certification until he obtained the information he wanted, whether or not that information was, in fact, truthful. On the other hand, I can see a United States Attorney certifying as significant information which might, in fact, not be. For this reason, I am not satisfied with this guideline as now written. I would sooner see a practice defined by the Commission of the judge receiving the relevant evidence on the subject of the defendant's cooperation, with the judge making determination as to its significance. The comment by the Commission in the second paragraph on page 126 speaks to this problem when the United States Attorney has made his certification in bad faith but does not address the corresponding problem of a certificate withheld in bad faith. Additionally, bad faith may not be the only reason for inadequacy or inaccuracy of the certification. In short, I would sooner see the neutral judicial authority passing on these questions than having the advocate assume this much of a judicial role.

Other Offender Characteristics (pp. 136-37, Part E):

I see no better method of dealing with the remaining factors numbered 1 through 8 than that suggested in the first paragraph on page 137. While I wish the statute provided a wider than 25 percent range within which the judge could exercise his discretion, it doesn't.

Conversion of Sanction Units (pp. 142-43):

As to option 1, I don't think a conversion equivalency can ever be established that will be both fair and workable. Option 2, third approach, seems to me to be the only workable one and the only one that permits a judge to act as a judge rather than a calculator.

As to probation, I would express a perhaps sanguine hope that Congress, the appellate courts, or somebody would permit the United States to be treated as a victim for purposes of restitution in cases of appointed counsel so as to make it clearly possible to impose restitution of attorney fees as a condition of probation. I understand this question to be beyond the scope of the Commission's mandate.

The supervised release program seems to permit the Judiciary to accomplish the results once accomplished under a split sentence. I think the Commission has done a good job of outlining the ways in which this could be done.

Chapter Six, Part A--Fines (pp, 158, et seq.):

First, with reference to the philosophical question of the roles of "ability to pay" and "harm-based deterrent and compensation," the Commission identifies a difficult problem. I would expand on it just a bit. If ability to pay is not taken into account, the resulting fines would have the potential for not only resulting in a disparity of punishment but, in many instances, could impose devastating punishment on one offender while not really punishing another offender at all. Hypothesize two offenders who have committed approximately equivalent crimes. One has earned income of $40,000 per annum, a disabled wife, and three children. The other has earned income of $100,000, inherited trust funds yielding $500,000, an independently wealthy wife, and no children. A fine of no greater than $5,000 could be devastating to the first offender and would constitute no punishment at all to the second.

In this same connection, "available income," no matter how defined, does not appear to me to be an adequate measure of

"ability to pay." I can envision again two offenders, one of whom is working for a living and struggling to maintain himself and family on an earned income of $25,000 per annum; the other of whom has never worked very hard but has inherited trust funds, conservatively invested, yielding low annual incomes with high growth rates. While his income might equal or even be lower than the first offender, his actual ability to pay might well be considerably greater. I would, therefore, suggest that some calculation of assets should be included in any ability-to-pay formula rather than simply available income. This, of course, raises the converse problem that the potential would exist, in using assets as an indicator of ability to pay, that the thrifty and wise would be punished, in part, based upon their thrift and wisdom, while the spendthrift and wastrel would benefit from his past misdeeds while being punished for the present ones. I suppose the short of it is the problem is a difficult one, but I would hope the Commission would continue to consider ability to pay and give some thought as to how to treat assets and not solely base the result on "available income." To expand just a little on the subject of available income, I suggest that a definition using gross income less taxes paid, with some modifier for number of dependents, is more likely to be accurate than one attempting to assign arbitrary values for housing, food, clothing, and other essentials, since these would vary widely based more on the history of the offender and factors not within his control than would the gross income, taxes, and number of dependents. For example, not to belabor a point, but a person who by luck or family connections had acquired paid-for housing or substantially paid-for housing might benefit at the punishment stage for something he had already benefited by at earlier stages through no credit attributable to himself.

Part B, Organization Sanctions (pp. 164-65):

With reference the just punishment approach versus harm-based deterrence and compensation approach, the Commission identifies some distinctly difficult choices to be made. While it is true that the just punishment approach perhaps affords a better theoretical consistency with the guidelines concept of the earlier portions of the Commission report, it would seem to me that the deterrence factor identified in the first paragraph under heading "B" on page 164 should govern; that is to say, the organizations with which we are dealing are motivated by economic self-interest, deterrence being of immense importance in assigning punishment, the way to deter the organizations is to make crime unprofitable.

Understanding that ability to pay is perhaps an inescapable factor, nonetheless, I think the Commission should give great

weight to its statement ending the last full paragraph on page 165: "If firms cannot be profitable without engaging in criminal conduct, it might be better to force them out of business."

While it is true that this approach might cause harm to fall on innocents (employees and creditors), crime itself certainly falls on innocents. Also, as suggested by the Commission in the next paragraph, Chapter 11 reorganization is often available to minimize the impact on creditors, and certainly on employees.

Part C, Plea Agreements (p. 166):

The five areas as to which the Commission expressly invites comments certainly identify the difficulties in compliance with 28 U.S.C. § 994(a)(2)(D). At the risk of stating tautology, the current spirit of Rule 11(e)(2) seems to me to reflect something of what a judge's role should be in plea agreement. That is, that the defense and the prosecution can work out between them what charges shall come before a judge and what shall be recommended but that a judge should retain the option to accept or reject (a) the whole bargain or (b) the sentence in sentence recommendation agreements. Under the guidelines practice, so far as "charge bargaining" is concerned, the court should make it clear to defendants and counsel on the record that, while other charges may be dismissed, the real offense philosophy of guideline sentencing is still in effect (assuming it is) and that the conduct may, nonetheless, affect the judge's decision as to the sentence to impose, although the dismissal of other charges will benefit the defendant in terms of the maximum available penalty and his record. The judge should then, I believe, proceed to consider the real offense behavior for purposes of imposing sentence.

So far as sentence bargains are concerned, if Congress is correct that guidelines should exist to bind judges' hands and prevent disparity, I don't see why the same philosophy should not extend to binding the prosecutors' hands in the same regard. In other words, I do not think plea bargains should be permitted to circumvent the philosophy of guidelines.

So far as what defendants and prosecutors can stipulate, the application of the rules should not permit a stipulation away of facts relevant to the true real offense behavior or the true character of the defendant.

Nonetheless, I see problems in being as tight in binding all parties as I may seem to be above. There are those cases where the conduct involved is sufficiently reprehensible, heinous, or aggravated as to deserve severe penalty but in which the

prosecution knows that it will have an extremely slim chance of establishing in a trial that the defendant is the perpetrator. In those cases, it may well be in the best interest of society to permit an otherwise impermissible plea bargain which will result in the defendant being punished some, although not as much as he no doubt deserves, rather than running what may be an enormous risk that he will remain unpunished. I would, therefore, suggest that there should perhaps be some special rule for certification of difficult situations of that sort. This could perhaps require that those parties advise the judge of that type extraordinary factors, with the court then reviewing the case to determine if it is, in fact, an appropriate one for such treatment.

Part D, Community Confinement and Home Detention (p. 167):

So far as what offender characteristics should exclude individuals from consideration of these programs, in addition to the antisocietal factors (such as violence and sexually assaultive conduct) identified by the Commission, I would add recidivism and a history of escape, probation or parole violation, and failure to appear, since offenders having these characteristics may place an undue cost and administrative burden on the community treatment centers and the other resources of the criminal justice system if they are placed under this type confinement. I would additionally question whether a history of substance abuse and refusal of treatment might not also be an appropriate factor to consider in making this decision since persons of that sort might also be an undue burden on the facility unless their confinement is coupled with other some other conditions stringently limiting the offender's ability to indulge in his or her weakness (such as the use of antibuse or frequent urine checks).

As to the specific question of whether community residential correctional facilities and probation resources would be misspent by assigning "low risk" of recidivism defendants for punitive purposes, I do not think this would be misspent at all. Just as the more expensive prison facilities can function as punishment of the higher risk defender, so could the less expensive community facility serve the same function for the lower risk offender--I think with complete propriety.

So far as conditions of supervised release, I would not automatically bar violent criminals from reentry use of the community confinement, provided their prison behavior indicated a departure from those prior tendencies. While I do not believe rehabilitation is a goal of punishment often achieved by prison, nonetheless, prison can be a place where the prisoner achieves rehabilitation of himself; and if there is evidence of that

having occurred, society might benefit from encouraging that tendency through the use of reentry community confinement.

Part E, Determining Offense Values for Multiple Crimes (pp. 167, et seq.):

Rules 1 through 5 on page 168 appear to me to reflect fair and equitable treatment and a reasonable resolution of a difficult problem.

I am not sure that rule 6 does. My difficulty lies, in part, with the definition of the phrase "course of conduct." I can see rule 6 fairly applying if we are talking, for example, of multiple sales of narcotics from a single, ongoing operation. I do not see it fairly applying if we are talking about multiple uses of the mails in furtherance of the same scheme for a single objective. I would suggest (although somewhat tentatively) that rule 6 should be modified to say that if the specific acts creating the multiplicity of offenses are only jurisdictional in nature and not reflective of an independent act of criminal or antisocietal conduct, then the maximum punishment should be determined by the single most serious offense rather than the total of the three most serious.

CONCLUSION

I would conclude by offering my commendations and congratulations to a Commission having undertaken a difficult task and performed incredibly well.

These comments are respectfully submitted, the 23 day of October, 1986.

DAVID B. SENTELLE
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF NORTH CAROLINA

00019
Rec'd 10-29-8

REMARKS

OF

ROBERT L. BARR, JR.

UNITED STATES ATTORNEY

NORTHERN DISTRICT OF GEORGIA

BEFORE THE

UNITED STATES SENTENCING COMMISSION

REGIONAL HEARING

OCTOBER 29, 1986

ATLANTA, GEORGIA

MEMBERS OF THE UNITED STATES SENTENCING COMMISSION,

DISTINGUISHED WITNESSES,

MEMBERS OF THE JUDICIARY,

MEMBERS OF THE BAR,

AND DISTINGUISHED GUESTS:

WELCOME TO ATLANTA, HOME OF THE ELEVENTH CIRCUIT COURT OF APPEALS, THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, AND TO A HOST OF STATE AND REGIONAL FEDERAL AGENCIES.

IT IS AN HONOR TO ME TO WELCOME YOU TO ATLANTA AND TO HAVE THIS OPPORTUNITY TO COMMENT BRIEFLY ON THE TASK BEFORE YOU. I NOTE THAT I SHARE THE PODIUM THIS MORNING WITH A MOST DISTINGUISHED WITNESS--THE HONORABLE LARRY THOMPSON, FORMER UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF GEORGIA. MR. THOMPSON AND I BRING VERY SIMILAR YET MIRROR-IMAGE PERCEPTIONS TO THIS REGIONAL HEARING. MR. THOMPSON WILL ADDRESS YOU AS A <u>FORMER</u> UNITED STATES ATTORNEY NOW ENGAGED IN THE PRIVATE PRACTICE OF LAW. I ADDRESS YOU AS A <u>CURRENT</u> UNITED STATES

ATTORNEY, UNTIL VERY RECENTLY FORMERLY ENGAGED IN THE PRIVATE PRACTICE OF LAW. BOTH OF US, THEREFORE, BRING A VERY IMPORTANT, IF NOT UNIQUE, PERSPECTIVE TO THESE PROCEEDINGS, AND THAT IS, BEING ABLE TO LOOK AT THE SENTENCING GUIDELINES FROM BOTH SIDES OF THE PROVERBIAL FENCE, IF YOU WILL: DEFENSE AND PROSECUTION. THE MATTERS BEFORE YOU HERE TODAY, AND INDEED, IN YOUR ENTIRE EXISTENCE, HOWEVER, ARE MUCH MORE IMPORTANT THAN THE INTERESTS OF EITHER DEFENSE ATTORNEYS OR PROSECUTORS. THE MATTERS BEFORE YOU GO TO THE VERY HEART AND INTEGRITY OF OUR CRIMINAL JUSTICE SYSTEM.

YOU HAVE AN HERCULEAN TASK BEFORE YOU. YOU MUST, IN A MANNER NEVER BEFORE ACCOMPLISHED, TRY TO BALANCE THE INTERESTS OF ALL PARTIES TO A CRIMINAL PROSECUTION IN A WAY THAT IS, IN A WORD, JUST. ALTHOUGH THE GENERAL PUBLIC MAY FREQUENTLY VIEW CRIMINAL PROCEEDINGS IN TERMS OF TWO PARTIES ONLY--THE GOVERNMENT AND THE DEFENDANT--THERE ARE REALLY AT LEAST FOUR LEGITIMATE AND CONCERNED PARTIES TO ANY CRIMINAL PROCEEDING. I AM SPEAKING OF THE GOVERNMENT, THE DEFENDANT, THE COURT AND THE SOCIETY

IN WHICH THE OFFENSE TAKES PLACE AND IS DISPOSED OF. HAPPILY, AND IMPORTANTLY, THE SENTENCING GUIDELINES, AT LEAST IN THEIR PRELIMINARY DRAFT, AS I HAVE REVIEWED THEM, ADD TO THIS GROUP OF INTERESTED PARTIES IN A CRIMINAL PROCEEDING, A FIFTH: THE VICTIM. THIS REPRESENTS AN IMPORTANT MILESTONE IN SENTENCING PROCEDURES AS WE HAVE KNOWN THEM OVER THE YEARS IN THE AMERICAN JUDICIAL SYSTEM. WE BELIEVE THIS RECOGNIZES A VERY SIGNIFICANT FACTOR, AND THAT IS, THAT THE RIGHTS OF THE VICTIM OR VICTIMS TO A CRIME ARE IMPORTANT FACTORS TO BE TAKEN FORMALLY INTO ACCOUNT IN DETERMINING WHAT PUNISHMENT TO METE OUT TO A DEFENDANT OR DEFENDANTS.

THE PRELIMINARY DRAFT GUIDELINES, ARE EXTREMELY THOROUGH AND, ALTHOUGH EXPECTEDLY NECESSITATING A PERIOD OF ADJUSTMENT, THEY WILL, OVER THE LONG RUN, BENEFIT ALL PARTIES TO CRIMINAL PROCEEDINGS. THEY WILL ESPECIALLY BENEFIT THE GOVERNMENT AND THE DEFENSE BAR. I BELIEVE THE PRINCIPAL WAY IN WHICH THIS BENEFIT WILL OCCUR WILL BE THROUGH HAVING A SYSTEM THAT, MUCH

MORE THAN AT PRESENT, BRINGS A DEGREE OF CERTAINTY AND LOGIC TO SENTENCING PROCEEDINGS. THIS WILL HELP, TOO, THE DEFENDANT, BY PLACING THAT PERSON ON NOTICE, EARLY IN HIS OR HER EXPOSURE TO THE CRIMINAL JUSTICE SYSTEM, OF WHAT THE PARAMETERS OF HIS SENTENCE WILL BE. HE OR SHE WILL KNOW THIS UP FRONT. THIS WILL MAKE NEGOTIATIONS BETWEEN DEFENSE ATTORNEY AND CLIENT, AND BETWEEN DEFENSE ATTORNEY AND THE GOVERNMENT, MUCH MORE PRECISE, LOGICAL AND CLEAR THAN IS POSSIBLE PRESENTLY.

THE UNDERPINNING OF THE SENTENCING GUIDELINES APPEARS TO ME VERY SIMPLE: THE AUTHORITIES MUST LOOK AT WHAT THE DEFENDANT ACTUALLY DID IN THE COMMISSION OF HIS CRIME AND AT HIS OR HER CRIMINAL HISTORY GENERALLY. THE COURT MUST BASE ITS SENTENCING DECISION ON REALITY, NOT PERCEPTION. THE GUIDELINES WILL REQUIRE THE CRIMINAL JUSTICE SYSTEM, COMPOSED OF ITS VARIOUS COMPONENTS AS I HAVE STATED EARLIER, TO LOOK AT ALL FACTORS IN THE FRESH LIGHT OF REALITY. THIS IS GOOD.

ALTHOUGH THE SYSTEM, AS ENVISAGED BY THE PRELIMINARY DRAFT GUIDELINES, IS DESIGNED TO ENSURE CONSISTENCY IN SENTENCING,

AND REINSTATE THE CONFIDENCE THAT HAS BEEN LACKING UNDER THE CURRENT SYSTEM, THERE IS WOVEN INTO THIS FABRIC A NECESSARY DEGREE OF FLEXIBILITY. ONE CAN ARGUE AD INFINITUM OVER THE SPECIFIC DEGREE OF FLEXIBILITY THAT SHOULD BE BUILT INTO THE SYSTEM; BUT THE IMPORTANT FACTOR TO KEEP IN MIND, AS WE ENDORSE YOUR EFFORT, IS THAT THERE BE SOME FLEXIBILITY IN THE GUIDELINES. WE BELIEVE THE FACTORS WHICH ARE INCORPORATED INTO THESE GUIDELINES ARE NOT UNYIELDING, AND ARE BROAD ENOUGH TO TAKE INTO ACCOUNT THE MYRIAD OF PERSONS, ACTIVITIES AND CRIMES THAT WILL BE PRESENTED TO OUR FEDERAL COURT JUDGES.

BOTH SIDES HAVE THE RIGHT TO LIMITED APPEAL OF SENTENCING, WHICH WE ALSO ENDORSE. WE BELIEVE THIS SIMPLY RECOGNIZES, PROPERLY AND WITHIN THE BOUNDS OF CONTITUTIONAL LAW, THAT BOTH THE GOVERNMENT AND THE DEFENDANT HAVE A VERY LEGITIMATE INTEREST IN ENSURING THAT SENTENCES ARE FAIR AND JUST. HERE AGAIN BOTH SIDES BENEFIT BY A BALANCED APPROACH. THE GUIDELINES DO NOT GIVE PROSECUTORS ANY REAL AUTHORITY WHICH THEY DO NOT NOW POSSESS IN A PRACTICAL SENSE, AND THE GUIDELINES DO NOT UNDERMINE THE

LEGITIMATE CONSTITUTIONAL RIGHTS OF OFFENDERS.

THE BOTTOM LINE IS THAT THE GUIDELINES WHICH YOU ARE DEVELOPING REQUIRE BOTH THE PROSECUTION AND THE COURTS, AND INDEED DEFENSE ATTORNEYS, TO DO THEIR HOMEWORK AND, IN SO DOING, WE BELIEVE THE AMERICAN SOCIETY AND SYSTEM OF CRIMINAL JUSTICE WILL NOT ONLY SURVIVE BUT BE STRENGTHENED THEREBY.

THANK YOU.

00020
Rec'd 10-31

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS
PROBATION OFFICE

H. H. WHITEHILL
CHIEF PROBATION OFFICER

October 24, 1986

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POST OFFICE BOX 1265
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305 U.S. COURTHOUSE
201 E. 4TH STREET
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AUSTIN

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

RE: **GUIDELINE SCORING FORM**

Dear Judge Wilkins:

Judge Nowlin requested that I forward to you a scoring form I developed. Previously Judge Nowlin asked me to score cases which had been sentenced as if they were being sentenced pursuant to the proposed sentencing guidelines. To accomplish this, I developed this rather simple form to aid in this endeavor. It has been extremely useful for this purpose.

I might point out that I have been extremely pleased with the cases that I have checked. All of them have been in line with the proposed guidelines.

Another area I would like to bring to your attention is in Chapter 6, Part A - Fines. The preliminary draft references the fine amounts as contained in Title 18, United States Code, Section 3571, of the Comprehensive Crime Control Act of 1984. This section was actually superseded by the Criminal Fine Enforcement Act of 1984 and the correct fine amounts are in Title 18, United States Code, Section 3623.

I am attaching a copy of an explanation of the new Fine Act that was prepared by Mr. Anthony Partridge of the Federal Judicial Center in January 1985. If we can ever be of any additional assistance, please do not hesitate to call.

Sincerely,

LAMONT RAMAGE
Supervising U.S. Probation Officer

LR/bh
Enclosures

cc: Honorable James R. Nowlin
United States District Judge
Western District of Texas
Austin, Texas 78701

OFFENSE:

I. Base offense value: _____

A. Specific characteristics: _____

B. Cross-reference: _____

Total offense value: _____

II. Offender Characteristics

A. Role in offense _____(+ or - to total offense value)

B. Post-offense conduct

1. Obstruction of justice or perjury _____(+ to total offense value

2. Acceptance of responsibility _____(- to total offense value

3. Cooperation _____(- to total offense value

C. Criminal history _____(+ to total offense value

D. Plea Agreement _____(not yet scaled)

Total of A,B,C, & D _____

III. Adjusted total offense value:

(+ or - I & II) _____ = Sanction Units

Guideline range for sentence _____ (page 140)

Sentence imposed under present system_____

OFFENSE:

I. Base offense value: _____

A. Specific characteristics: _____

B. Cross-reference: _____

Total offense value: _____

II. Offender Characteristics

A. Role in offense _____(+ or - to total offense value)

B. Post-offense conduct

1. Obstruction of justice or perjury _____(+ to total offense value

2. Acceptance of responsibility _____(- to total offense value

3. Cooperation _____(- to total offense value

C. Criminal history _____(+ to total offense value

D. Plea Agreement _____(not yet scaled)

Total of A,B,C, & D _____

III. Adjusted total offense value:

(+ or - I & II) _____ = Sanction Units

Guideline range for sentence _____ (page 140)

Sentence imposed under present system_____

VIII. FINES
(Fine Enforcement Act)

A. Introduction

1. Authorized fines for virtually all offenses are increased, and statutory guidance is provided on the use of fines.

2. Collection and enforcement procedures are revised.

3. Section 12 of the Fine Enforcement Act in substance repeals the amendments to title 18 made by section 238 of the Crime Control Act (pp. 198-203, 98 Stat. 2034-39). Sections 2 through 9 of the Fine Enforcement Act therefore amend provisions of title 18 as they stood before October 12, 1984.

4. Section 12 took effect on the date of enactment of the Crime Control Act. Fine Enforcement Act § 12(b) (98 Stat. 3140). Because of an erroneous reference in the Crime Control Act's effective-date provision (§ 235(a)(1)(B)(ii)(IV) (p. 196, 98 Stat. 2032)), section 238 of the Crime Control Act had not taken effect when the Fine Enforcement Act was enacted. Accordingly, the repeal of the changes made by that section appears to present no retroactivity problems.

5. "The amendments made by sections 2 through 9 . . . shall apply with respect to offenses committed after December 31, 1984." Fine Enforcement Act § 10 (98 Stat. 3138).

6. The principal source of legislative history is H.R. Rep. No. 98-906, 98th Cong., 2d Sess. (1984).

B. Authorized Fines and Guidance About Imposition

1. The permissible fine for an offense is the largest of--

   a. the amount specified in law defining the offense;

   b. double the gross pecuniary gain derived by the defendant from the offense;

<u>Effective now</u>

c. double the gross pecuniary loss caused by the offense to another person; or

d. the following:

	Individual defendant	Other defendant
Any felony; misdemeanor resulting in death	$250,000	$500,000
Other misdemeanor punishable by more than 6 months	$100,000	$100,000

18 U.S.C. § 3623, added by Fine Enforcement Act § 6 (98 Stat. 3137).

2. There is a limit on the aggregate fines that may be imposed on a defendant "at the same time for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage." It is twice the amount imposable for the most serious offense. 18 U.S.C. § 3623(c)(2), added by Fine Enforcement Act § 6 (98 Stat. 3137).

3. The statute includes a list of factors to be considered in determining whether to impose fine and how much. 18 U.S.C. § 3622(a), added by Fine Enforcement Act § 6 (98 Stat. 3136-37).

4. If the defendant has a restitution obligation as a result of a conviction, the court shall impose a fine or penalty "only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution." 18 U.S.C. § 3622(b), added by Fine Enforcement Act § 6 (98 Stat. 3137).

C. Collection and Enforcement

1. Fines are to be paid to the attorney general except that the attorney general and the director of the Administrative Office may jointly provide by regulation that fines and penalties for certain categories of offenses will be paid to the clerk of court. 18 U.S.C. § 3565(d), added by Fine Enforcement Act § 2(3) (98 Stat. 3135).

2. The judgment shall include the name and address of the defendant, the docket number of the case, and the amount

of the fine. If other than immediate payment is specified, the judgment shall include the payment schedule and shall require the defendant to notify the U.S. attorney of any change in the defendant's name or address. 18 U.S.C. § 3565(b)(1)(B), (C), added by Fine Enforcement Act § 2(3) (98 Stat. 3135).

3. There are lien provisions based on provisions of the Internal Revenue Code. 18 U.S.C. § 3565(a)(2)-(5), added by Fine Enforcement Act § 2(3) (98 Stat. 3134-35).

4. The court may impose a committed fine only if the court finds "present ability to pay." 18 U.S.C. § 3565(a)(1), as redesignated and amended by Fine Enforcement Act § 2(1), (2) (98 Stat. 3134).

5. Absent exceptional circumstances, a court that stays a fine must order that the defendant (1) deposit the amount of the fine in the registry of the district court; (2) provide a bond or other security; or (3) not transfer or dissipate assets. 18 U.S.C. § 3624, added by Fine Enforcement Act § 6 (98 Stat. 3138).

6. Probation officers are required to report to the court any failure of a probationer to pay an amount due as fine or restitution. 18 U.S.C. § 3655, paragraph added by Fine Enforcement Act § 5 (98 Stat. 3136).

7. Interest will run if a fine is to be paid in installments or is otherwise not paid immediately, and a 25 percent penalty is imposed if a payment is overdue more than ninety days. 18 U.S.C. § 3565(b)(2), (c), added by Fine Enforcement Act § 2(3) (98 Stat. 3135).

8. A new offense of willful failure to pay is created. 18 U.S.C. § 3621, added by Fine Enforcement Act § 6 (98 Stat. 3136).

Effective now

00021
mc'd 10-29-86 Testimony of Mrs. Miriam Shehane, Clio, AL, Victim Advocate, Atlanta Hrng. October 29, 198.

I HUMBLY APPRECIATE THE HONOR TO TESTIFY BEFORE THIS SENTENCING COMMISSION. MY BEING A VICTIM'S ADVOCATE STEMS FROM A VERY PERSONAL EXPERIENCE. WHILE IT COULD BE ARGUED THAT SOMEONE SO PERSONALLY INVOLVED IS TOO EMOTIONAL FOR THEIR VIEWS TO HAVE MERIT, THE FACT REMAINS THAT VICTIMS' VIEWS AND THEIR PHYCOLOGICAL INJURIES MUST BE ADDRESSED. I AM A VICTIM. SOCIETY LABELS ME THE MOTHER OF A VICTIM BUT I EMPHASIZE--I AM A VICTIM. A VICTIM WHERE THERE IS NO RESTITUTION. MY ONLY HOPE IS THAT OUR JUDICIAL SYSTEM DOES NOT FAIL ME MORE THAN IT HAS ALREADY. I COMMEND THIS COMMISSION FOR THEIR DILIGENT EFFORT TO ESTABLISH A UNIFORM POLICY FOR SENTENCING. HOPEFULLY, THE FINAL GUIDELINES WILL REFLECT A CONSCIENTIOUS EFFORT TO ENSURE THAT LAW-ABIDING CITIZENS WILL RECEIVE AT LEAST THE SAME CONSIDERATION FOR JUSTICE AS THE OFFENDER HAS BEEN AFFORDED.

WHILE MOST OF MY SECOND INJURY (THE TERM WE VICTIMS USE DUE TO THE VICTIMIZATION FROM OUR JUDICIAL SYSTEM) CAME FROM THE STATE, THE SAME INJURY HAS PREVAILED THROUGHOUT OUR SYSTEM. MY VICTIMIZATION BEGAN ON DECEMBER 20, 1976. I FEEL THAT I MUST RELATE MY STORY ONLY TO MAKE AN AWARENESS OF THE CALLOUS MANNER IN WHICH VICTIMS ARE TREATED, THUS MAKING IT EVEN MORE IMPORTANT THAT THEY ARE DEALT A FAIR DEAL WHEN THE OFFENDER IS SENTENCED. MY DAUGHTER, QUENETTE, WAS ABDUCTED, RAPED AND MURDERED IN BIRMINGHAM BY THREE COLLEGE STUDENTS WHEN SHE WENT TO A CONVENIENCE STORE TO PURCHASE SALAD DRESSING FOR THE SALAD SHE AND HER FIANCE WERE TO HAVE WITH THEIR STEAKS. MY FIRST ENCOUNTER WITH "OUR SYSTEM" WAS WITH THE POLICEMAN ON DUTY WHEN WE ASKED FOR THE DEPARTMENT'S ASSISTANCE IN SEARCHING FOR QUENETTE. HE NOT ONLY IGNORED OUR PLEA TO LOOK FOR HER, BUT SUGGESTED THAT WE, IN A STRANGE CITY, CHECK THE BARS AND FIND HER OURSELVES. AFTER THE OFFENDERS HAD BEEN APPREHENDED, EACH GOT SEPARATE TRIALS. THE DEFENSE HAD AN ADVANTAGE IN THE BEGINNING BY THE MANNER IN WHICH THE JURY WAS SELECTED. AT THE TIME, ALABAMA STILL HAD THE 2-1 JURY STRIKE. WE WERE ALLOWED TO SIT IN THE COURTROOM SINCE WE WERE NOT WITNESSES. THIS IS NOT ALWAYS THE CASE. A FRIEND WHOSE DAUGHTER WAS MURDERED, WAS SUBPOENAED AS A WITNESS ONLY TO TESTIFY THAT SHE IDENTIFIED HER DAUGHTER'S CORPSE. SHE WAS NOT ALLOWED TO SIT IN THE COURTROOM DURING ANY OF

THE TRIAL. YET, THE MURDERER WHO COULD ALSO TESTIFY WAS ALLOWED TO SIT, NOT ONLY IN THE COURTROOM, BUT ALSO AT THE COUNCIL TABLE.

OUR FIRST TRIAL WAS HELD IN BIRMINGHAM, THE SECOND HAD A CHANGE OF VENUE AND WAS TRIED IN MOBILE. THE THIRD WAS IN BIRMINGHAM AGAIN. HAVING ALREADY HEARD ALL THE AGONIZING EVIDENCE TWICE BEFORE, I WAS MUCH MORE COMPOSED IN THIS ONE. NONE-THE-LESS, JUST AS A FIFTEEN MINUTE BREAK WAS CALLED, THE JUDGE SENT WORD BY THE DISTRICT ATTORNEY THAT UNLESS I COULD CONTROL MY EMOTIONS, I WOULD BE REMOVED FROM THE COURTROOM. MY HUSBAND HAS REPEATEDLY SAID THAT I WAS BREATHING AND NOTHING ELSE. THIS SHATTERED ME. I CONTAINED MYSELF UNTIL I WALKED OUTSIDE AND THEN LITERALLY FELL APART. THE NEWS MEDIA CAUGHT THIS ON CAMERA AND ON THE AFTERNOON NEWS IT WAS MADE TO APPEAR THAT THIS WAS THE MANNER IN WHICH I CONDUCTED MYSELF DURING THE TRIAL. THE DEFENSE ATTORNEYS ACTUALLY HAD COURT WATCHERS TO MAKE SURE I DID NOT SO MUCH AS LET A TEAR RUN DOWN MY CHEEKS.

ALL DEFENDANTS WERE FOUND GUILTY OF CAPITAL MURDER WHICH CARRIED THE DEATH PENALTY UNDER ALABAMA'S 1976 DEATH PENALTY LAW. THE JUDGE'S UPHELD THE VERDICTS IN THE FIRST TWO TRIALS BUT TO NO SURPRISE TO THE DISTRICT ATTORNEYS BUT WAS A DEVASTATING BLOW TO THE FAMILY WAS THE COMMUTING OF THE SENTENCE IN THE LAST TRIAL. IT WAS THE PATTERN OF THIS JUDGE TO COMMUTE EVERY DEATH SENTENCE THAT WAS TRIED BEFORE HIM. THE ONLY MITIGATING CIRCUMSTANCES WERE NO PREVIOUS RECORD AND HE WAS ONLY 19 YEARS OLD AT THE TIME OF THE MURDER. MY YOUNGER DAUGHTER WAS THE SAME AGE AND WAS OUR-RAGED AT THIS SUMMATION. BY THIS TIME I WAS THOROUGHLY DISILLUSIONED WITH OUR SYSTEM BUT RELIEVED THE TRIALS WERE FINALLY OVER. I WAS EAGER TO PUT MY LIFE BACK INTO SOME TYPE OF ORDER. THE TRIALS HAD RUN FROM MARCH, 1977 THROUGH AUGUST, 1978. I THOUGHT THE WORST WAS OVER AND WANTED TO ATTEMPT TO BRING TO THE PUBLIC'S CONSCIOUSNESS SOME DESPARATELY NEEDED CHANGES IN OUR SYSTEM. THE 1-1 JURY STRIKE WAS FOREMOST IN MY MIND. I ASKED MY REPRESENTATIVE TO INTRODUCE A BILL REQUIRING THE JURY TO BE STRUCK IN AN EQUAL MANNER. THIS HE DID TO NO AVAIL. IT BECAME VERY EVIDENT THAT THE LEGISLATURE VERBALLY SYMPAHTHIZED WITH VICTIMS BUT WERE NOT

WILLING TO BUCK THE SYSTEM--TRANSLATION--TOO MANY DEFENSE ATTORNEYS WERE IN THE LEGISLATURE AND WERE UNWILLING TO RELINQUISH THE EDGE THEY HAD TO WIN CASES. HOWEVER, THIS BILL WAS PERSISTANTLY INTRODUCED EACH TIME THE LEGISLATURE WAS IN SESSION.

MY EDUCATION OF THE JUDICIAL SYSTEM WAS VERY LIMITED AS I HAVE SINCE FOUND THE AVERAGE CITIZEN'S TO BE. I WAS AWARE OF THE AUTOMATIC APPEAL, BUT I ASSUMED THAT IF THE COURTS WERE CONVINCED THE ACCUSED OFFENDER WAS GUILTY, THAT WOULD BE THE END OF THE ORDEAL. MY FIRST REALIZATION THAT THIS WAS NOT THE CASE WAS THE SETTING ASIDE THE VERDICT IN THE FIRST TRIAL. A COMPLETELY NEW TRIAL HAD TO BE HELD DUE TO A TECHNICALITY OF THE WORDING ON THE FORM THE VERDICT WAS WRITTEN ON. THIS MEANT THAT OUR DAUGHTER WAS TO BE MURDERED BEFORE US ALL OVER AGAIN. THE VERDICT WAS GUILTY AND THE SENTENCE WAS DEATH. BEFORE OUR CASES COULD REACH THE UNITED STATES SUPREME COURT, WE LEARNED THAT A PORTION OF ALABAMA'S DEATH PENALTY LAW WAS FOUND TO BE UNCONSTITUTIONAL. WE WERE NOTIFIED THAT, ALONG WITH MANY MORE FAMILIES, WE WOULD BE FORCED TO WATCH OUR LOVED ONES MURDERED OVER AGAIN. SICK AT HEART, I TRIED TO LOOK FOR SOMETHING POSITIVE. I THOUGHT PERHAPS WE WOULD HAVE ANOTHER ATTEMPT FOR JUSTICE DESERVED IN THE CASE THAT WAS COMMUTED. NOT SO. THEN SURELY, SINCE THE DEATH PENALTY WOULD NOT APPLY IN THIS CASE, WE WOULD NOT TRY THIS ONE AGAIN, RIGHT? WRONG AGAIN. THE SHARP REALITY WAS THE DEFENDANT HAD NOTHING TO LOSE AND EVERYTHING TO GAIN WHILE WE HAD THE OPPOSITE. AFTER FIVE YEARS HAD LAPSED, WITNESSES HAD DIED. EVEN WORSE, AS THE DISTRICT ATTORNEY STATED, YOU BECOME JELLY-BRAINED FROM TRYING THE SAME CASES SO MANY TIMES. NOT ONLY WERE WE CONCERNED ABOUT THE NUMBER OF YEARS THAT HAD PASSED BUT WERE INFORMED THAT THE SAME JUDGES WOULD PRESIDE. JUST THE THOUGHT OF SITTING THROUGH ANOTHER TRIAL WITH THE SAME JUDGE THAT OBVIOUSLY WAS SYMPATHETIC TO THE OFFENDER WAS SICKENING. I IMMEDIATELY WROTE THE PRESIDING JUDGE PLEADING FOR THE ASSIGNMENT OF THIS CASE TO SOMEONE ELSE. MY REQUEST WAS DENIED.

OUR TRIALS STARTED OVER IN THE SAME SEQUENCE AS BEFORE. THE FIRST VERDICT WAS LIFE. THE JURY WAS NOT INSTRUCTED WHAT LIFE REALLY MEANT. I DO NOT BELIEVE THIS JURY HAD

ANY IDEA THAT LIFE DID NOT MEAN LIFE. I CANNOT BELIEVE THEY WERE AWARE THAT HE WOULD BE ELIGIBLE FOR PAROLE THIS FEBRUARY OR THAT IF HE IS NOT PAROLED THE FIRST TIME HE IS CONSIDERED THAT HE WILL BE CONSIDERED AGAIN IN 3 YEAR INTERVALS.

THE SECOND VERDICT WAS DEATH AND WAS UPHELD. THE THIRD RESULTED IN LIFE WITHOUT PAROLE AGAIN. INCIDENTALLY, WE DID HAVE A DIFFERENT JUDGE. HE COMMUTED ONE TOO MANY DEATH SENTANCES AND RESIGNED UNDER PRESSURE.

AGAIN, THE AUTOMATIC APPEALS AND AN END WOULD COME. WRONG. AUGUST ONE YEAR AGO, THE OFFENDER THAT RECEIVED DEATH FILED FOR ANOTHER HEARING FOR A NEW TRIAL DUE TO THE INFAMOUS TECHNICALITY. IT WAS DENIED BUT NEW APPEALS BEGAN ON THIS ONE ISSUE. I HAVE BEEN INFORMED THAT A NEW HEARING AND NEW APPEALS WLL BE POSSIBLE EVERY TIME ANY TECHNICALITY CAN BE FOUND AND A REQUEST IS MADE. THIS CANNOT BE THE INTENTIONS OF OUR FOREFATHERS. THIS IS NOT JUSTICE. LAW-ABIDING CITIZENS DESERVE BETTER.

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rec'd 10-29-

COMMENTS OF

LARRY D. THOMPSON

BEFORE THE

UNITED STATES SENTENCING COMMISSION

ON

OCTOBER 29, 1986

I WOULD LIKE TO TAKE THIS OPPORTUNITY TO CONGRATULATE THE COMMISSION ON COMPLETION OF THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES. AS REFLECTED BY THE OVERWHELMING VOTE IN CONGRESS FOR PASSAGE OF THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 WHICH CREATED THE COMMISSION, THE GUIDELINES ARE MUCH NEEDED.

DURING MY TENURE AS UNITED STATES ATTORNEY I HAD THE OPPORTUNITY TO MEET WITH MANY CITIZENS THROUGHOUT NORTH GEORGIA. NOTHING WAS MORE PERPLEXING TO THE AVERAGE CITIZEN OR SERVED MORE TO UNDERMINE RESPECT FOR OUR CRIMINAL JUSTICE SYSTEM THAN WIDELY DISPARATE SENTENCES GIVEN TO DEFENDANTS WHO HAD SIMILAR CRIMINAL RECORDS AND WHO HAD BEEN FOUND GUILTY OF SIMILAR CRIMINAL CONDUCT. I WELCOME THE SENTENCING GUIDELINES WHICH ARE DESIGNED TO INCREASE CERTAINTY AND FAIRNESS IN THE SENTENCING PROCESS. I ALSO BELIEVE THAT WITH INCREASED CERTAINTY WILL COME IMPROVED DETERRENCE. IT IS EXTREMELY IMPORTANT THAT AVERAGE CITIZENS HAVE RESPECT FOR OUR CRIMINAL JUSTICE SYSTEM AND BELIEVE THAT IT WORKS FOR THEM, AS OPPOSED TO CRIMINALS, BY DETERRING CRIMINAL CONDUCT.

I HAVE NOT HAD AN OPPORTUNITY TO REVIEW IN DETAIL AND FULLY CONSIDER ALL OF THE PROVISIONS OF THE PROPOSED GUIDELINES. AS WOULD BE EXPECTED IN A PROJECT OF THIS MAGNITUDE, SOME PROVISIONS HAVE CAUSED ME TO PAUSE. FOR EXAMPLE, I QUESTION WHETHER THE BASE OFFENSE VALUE FOR PRICE FIXING AGREEMENTS SHOULD BE DETERMINED SOLELY BY THE DOLLAR AMOUNT OF COMMERCE INVOLVED. BASED ON MY EXPERIENCE AS AN ANTITRUST PRACTITIONER, I SUGGEST THAT THE OFFENSE VALUE COULD ALSO BE DETERMINED BY THE NATURE AND STRUCTURE

OF THE PRICE FIXING AGREEMENT ITSELF. FACTORS THAT MIGHT BE CONSIDERED ARE: HOW MANY PARTIES WERE THERE TO THE AGREEMENT? HOW MANY MEETINGS DID THE PARTIES HAVE? WAS THE AGREEMENT LOOSE OR A HIGHLY STRUCTURED ONE? DID THE AGREEMENT WORK? HOW LONG DID THE AGREEMENT LAST? WHAT EXACTLY DID THE PARTIES AGREE TO DO? THIS TYPE OF ANALYSIS, AS WELL AS THE DOLLAR AMOUNT OF COMMERCE INVOLVED, SHOULD BE CONSIDERED IN DETERMINING THE BASE OFFENSE VALUE FOR A PRICE FIXING AGREEMENT.

THE COMMISSION'S COMMENTARY CONCERNING PRICE FIXING OFFENSES INDICATES SOME DISSATISFACTION WITH PRESENT SENTENCING PRACTICES IN THE AREA. HOWEVER, PRESENT PRACTICES MAY SIMPLY REFLECT JUDICIAL EVALUATION OF THE NATURE AND STRUCTURE OF PRICE FIXING AGREEMENTS AND THE DIFFICULTY OF DETERMINING APPROPRIATE CRIMINAL SANCTIONS FOR THEM. SEE UNITED STATES V. U.S. GYPSUM, 438 U.S. 422, 438 (1978)("THE SHERMAN ACT, UNLIKE TRADITIONAL CRIMINAL STATUTES, DOES NOT . . . PRECISELY IDENTIFY THE CONDUCT WHICH IT PROSCRIBES.")

I HAVE NOT BEEN ABLE TO FULLY CONSIDER THE PROCESS DESCRIBED IN THE GUIDELINES BY WHICH ACTUAL TERMS OF IMPRISONMENT ARE DETERMINED. FULL CONSIDERATION OF THIS PROCESS WOULD CALL FOR A DETAILED EXAMINATION OF THE DETERMINATION OF BASE OFFENSE VALUES FOR A PARTICULAR OFFENSE, AS WELL AS A DETERMINATION OF EXACTLY HOW THE VALUES MIGHT BE MITIGATED OR AGGRAVATED BY OFFENDER CHARACTERISTICS.

HOWEVER, I FULLY AGREE WITH THE CONCEPT THAT SANCTION UNITS ABOVE A CERTAIN MINIMUM NUMBER SHOULD REQUIRE THE COURT TO IMPOSE

SOME TERM OF IMPRISONMENT. IN OTHER WORDS, THE GUIDELINES SHOULD NOT COMPLETELY RULE OUT IMPRISONMENT FOR NONVIOLENT CRIMINAL OFFENSES.

DURING MY TENURE AS UNITED STATES ATTORNEY, MY OFFICE, ALONG WITH THE FBI AND THE GEORGIA DRUGS AND NARCOTICS AGENCY, UNDERTOOK AN IMPORTANT NATIONWIDE INVESTIGATION INTO ILLEGAL DIVERSION OF PRESCRIPTION PHARMACEUTICALS. SEVERAL OF THE DEFENDANTS IN THIS INVESTIGATION RECEIVED JAIL SENTENCES AND THESE SENTENCES SERVED THE ALL IMPORTANT FUNCTION OF DETERRENCE.

A BRIEF EXCERPT FROM A SENTENCING HEARING BEFORE THE HONORABLE RICHARD C. FREEMAN OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ON OCTOBER 19, 1985 SUMMARIZES, I BELIEVE, WHY IMPRISONMENT IS IMPORTANT AND CANNOT BE RULED OUT IN APPROPRIATE CIRCUMSTANCES. SENTENCING THE DEFENDANT IN THE CASE TO A TERM OF IMPRISONMENT, JUDGE FREEMAN STATED:

> I FORGOT ABOUT THE DIVERSION COUNT, BUT THAT DOES PRESENT SOME PROBLEMS BECAUSE THE TRIAL USUALLY ENDS THERE. IF THERE IS A RECALL AND YOU HAVE NOBODY, YOU DON'T KNOW WHO HAS THE DRUGS. YOU KNOW THEY WENT TO A HOSPITAL, BUT THE HOSPITAL LET THEM GO TO SOMEBODY ELSE, SO YOU DON'T KNOW WHERE THEY ARE. IT IS A VERY SERIOUS THING, AND I DON'T THINK REALLY THAT THE PUBLIC UNDERSTANDS QUITE YET THE SERIOUSNESS OF WHAT HAS BEEN GOING ON. YOU OR SOMEBODY ELSE SAID IN A MEMO THAT I READ RECENTLY MAYBE THIS WILL SHAKE UP THE PHARMACEUTICAL INDUSTRY AND THEY WILL DO SOME THINGS TO PREVENT THIS THING FROM HAPPENING IN THE FUTURE.
>
> WE HAVE, FROM THE STANDPOINT OF DETERRENCE, WE HAVE NOT ONLY TO THINK OF MR. X. I DON'T BELIEVE MR. X WILL EVER BE BACK HERE AGAIN, HE WOULDN'T BE BACK HERE AGAIN ON A CHARGE SUCH AS THIS, I AGREE WITH YOU THERE.

> BUT IT DOES NOT DO GOOD TO HAVE THE UNITED STATES ATTORNEY'S OFFICE WORKING WITH THE FEDERAL BUREAU OF INVESTIGATION ON A GREAT BIG NATIONWIDE PROGRAM TO GO OUT AND ROUND UP HUNDREDS OF PEOPLE WHO ARE DOING THIS SORT OF THING; AND THE PUBLIC GETS ALL AROUSED AND SAYS, THIS IS WONDERFUL, SOMEBODY IS SPENDING OUR TAX DOLLARS WISELY, THEY ARE CATCHING THESE THIEVES AND THESE PEOPLE WHO ARE TAKING ADVANTAGE OF US; AND TO HAVE SOME JUDGE COME ALONG AND GIVE EVERYBODY PROBATION.

BECAUSE I BELIEVE THAT IMPRISONMENT SHOULD NOT BE RULED OUT UNDER THE GUIDELINES FOR NONVIOLENT OFFENSES, IT IS THEREFORE IMPORTANT THAT THE COMMISSION CAREFULLY DETERMINE THE BASE VALUES ASSIGNED TO PARTICULAR OFFENSES, AS WELL AS CAREFULLY CONSIDER THE APPLICATION OF OFFENDER CHARACTERISTICS TO THESE VALUES.

THE COMMISSION HAS REQUESTED COMMENT ON SEVERAL AREAS, AND I WOULD LIKE TO BRIEFLY RESPOND TO TWO OF THEM.

A GUILTY PLEA, ESPECIALLY PURSUANT TO A PLEA AGREEMENT, SHOULD ALWAYS BE CONSIDERED AS A MITIGATING FACTOR IN SENTENCING UNLESS THE COURT FINDS THAT THE PLEA IS MERELY SELF-SERVING, MADE IN BAD FAITH OR THAT THE PLEA AGREEMENT BETWEEN THE DEFENDANT AND GOVERNMENT IS SOMEHOW TAINTED. IN MANY INSTANCES, ESPECIALLY IN WHITE COLLAR CRIME CASES INVOLVING ORGANIZATIONS, A GUILTY PLEA PURUSANT TO A PLEA AGREEMENT IS AN IMPORTANT FIRST STEP TOWARD ACCEPTING RESPONSIBILITY FOR THE OFFENSE AND DOES SERVE TO CONSERVE THE LIMITED RESOURCES OF THE CRIMINAL JUSTICE SYSTEM IN CASES THAT ARE MANY TIMES COMPLEX AND LENGTHY. THIS APPROACH SHOULD NOT PRECLUDE THE COURT FROM REDUCING A DEFENDANT'S SENTENCE FURTHER, IN ADDITION TO THE GUILTY PLEA, IF IT FINDS THAT THE DEFENDANT SATISFIES ADDITIONAL INDICIA OF CONTRITION.

THE COMMISSION HAS ALSO REQUESTED COMMENTS CONCERNING ALTERNATIVE APPROACHES TO ORGANIZATIONAL SANCTIONS. BASED ON MY TENURE AS UNITED STATES ATTORNEY AND MY EXPERIENCE AS A PRACTITIONER, I BELIEVE THE JUST PUNISHMENT APPROACH IS PREFERABLE AND REFLECTS A MORE ACCURATE UNDERSTANDING OF THE NATURE OF CORPORATIONS IN OUR SOCIETY.

A CRIME MAY BE THE RESULT OF A CONSCIOUS PLAN OF A CORPORATION'S TOP MANAGEMENT. HOWEVER, IT MAY ALSO BE THE RESULT OF INDEPENDENT ACTIONS OF LOWER LEVEL EMPLOYEES. THE CORPORATION MAY NOT HAVE BENEFITED FROM THE ILLEGAL ACTIONS OF ITS EMPLOYEES. AND, THE CORPORATION MAY HAVE TAKEN TOUGH MEASURES TO DISCIPLINE ITS ERRANT EMPLOYEES. THESE ARE ALL IMPORTANT FACTORS THAT SHOULD BE CONSIDERED IN DETERMINING ORGANIZATIONAL SANCTIONS. AND, THERE IS CASE LAW AND AUTHORITY IN SUPPORT OF THE JUST BENEFIT APPROACH TO ORGANIZATIONAL SANCTIONS. SEE, E.G., STANDARD OIL CO. OF TEXAS V. UNITED STATES, 330 F.2D 719 (5TH CIR., 1963) (REVERSING A CORPORATION'S CONVICTION UNDER THE "HOT OIL ACT" BECAUSE THE CORPORATION RECEIVED NO BENEFIT FROM ITS EMPLOYEES' ILLEGAL ACTIONS) AND MODEL PENAL CODE § 2.07(5) (PROPOSED DRAFT 1962).

Marcia Klein
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SENTENCING REFORM?*

The first draft of the new determinate sentencing guidelines has been published and the overwhelming response thus far seems to be cries of dismay. The **Sentencing Reform Act of 1984** which is included in the **Comprehensive Crime Control Act of 1984** stipulated the formation of the United States Sentencing Commission and promulgation of the guidelines. Within the Sentencing Reform Act, Public Law 98-473, was written a "sense of the Senate resolution." This was not a law per se, but an expression of the intent of Congress in passing such a major crime reform bill. It would seem this intention was waylaid, disregarded, or forgotten for surely it has not resurfaced in the draft of the guidelines. The following is the full text of the Senate resolution as it appears in the 1986 edition of the Federal Criminal Code and Rules:

> **Sentencing Considerations Prior to Enactment of Guidelines.** Section 239 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2039, provided:
>
> "Since, due to an impending crisis in prison overcrowding, available Federal prison space must be treated as a scarce resource in the sentencing of criminal defendants;
>
> "Since, sentencing decisions should be designed to ensure that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society;

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*To improve by correction of error or removal of defects; to abolish abuse. American Heritage Dictionary.

"Since, in cases of nonviolent and nonserious offenders, the interests of society as a whole as well as individual victims of crime can continue to be served through the imposition of alternative sentences, such as restitution and community service;

"Since, in the two years preceding the enactment of sentencing guidelines, Federal sentencing practice should ensure that scarce prison resources are available to house violent and serious criminal offenders by the increased use of restitution, community service, and nonserious offenders: Now, therefore, be it

"Declared, That it is the sense of the Senate that in the two years preceding the enactment of the sentencing guidelines, Federal judges, in determining the particular sentence to be imposed, consider --

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant has not been convicted of a crime of violence or otherwise serious offense; and

"(3) the general appropriateness of imposing a sentence of imprisonment in cases in which the defendant has been convicted of a crime of violence or otherwise serious offense."

How a Sentence Will Be Determined

The draft guidelines outline 12 steps the Court should take in determining a sentence. In brief, they go something like this:

(a) Determine the statute the offender has been convicted of violating.

(b) A Statutory Index at the back of the guidelines then refers the Court to a specific section in the chapter on **Offense Conduct.** This chapter assigns a base offense value

(a numerical figure) to the offense. The Court then adds or subtracts points for special offense characteristics*, thus aggravating or mitigating the base offense score.

(c) Steps 1 and 2 are repeated for each offense of conviction.

(d) Then the Court refers to a chapter in the guidelines which covers applicable adjustments for **Offender Characteristics**.** Points are added or subtracted to aggravate or mitigate the base offense score further.

(e) When all offenses have been thus scored, the Court totals the offense values.

(f) There is an adjustment for **Post-Offense Conduct** (obstruction of justice and perjury, acceptance of responsibility, cooperation).

(g) There is also an adjustment for **Criminal History.**

(h) The new total is the offender's **Sanction Unit Score.**

(i) The Court then refers to the **Sanction Unit Guideline Table** and a sentence is assigned within the applicable guidelines.

In the above steps where the Court is instructed to add or subtract points for special Offense Characteristics or Offender Characteristics, it is clear from reviewing the lists and lists and lists of aggravating factors and the list of mitigating factors that the Court is not fond of subtraction.

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*See Sentencing samples p. 5-6 of this article.

**See Offender Characteristics p. 15 of this article.

What Does "Real-Offense" Mean?

Although judges would have to consider a variety of factors in sentencing under this proposed modified real-offense approach, the approach itself bears a marked resemblance to the working practices of the Parole Commission. Under current law, the Parole Commission can, by a Preponderance of the Evidence, use evidence or indictments not used at sentencing to aggravate an inmate's release date. If this modified real-offense system is adopted, a defendant indicted on homicide charges, later reduced to manslaughter, would essentially be sentenced under homicide sentencing guidelines nonetheless. Thus a judge, like the soon to be abolished Parole Commission, could consider factors the defendant thought mooted by agreement to the negotiated plea. Critics of this system point out the obvious impact this would have on a defendant's incentive to plea bargain (or cooperate with the Government). There will not be much of a "bargain" in plea bargaining.

In its commentary the Commission does point out this and other concerns involved in a real-offense system. Without incentives, defendants have nothing to lose and everything to gain by going to trial. Critics suggest that even a 10 to 15 percent decline in the guilty plea rate would require the Courts to **double** their current load of trials to maintain the current rate of disposition. That is an alarming thought.

The near opposite of a real-offense system, a charge of conviction system, is also described in the draft guidelines. In a charge

of conviction system defendants know what their sentence is likely to be at the time they plead guilty in a plea agreement. However, a fair sentencing system must take into account at least some of the real, uncharged elements of a crime. All defendants sentenced for say, tax evasion, could not be sentenced identically regardless of wide variances in the dollars involved in the offense.

In conclusion, the Commission felt these and other considerations pointed to a need for a **modified** real-offense structure. For sentencing purposes only those real elements that are importantly bound up with the conduct that constitutes the crime charged are to be included. The judge uses the guidelines, specifically the special Offense Characteristics listed with each offense and the list of explicitly cross-referenced aggravating harms and conduct associated with the particular offense, to determine which conduct should be taken into account. Here is how it is explained in the draft itself:

> "Prior to sentencing an offender convicted of bank robbery, the judge will look up bank robbery in the guidelines. An explicit reference to the amount of money stolen and cross-references to those (aggravating) physical harms and conduct that typically accompany most bank robberies are given. The judge will not find any reference to conduct (e.g. drug trafficking) that is unusual in a bank robbery. The guidelines take account of those harms and conduct that it lists or cross-references. They do not take account of any other conduct. (Such other conduct will affect the sentence only if the offender is charged and convicted separately.)
>
> The following examples demonstrate how modified real offense sentencing works under the preliminary guidelines:
>
> (1) The offense of conviction is distribution of cocaine. Evidence at trial established that the offender used a twelve-year old child to transport the drugs.

The offense value for distribution of cocaine is aggravated by the offense value for using a minor child as a conduit for distributing drugs. The involvement of the child is related to and is an act done in furtherance of the offense of conviction.

(2) The offense of conviction is distribution of cocaine. After the offender's arrest, officers execute a search warrant at the offender's apartment. The search reveals no other evidence linking the offender to other drug transactions. However, an illegal short-barreled shotgun is recovered. No indictment or conviction results from seizure of this weapon at the time of sentencing.

The offense value for the shotgun is not, under these circumstances, added to the offense value for the drug distribution. The possession of the shotgun is not related to the offense of conviction.

(3) The offense of conviction is conspiracy to steal and forge one social security check. At sentencing the judge finds by a preponderance of the evidence that the offender stole, forged, and cashed 20 checks.

All of the offenses related to the 20 checks done in furterance of the conspiracy, or that resulted therefrom, are used to calculate the total offense value for the conspiracy."

The question we still have about this system is will this type of real but uncharged information still appear in the Government PSI? If the judge, supposedly, cannot use the information in establishing the sentence, then why should it be in the Government PSI? Rule 32 conflicts (correction of PSI controversies) will continue if this issue is not resolved prior to finalization of the guidelines.

An important related issue concerns sentencing facts. When a sentencing fact is disputed, the judge is to determine the fact using a Preponderance of the Evidence standard. If a hearing becomes

necessary the Government will bear the burden of proof for any aggravating factors, but the defendant and the defense bear the burden for mitigating factors. If a Preponderance of the Evidence standard is to be applied to mitigating factors as well, defense would be less than wise to greet the day of sentencing without having reviewed the Government PSI and without a defense PSI ready in hand to document a preponderance of evidence for any mitigating factors which could well prove to be time savers for the defendant.

The New Guidelines And Sentencing Alternatives

Results from a recent study by the Bureau of Justice Statistics show that the nation's state and federal prison population is not only growing but accelerating at a rate of approximately 1,000 new prisoners each week. Other statistics from this same source indicate that Category One offenders make up at least one-third of our prison population. The majority of which are first offenders of non-violent crimes. The sense of the Senate resolution repeatedly emphasizes the great need to recognize prison space as a scarce resource and to reserve its use for offenders of violent crime who need to be removed from society for the protection of all. The impetus behind the Nunn-Armstrong bill on sentencing reform which led to the Sentencing Reform Act of 1984 was to stop the useless waste of taxpayer dollars being spent to keep non-dangerous offenders behind bars. The proposed guidelines do not address the issue of alternatives to lengthy incarceration. If guidelines are not going to be provided to the Court which recommend sentencing options other than incarceration for first offenders of non-violent crimes or options to be paired

with short-term incarceration, let the Court request a sentencing alternative plan from the defense. This would provide the Court with a focal point from which to work in deciding an appropriate sentence. Unless the guidelines are revised before enactment to allow a wider range of Sanction Units as at least possibly eligible for alternatives to incarceration, this suggestion is close to pointless.

The guidelines table which converts an offender's total Sanction Units into a term of imprisonment does not specifically include any alternative sentencing options. Sanction Units less than 14 result in a term of imprisonment from zero to six months. "The Court **may**, [emphasis added] therefore, impose a sentence other than imprisonment on offenders whose units total less than 14. Sanction Unit totals of 14 or more will **require** [emphasis added] the Court to impose some term of imprisonment."

The tables below are from the new guidelines and will give the reader some idea of what offenses, in terms of monies or drugs involved, would be eligible for a sentence other than incarceration. Few. Even though some of the tables seem to represent a small number of offenders who might be eligible for alternatives, the base score in the table does not take into consideration the multiple aggravating factors available to the Court which will convert a potential alternative sanction into incarceration. In reality there appears to be no alternative sentencing options available to the majority who are eligible. The number of persons incarcerated right now who are eligible is phenomenal. A first time offender of a non-violent offense with no priors rated above 14 Sanction Units would **not** be

eligible for an alternative to incarceration as the guidelines now stand. The Commission does include lengthy commentary on several proposed methods for converting Sanction Units into terms of imprisonment as well as into sentences other than imprisonment. However, there are no guidelines or even specific suggestions for the Court on the appropriation of sentences other than incarceration.

OFFENSES INVOLVING PROPERTY

Monetary Value	Offense Value
Up to $1,000	4
$ 1,001 - $ 2,000	6
2,001 - 5,000	8
5,001 - 10,000	12
10,001 - 25,000	16
25,001 - 50,000	20
50,001 - 100,000	24
100,001 - 200,000	30
200,001 - 500,000	36
500,001 - 1,000,000	42
1,000,001 - 2,000,000	48
2,000,001 - 5,000,000	54
Over $5,000,000	60

OFFENSES INVOLVING INCOME TAXES

Deficiency	Base Offense Value
Up to $1,000	10
1,001 - $ 5,000	12
5,001 - 10,000	14
10,001 - 20,000	16
20,001 - 35,000	18
35,001 - 70,000	22
70,001 - 120,000	26
120,001 - 200,000	30
200,001 - 350,000	36
350,001 - 600,000	42
600,001 - 1,000,000	48
1,000,001 - 2,000,000	54
Over $2,000,000	60

OFFENSES INVOLVING DRUGS

Amount	Base Offense Value
2 kg. or more cocaine	180
1 kg. to < 2 kg. cocaine	168
500 gms. to < 1 kg. cocaine	144
250 to < 500 gms. cocaine	132
100 go < 250 gms. cocaine	72
25 to < 100 gms. cocaine	66
10 to < 25 gms. cocaine	48
< 10 gms. cocaine	28
20,000 lbs. or more marijuana	108
2,000 to < 20,000 lbs. marijuana	72
200 to < 2,000 lbs. marijuana	48
50 to < 200 lbs. marijuana	32
10 to < 50 lbs. marijuana	24
1 to < 10 lbs. marijuana	18
< 1 lb. marijuana	12

As they now stand the guidelines do not require or suggest that the Court deliver an alternative to incarceration even for those cases where the Sanction Units do fall below 14. It is left entirely to the discretion of the Court. It is an established fact that the United States has the longest sentences in the world and one of the highest crime rates.[1] There is no evidence that longer sentences provide greater deterrence (to the offender or would-be offender) than short ones.[2] As the prosecutorially oriented reforms begin to

[1] James Jay. "State Prisons on Trial." State Legislatures: Vol. 2, Feb. 1979, p.5

[2] Ibid. Jay. p.4

jell, the onus falls with increased heaviness onto the shoulders of the defense counselor to aggressively represent the defendant at the time of sentencing. A documented defense PSI which intelligently reviews the facts of the case and highlights the mitigating aspects is essential to an informed sentencing decision. Eighteen U.S.C. § 3553(c) states: "The Court must explain its specific reasons for imposing a sentence at a particular point within the range, or outside the range, in open Court at the time of sentencing." The judge can readily point to specific tables and offense and offender characteristics, in print, in the guidelines with assigned numerical values as the reasons for aggravating the defendant's base offense score. As the guidelines stand now there are no corresponding lists for mitigating factors whereby the base offense score might be reduced. Although the Commission states it has yet to fully consider the weight to be given such basic offender characteristics as age, education, previous employment record, family ties and responsibilities, community ties, and so on, and seeks the public's input on such matters, as it now stands these are not addressed formally within the structure of the guidelines. Any "list" of mitigating factors to be used at sentencing which bear with relevance on the facts of the case will not come from the sentencing guidelines (or drop from heaven). In some respects, guidelines alone could not address these factors; not entirely. An individual life has very individual circumstances which give rise to the situation bringing the defendant before the Court. A defense PSI, prepared to aid the attorney on behalf of the client, must address sentencing alternatives whenever appropriate. One of the purposes of a defense PSI is to document

specific mitigating factors investigated and researched whereby the Court can view the offender and the offense in the context of the offender as an individual person, past, present, and future. This document can serve as an immediately available written record from which the judge can identify mitigating facts that support a reduction of the defendant's Sanction Units to render a decision at or near the lower end of the applicable guideline range. **This is the only opportunity for the defense to influence the time a client will serve in jail.** There is no parole. Time sentenced is time served under the new guidelines.

It is hard to believe that the purposes of sentencing and justice will be met by sentencing an 18-year-old the same as a 40-year-old under identical guidelines as if both had equal culpability and ability to evaluate themselves and their behavior. Any one of us at least age 30 or older can look back at ourselves at age 18 and readily admit we were not capable of the insight and foresight we can now bring to our decision-making process as a result of our longer life experience. And who could possibly believe that justice and the community are better served by paying $15,000 to $17,000 per year to house a man in jail for a "refusal to file" tax charge of $16,000 when he could have served as a community volunteer in a local hospital filling a staff position normally costing the hospital $14,000 in salary. Through a community service sentence this individual could begin paying back his debt to society, real and moral. And who would willingly turn over their personal tax dollars to foot the bill for imprisoning a young man for taking six bags of dirt from a National Park? Surely he requires punishment, but who is being

punished by sending him to jail? Perhaps under our current federal system alternatives to incarceration do not receive widespread attention or popularity among judges, or the public, but they are available and on occasion wisely selected and used. These preliminary guidelines seem inclined to preclude the use of alternatives to incarceration to any degree which would make them practical and helpful to our current judicial and prison systems, not to mention society.

In any project, corporate or personal, there are goals. Some are stated, some are implicit, some are private. The Senate resolution states some very obviously worthy goals. The Comprehensive Crime Control Act of 1984 with its first time ever written purposes of sentencing, stated some goals for our federal sentencing practices. The Sentencing Commission, holder of many goals, states its long term goals as achieving workable, fair, and effective sentencing guidelines. The implicit goals of the crime reform wave sweeping across our country are perhaps goals for greater personal safety, crime reduction, reduction of sentencing disparity. But upon reading through the draft of these guidelines albeit filled with underscored requests for comments and assumed future revisions prior to finalization it seems the private goal being sought by our justice system and current administration is to add another title to our country's image-making machinery:"Crime Busters of the Universe."

Constitutionality Of The Proposed Guidelines

The Supreme Court has ruled that the Sixth Amendment forbids penalties against defendants who choose to stand trial, but does not forbid a "proper degree of leniency in return for guilty pleas." Corbitt v. New Jersey, 439 U.S. 212, 223 (1978).[3] An individual's right to a trial is a Constitutional right, the basic foundation of which may be threatened by these new guidelines. A witness at one of the Commission hearings, Edward F. Marek, a federal public defender for the Northern District of Ohio, testified that an explicit system-wide, automatic discount which would apply in 90 percent of all cases might well be viewed not as leniency but as a means of penalizing those who do not accept it.[4] It is appearing to many in criminal justice circles that mitigating a sentence by admission of guilt is a fine-line issue which the Commission must walk a bit more convincingly if these new guidelines are to be endorsed as they stand.

This is not to say that cooperation should not have its due rewards, but the message in the guidelines appears to be, "Plead guilty, cooperate, and in turn a few points will be deducted from your offense Sanction Unit score. However, if you have been convicted of a greater charge than the one you pled to, you will be sentenced nonetheless, based on the Sanction Units assigned to the greater charge." It sounds like the interest earning checking

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[3] Criminal Justice newsletter, Vol.17, No.19, October 1, 1986.

[4] Ibid.

accounts with a monthly service charge for balances below a certain dollar amount...whatever you gain in interest, you lose in service charge. One of the concerns of using cooperation as a mitigating factor in sentencing is that it considers only those people who literally admit to a crime despite their right to a trial, and a fair trial at that.

Aggravating And Mitigating Offender Characteristics

In calculating an offender's Sanction Unit score the Court has three Offender Characteristics to assess: Role in the Offense, Post-Offense Conduct, and Criminal History.

(1) Role in the Offense: Titles are not controlling. It is the offender's role in the offense of conviction that is significant. There are various characteristics such as position of control over a criminal enterprise, supervising another person in the commission of the offense, or using a special skill in the offense which multiplies an offense score by a set number. If the offender was a minor participant the score is reduced based upon culpability and the nature of the criminal conduct involved. The appropriate numerical multiplier for some of the considerations listed is decided by the judge. For a first conviction for engaging in a continuing criminal enterprise the base offense value is 120, or the total of the offense value(s) applicable to the predicate offenses, whichever is greater.

(2) Post-Offense Conduct: This section includes Obstruction of Justice whereby the judge selects an appropriate numerical multiplier to assign to such considerations as attempts to conceal or destroy evidence, offering untruthful testimony, directing another person to offer perjured testimony. The second characteristic is Acceptance of Responsibility whereby the offender's Sanction Unit score can be decreased by an amount not to exceed 20 percent of the base score if the judge finds through a Preponderance of the Evidence that the defendant's acceptance of responsibility has been established. This may be accomplished through such activities as voluntary surrender before charges are filed, voluntarily making restitution, or other objective steps towards rehabilitation. This is one of the few areas whereby mitigating factors may be assessed and used to decrease a Sanction Unit score. This is a separate category from Cooperation. Cooperation is the third characteristic in this section. The text from the guidelines reads thus:

"COOPERATION

If the United States Attorney certifies that the offender provided truthful and significant information regarding the criminal activities of another person or persons, multiply the total offense value from Chapter Two by **.8.**

If the United States Attorney certifies that the offender actively assisted authorities in an ongoing investigation or provided truthful and significant testimony before a grand jury or in a court proceeding, multiply the total offense value by **.7.**

If the United States Attorney certifies that the offender provided exceptional assistance to law enforcement authorities, multiply the total offense value by **.6.**"

The last statement provides for a 40 percent reduction for exceptional cooperation.

(3) The third section under Offender Characteristics is Criminal History. The introductory text from the guidelines reads as follows:

"A sentence adjustment for an offender's criminal history can be justified on both just punishment and utilitarian grounds. From a just punishment perspective, repeat offenders who have already experienced intervention from the criminal justice system has ignored warnings. Therefore, they are deemed more blameworthy than offenders who have not been confronted previously. The amount of the sentence adjustment that is justified by a criminal history is a subject of debate, but many just punishment proponents accept some sentence modification for criminal record.

Crime control arguments provide a stronger justification for using criminal history to adjust a sentence. Criminal record is a strong predictor of recidivism. As a result, it is often used to increase the length of imprisonment and the level of supervision for offenders, thus addressing incapacitation and deterrence respectively.

The major components of the criminal history adjustment are the number and severity of sanctions imposed for prior convictions, and whether the offender was under criminal justice control during the commission of the current offense or had recently been released from custody. These components reflect the extent, seriousness, and recentness of criminal history. An additional item deals with the use of heroin, opiate derivatives, and other dangerous drugs. A decay factor is used to eliminate old offenses from the criminal history adjustment."

The Commission invites public comment on the appropriate relationship between criminal record and sentence. The guidelines contain a criminal history score table based on the role criminal history has played in past sentencing decisions

as a focal point for examining various alternative approaches. The following is taken from the guidelines listing the areas to be considered in calculating the criminal history score. The total score is then applied to the criminal history score table which relates that score to the base offense score and determines the final number to be added to the base offense score.

A. Score at least 3 points for each prior sentence of imprisonment for a maximum term of more than one year. For each such term:

   1. score 3 points if the offender served less than three years;

   2. score 4 points if the offender served three or more years but less than five years;

   3. score 5 points if the offender served five or more years.

B. Score 2 points for each prior sentence of imprisonment for a maximum term of 60 days or more that is not counted above.

C. Score 1 point for each prior sentence that is not counted above.

D. Score 2 points if the offender committed the current offense:

   1. while under any form of criminal justice control, including probation, parole, or supervised release, custody or escape status, or any form of release pending trial, sentencing, or appeal; or

   2. within three years after any release from imprisonment on a sentence counted in (A) above; or within three years after the imposition or commencement of any sentence counted in (B) above.

E. Score 3 points if the offender had a positive urine test for heroin or any other opiate, cocaine, or PCP either at the time of arrest, during the pretrial release period, or during the presentence release period; or score 3 points if the offender is determined to have been an abuser of heroin or any other opiate, cocaine, or PCP within ten years of the current conviction.

The chapter on Offender Characteristics concludes with two major considerations, Plea Agreements and Other Offender Characteristics. The plea agreement section consists of a list of unresolved issues about which the Commission solicits public comments. The remaining Offender Characteristics are ones the relevance of which has not been determined.

"The Commission's authorizing legislation requires it to consider whether a number of offender characteristics have "any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined relevant. 28 U.S.C. § 994(d). The characteristics are:

1. age;
2. education;
3. vocational skills;
4. 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;
5. physical condition, including drug dependence;
6. previous employment record;
7. family ties and responsibilities;
8. community ties;
9. role in the offense;
10. criminal history; and
11. degree of dependence upon criminal activity for a livelihood."

Comparing The Old And The New

It would be difficult to draw perfectly equal comparisons since the scoring systems between the old and new guidelines are not the same. However, looking at some basic examples readily establishes a comparison.

Offense Example	Months To Serve: Under Old Guidelines	Under New Guidelines
10 - 50 lbs. marijuana	0 to 22 months (depending on Salient Factor Score)	12 to 18
200 to 2,000 lbs. marijuana	12 to 44 (depending on Salient Factor Score)	36 to 44
1 to 5 kilos cocaine	40 to 100 (depending on Salient Factor Score)	132 to 210
20,000 or > lbs. marijuana	40 to 100 (depending on Salient Factor Score)	96 to 120
500,000.00 property offense	40 to 100 (depending on Salient Factor Score)	24 to 30

From these and other examples across old and new guidelines some patterns stand out. Drug offenses of small quantities start out with higher guidelines under the new system with upper limits close to the old limits. Penalties for larger quantities start very much higher with higher maximum terms. Some white collar offenses have comparable or lower penalties under the new guidelines compared to the old.

It is understandable that we would all like there to be less crime in our country, less fear of crime, but longer, tougher sentences and classifying all criminals in the same category will not bring the sought after results. This "last resort emotionalism"

will not remedy the situation. Too many of the wrong offenders are being sent to prison in droves, occupying precious space which is then unavailable for the violent offenders and it does not appear that the new guidelines will alter this pattern (they may in fact increase the problem). The vision of criminal law reform that began as progressive is looking dismally repressive.

One of the most distressing lacks in the draft of the new guidelines is a strong provision for lessening sentence severity based on the youthfulness of the offender. By incarcerating 18 to 20-year-olds to the severity level presented in these new guidelines we are jeopardizing the very essence of our humanity. The very heart of America's future is demoralized by incarcerating our young people for extended periods of time. This is so applicable to cases of youthful first time offenders. At 18, with your whole life before you, there is a sense of invincibility which precludes an adult grasp of cause and effect relationships. We are not leaving any latitude for judges to work with youthful offenders in alternatives to incarceration. The new guidelines mention youth as a mitigating factor to be discussed between now and finalization, but in this, the Sentencing Commission's conclusive draft developed as a result of enormous input from criminal justice professionals, no regulating procedure or point values are mentioned to account for youth as a mitigating factor in determining a sentence. Even if two, three, or four points were deducted that does not change the rate of incarceration to such a degree that a young person will have a chance to resolve their difficulties and return to life. The guidelines would not drop from ten years to two years, but only

perhaps nine. We really need to focus on rehabilitation for young people; not punishment for punishment's sake.

Summary

We have attempted in this article to represent what we have identified as the most urgent concerns for those interested in sentencing reform. Much of the information contained in the article comes from the actual draft of the guidelines and Commission's commentary therein.

National Legal Services is dedicated to sentencing alternative planning and the preparation of defense presentence reports to enable defense attorneys to be more effective sentencing advocates now and in the future.

> "A wise statesman once said: There are two things people shouldn't watch being made -- sausages and laws."
>
> from The Advocate, Vol.8, No.4, June, 1986.

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Rec'd 10-31-86

WILLIAM D. GRAVES
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October 29, 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:

The opportunity to review the Sentencing Commission's preliminary draft of its sentencing guidelines is much appreciated. I have been privileged to have been involved in responding to policy issues prior to the drafting of the guidelines and am gratified to see that many of the suggestions I, and other Court officials, have made have been incorporated into the preliminary draft. I also appreciate the opportunity to testify before the Commission at Denver on November 5, 1986. I will limit my testimony at that time to a summary statement of approximately 12 minutes, but felt it imperative to provide written comments to the Commission that go well beyond the statement I will have time to make during my testimony. I should add, that I feel that I have only scratched the surface in analyzing the preliminary draft and suspect I could have easily doubled the amount of written comments had we had the time to do a more in-depth analysis.

My initial reaction to the preliminary draft is that the changes to be brought by the Comprehensive Crime Control Act and the Sentencing Commission are going to be more than dramatic to the Federal Judiciary -- they will thoroughly revolutionize the sentencing process.

I was disappointed that the Commission didn't attempt a financial impact statement -- our limited application of the guidelines suggests that the sentences imposed would be significantly more severe than the current "customary total time to be served" guidelines of the U. S. Parole Commission. In my opinion the proposed guidelines in their present form could flood the Federal Prison System with inmates serving longer sentences. The financial strain on a Federal budget that is already deeply etched in red ink could be devastating. The additional workload demands on Probation Officers and Judges would be significant and require increases in personnel.

OPENING COMMENTS

I cannot readily accept the Commission's basic premise that "unwarranted disparity" is due to Judges having been provided little previous guidance in sentencing. That simply is not the whole truth. "Disparity" is a complex problem and I believe it is, predominately, created prior to a Judge's becoming involved in a criminal case. Law enforcement agencies have control over what crimes they investigate, what individuals they arrest and what cases they refer for prosecution. Prosecutors, similarly, have considerable discretion in what cases they accept and which cases they decline. The greater disparity, though, occurs as prosecutors and defense counsel become involved in charge bargaining. If the reduction of disparity is the superordinate goal of the Sentencing Commission then a national policy on charge and plea bargaining is as much needed as are specific sentencing policies.

The second facet of the basic premise that I take exception to is that Judges are provided little guidance on sentencing. U. S. Probation Departments, nationwide, provide Judges with a statistical analysis of what has happened previously to offenders convicted of the same crime and provides the Court with an analysis of guideline ranges currently used by the Parole Commission for offenders with similar backgrounds. This is not to say that there isn't disparity, but the cure is, in my opinion, much more dramatic than is warranted -- a poorly running but mechanically sound car may have needed only a tune-up and not a complete overhaul.

COMMENTS ON POLICY ISSUES

MODIFIED REAL OFFENSE SENTENCING SYSTEM

The Commission asked specifically for input on the compromise that it has proposed through the preliminary draft. The system that the Commission proposes is closely akin to the practice of this Court -- the Court relies on the facts in the conviction offense to impose sentence. My concern with adopting the proposed compromise is that it might overly restrict what the Court is allowed to consider and might encourage a shift in the sentencing function from Judges to prosecutors. The Commission has addressed that issue and has noted that its mandate is to reduce disparity not transfer its source.

The Comprehensive Crime Control Act (18 USC 3553(1)) allows the Court to **consider** (emphasis added) ". . . the nature and circumstances of the offense. . ."; (2)(A) ". . . the seriousness of the offense. . . " and (5) any pertinent policy statement issued by the Sentencing Commission. My concern with the Commission's adaptation of an overly restrictive policy of "modified real offense sentencing" is that it could result in the Court's lacking discretion to make decisions for problems the Commission is not able to foresee.

The most important point, though, in adopting either a "modified real offense sentencing system" or allowing the sentencing Judge to consider all conduct or harms committed in furtherance of the crime of conviction is to make that policy known to the defendant in advance of his plea. A defendant can be advised what the Court is going to consider, including unadjudicated information in other counts and other conduct. Our Court advises a defendant, at the time of his plea, that the Parole Commission will consider unadjudicated counts in determining the length of time that he must serve before being released on supervision. That does not seem to have had an adverse affect on plea bargaining here.

The overriding concern with a "modified real offense sentencing system" is that the Court must be allowed sufficient latitude to impose a just and fair sentence. That function should not be transferred to the prosecutor. I would expect the Court to take a more active role in scrutinizing plea bargains, perhaps deferring to the date of sentencing the acceptance of the plea agreement.

AUTOMATIC REDUCTIONS FOR GUILTY PLEAS

It is my firm conviction that to reward people for entering guilty pleas is to punish those others who take advantage of their constitutional right to a trial. The alternative approach suggested by the Commission, rewarding people who take the responsibility for their behavior, is a much more palatable approach and less likely to be critically reviewed by the Appellate Courts.

REWARDING COOPERATION

I would discourage the Sentencing Commission from incorporating any sort of reductions for cooperation into the guidelines. I don't feel that it is a proper place for the Court to be involved and have stated my reasons for that in my previous correspondence. The prosecution is capable of rewarding the cooperative defendant through charge bargaining.

CRIMINAL HISTORY

The tentative requirements for the Sentencing Commission in this area are going to require a re-emphasis of the information contained in the presentence report. I do think it important to factor criminal history into sentencing calculations. Either alternative provided by the Commission would work. The use of a table format appears the easiest to use and the approach that would result in less calculation error.

In this section of the preliminary draft, the Commission did ask for comment on the appropriate relationship between criminal record and sentence. I suspect it is going to be beyond the Commission's capability to determine which offenders are likely to recidivate. What seems proper for the Commission to do is to establish, openly

and publicly, that those inmates who do recidivate are going to serve longer sentences.

SANCTION UNITS FOR PROBATION

I do think the Commission will want to consider assigning sanction units for probation, with persons under a high activity supervision or with special conditions that require an abridgement of liberty (for example, CTC residents, urine screens, etc.) receiving more sanction units. This would provide the Court with some greater flexibility to grant probation where the case facts warrant it. Our attempts at application have indicated, at least superficially, that the sentences envisioned by the guidelines are substantially more severe than sentences currently being meted out in this Court. In plain language, it appears that a grant of probation would occur in only the most minor of cases. Clearly, a more detailed study by the Sentencing Commission on this issue is indicated.

CONDITIONS OF PROBATION/SUPERVISED RELEASE

I have carefully reviewed the supervision conditions proposed by the Commission and must say I find them to be exceptionally well done. I suspect that the Commission might get some adverse comment from defense counsel on the third party risk condition. We have had some hearings in our Courts on those and have had to take them on a case-by-case basis. Proceeding that way provides the Probation Office with some additional safeguards on officer liability and allows for hearings in close cases where there may not be a need to notify third parties. An addendum to the condition might be sufficient, simply to suggest that questionable cases be reviewed by the Court.

The optional conditions for home detention, community confinement and restitution are all well taken as long as it is an alternative sanction that the Court may impose. The matter of restitution is somewhat different in that the Victim Witness Protection Act requires that restitution under the act be made a condition of probation or parole [18 USC 3663(3)(g)]. In those cases, of course, it wouldn't be optional, but a mandatory special condition. The Victim Witness Protection Act sentence to restitution is considered an independent sentence. It would not be affected by change in the probation status, e.g. revocation.

VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

I have studied the model approach suggested by the Sentencing Commission for imposing sentence upon finding of violation. The model approach is extremely cumbersome and invites errors in computation. It seems to be overly complex -- a simpler approach might work just as well. I make that same observation of the entirety

of the Sentencing Commission guidelines -- it appears to me that a somewhat simpler, less arithmetic system could have evolved from the Congressional mandate.

The Commission did ask for specific comment on five separate issues related to probation violation (Pages 155 and 156) and I would like to address those here, though I may not do so specifically at the time I testify.

1. The most serious violations of probation are new violations of law or violations associated with previous criminal activity of the defendant, for example, association with other felons, use of drugs, possession of a weapon, etc. Interestingly, the Court need not establish guilt beyond a reasonable doubt before moving to revoke probation based on a new law violation. Appellate Court decisions have made clear that the standard to be applied is the preponderance of the evidence that the probationer hasn't taken advantage of his opportunity to avoid incarceration.

   Less serious violations include absconding, failure to make adequate progress in paying fines, restitution, etc.; failure to maintain faithful contact with the probation officer, etc. The least serious offenses would be those involving the missing of an occasional office visit or late filing of a written monthly report form.

2. Probation Officers must immediately advise the Court of any arrest or citation for a new criminal offense and must also advise the Court if a probationer absconds or is in violation of Court-ordered special conditions. The Probation Officer must have some discretion in reporting the technical, less serious offenses, such as: missing an office visit, filing a written monthly report form late, etc. Those minor violations can be staffed with supervisors for corrective actions before being brought to the Court's attention. If the Probation Officer has no discretion and must report all violations, the Court is going to be deluged with memorandums on every minor violation.

3. I have commented on the appropriateness of sentences proposed for application to revocation of supervision -- the form suggested appears overly complex. I would suggest something far simpler. The sentence for revocation of probation should be tied to the initial offense behavior as well as the facts of the violation. As to supervised release, the proposal and sample provided by the Sentencing Commission appears too limiting and too complex. As an example, the maximum sanction envisioned by the Commission for a technical violation of a Class E Felony (not more than 3 years confinement) would be two months confinement. That sanction is simply not sufficient enough to keep some probationers involved in reporting.

4. I would recommend that no grant be made for credit of time spent successfully on supervision toward meeting a revocation sentence. If a violation were to occur late in a probationer's supervision and he violated, it would leave little time to impose any sanctions. 18 USC 3565(a)(2) seems to allow the Court to impose any sentence that was available at the time of the initial sentencing. Probation is a conditional liberty and the condition is that one conduct himself properly in the community. If there are no sanctions left or if credit is going to be granted for part-time compliance, all that will be accomplished is a disrespect for the Courts and the Criminal Justice System.

5. Probation violation on corporate defendants should come for failure to perform Court-ordered community service or for failure to pay a restitution or fine. The probation violation would result in imposition of the original sentence. Probation could be used with a corporation to oversee compliance, however, Probation Officers lack the capability to monitor business practices of corporations. That is best left to regulatory agencies.

APPLICATION PROBLEMS

I have had our Supervisors and two Senior Probation Officers do workups using the Sentencing Commission guidelines on three cases recently sentenced by our Court. All five of the officers attempting that project reported that the instructions were difficult to follow, that the guidelines were not easy to apply and the process didn't seem to flow logically to allow different evaluators to arrive at the same conclusions. Part of those difficulties would be remedied when the Commission develops a better "road map" for application and Probation Officers are thoroughly trained in its use. The Commission will need to improve its wording of definitions and provide specific examples of when to apply the various adjustments to base offense value.

I am going to provide you with a tabular presentation of the results of our application of the Commission guidelines to a specific case, cited below. You will note the considerable differences between experienced officers, who scored the case independently of each other. (It took an average of 30 minutes to do the appropriate computations.) The only items all agreed on were that the offense involved Fraud and Deception (F211) and that the offense involved a breach of fiduciary duty.

In the fall of 1985 a 32 year old female entered a plea of guilty to a one count Information that charged her with Mail Fraud, 18 USC 1341. She had been employed in a position of fiduciary responsibility with Diner's Club for approximately five years. She, and an equally culpable codefendant, used their knowledge of the credit card process to change computer information and avoid detection. They received unauthorized credit cards that had gone to four genuine customers but were returned. They charged a total of $23,333.00 in goods to the four separate cards. The credit cards were used in Mexico, Puerto Rico, California and Hawaii. This particular defendant realized $19,035.00. She reported an unsubstantiated misdemeanor conviction for Possession of Marihuana in Texas in 1978. She voluntarily returned to the United States from Mexico, where she had moved, when she learned there was an investigation at Diner's Club. She admitted her guilt prior to actually appearing in Court. This Court suspended imposition of sentence and placed both defendants on probation for five years with the following special conditions: 1) Sixty days CTC; 2) 300 hours community service; 3) restitution under Victim Witness Protection Act with this defendant to pay $19,035.00; 4) $50.00 Crime Victim Fund assessment; 5) receive credit counseling and not possess credit cards during probation term. (Some details changed to shield identity of defendant.)

MAIL FRAUD (F211)

VALUES	OFFICER				
	A	B	C	D	E
Base Value[1]	8	8	8	12	12
Specific Offense Characteristics					
1. Transaction Outside U.S.[2]	0	6	6	0	0
2. Breach Fiduciary Trust	10	10	10	10	10
3. Property Loss[3]	6	8	8	6	6
Cross References					
1. Psychological Injury	0	0	0	0	0
SUBTOTAL: OFFENSE VALUE	**24**	**32**	**32**	**28**	**28**
Offender Characteristics					
1. Role in Offense Multiplier[4]	1.2	0	1.2	1.2	0
ADJUSTED OFFENSE VALUE	**28**	**32**	**38**	**33**	**28**
2. Obstruction/Perjury Multipliers	0	0	0	0	0
ADJUSTED OFFENSE VALUE	**28**	**32**	**38**	**33**	**28**
3. Acceptance of Responsibility Multiplier[5]	0	0	0	10%	20%
ADJUSTED OFFENSE VALUE	**28**	**32**	**38**	**30**	**23**
4. Cooperation Multiplier	0	.8	0	.7	0
ADJUSTED OFFENSE VALUE	**28**	**25**	**38**	**21**	**23**
5. Prior Record[6]	0	0	0	1	1
SANCTION UNIT TOTAL	**28**	**25**[7]	**38**	**22**	**24**
GUIDELINE RANGES	16-22	12-18	26-32	10-16	12-18

[1]Officers interpreted differently: multiple transactions but was there only one victim (Diner's Club) or multiple victims (individual cardholders)?

[2]Does use of credit card in Mexico qualify for addition of points or is it intended for more sophisticated offenses?

[3]Total loss of $23,333.00 or only portion defendant responsible for ($19,035.00)?

[4]Special skills/training in commission offense.

[5]Percent adjustment left to discretion of sentencing Judge.

[6]Misdemeanor Possession of Marihuana resulted in 3 years probation (1978). No attorney.

[7]Rounded down to 24, next lower sanction units and guidelines range available.

The time that the Probation Officer spends in calculation is not nearly as important as the time the Court is going to have to spend in making preponderance of evidence findings on basically every issue in the guidelines. The only item that I can think of that may not require Court finding is the base offense value and you can see, by our example, that we didn't enjoy any unanimity on that issue either. As I read the guidelines, all other factors including specific offense characteristics, offender characteristics, etc. will be established by preponderance of evidence if there is any disagreement with the officer's calculations. If there is one thing you can be sure of, there will be disagreement. Defendants and their attorneys have a vested interest in keeping that score as low as possible and the prosecutor, in many cases, will have an interest in getting the total sanction units as high as possible to result in lengthier sentences. I can envision, even with the proposed changes in the Rules of Criminal Procedure to allow for resolution of conflict, that the Court is going to have to spend an inordinate amount of time resolving disputes on controversial items. Sentencing is going to take on the atmosphere of a mini-trial and in some cases could take longer than the actual trial.

CONCLUDING COMMENTS

There are two final areas that I would like to address that could become potential areas of abuse if not headed off early by the Commission. I fear that defense counsel, prosecutors, Probation Officers and the Court could begin looking for "loopholes" that would allow the Court to focus more on the human factors that come into every case. I realize that the law limits the range of sentences possible in the guidelines but would hope that some adjustments can be made in those guidelines to allow for a broader range of cases where probation could be considered.

The second possible area for abuse might be the prosecutor's use of the sentencing process to circumvent due process rights of defendants during trial. It strikes me that it might be far easier to prove certain aggravating factors at a preponderance of the evidence hearing rather than at a more stringent beyond a reasonable doubt standard necessary at trial.

I agree with the Commission's assessment that there can't be a perfect system for sentencing that takes into account every variable every time in precisely the same way. Were it that simple, we wouldn't need Judges, we could simply score a defendant's current offense, his previous behavior and then have the computer programmer intone a sentence. That would insure that there was no disparity, but it certainly wouldn't be perceived by the public or the defendant as a human way to conduct human affairs. It is a matter of delicate balance and I certainly have no easy answer beyond the hope that there would be some room for additional Judicial discretion.

I again appreciate the opportunity to have input into the Commission's deliberations and certainly wish you well as you wrestle with these very large issues. I assure you the United States Probation Service stands ready to assist in this task in whatever manner it can.

Sincerely,

William D. Graves
Chief U. S. Probation Officer

WDG:RWJ:bg

00025
Rec'd 11-3-86

To Members:
United States Sentencing Commission
Washington D.C. 20305

Lee A. Moore #01169-025
PO. Box 33 (1-c)
Terre Haute, Indiana
47808

October 6, 1986

Dear Members:

I direct this letter to all the members of the United Stats Sentencing Commission to share my views on your proposed changes and new guidelines in the setencing of a convicted felon. It is hoped that you will find this letter revelent to your position and that much of what I share with you is felt by a large number of presently confined federal prisoners.

Members, it's a long held fact that the powers invested to judges is enormous and their discretion and disparity in sentencing individuals have long been abused. Congress, in essence, gave judges a blank check when it comes to the sentencing process. While some judges remain fair others have grossly misuased it's judical powers. Some have shown a high degree of feeble-mindness, gross prejudices to individual accused of certain crimes and racial biases. A change was long overdue and "God Bless" the changes.

Oliver Wendell Holmes emphasized long ago,"moral predilections must not be allowed to influence our minds in settling distinctions". Many judges do not and refuse to recoginize his role and,thus, act as "mystical Gods". The gross abuse in disparities of the sentencing judge are starling and can be pointed out in these few examples.

Let's take drug cases, there are men housed here for sells of cocaine. One was found quilty of selling a total of 2 ounces of the substance and was sentenced to thirty (30) years. And another was convicted of distri buting "kiloes" of cocaine and sentenced to ten(10). Both had little record or none at all. That form of disparity makes no sense at all.

Let's take my case for example - which is on appeal - I received a fifty (50) year terms for "kidnapping" although nothing was proven. Not even "interstate" movement. Another was convicted on"overwhelming" evidence and was sentenced to forty (40) years. In sentencing me the judge overlooked my innocence and mitigrating circumstances. In the use of a point system I probably would have been sentenced to no more than say fifteen (15) years.The misuse of authority is devastating. It must be changed!

This brings me to another point. The United States Statutes that empowers a judge the auhority to imprison a person from one (1) year to a term of Life needs to be noticed and carefully scrutinized. Looming in the shadows of those same statutes is the wording "or a term of years". This to has a devastating effort on sentencing. For example, a judge can sentence a person to a total of 1,000,000 years , thereby, exceeding the term of life.

It's a known fact that a life sentence is about forty (40) years in federal confinement. Now with that in mind a person who receives a sentence as mind (50) years can be confined up to a period of (30) years. So, in reality a person can be confined for almost a longer period in years then

that of a man sentenced to life. And a man sentenced to life becomes eligible for parole almost as fast as that of a man sentenced to (40) years. Does that make any sense at all.

So, in reality a life isn't as great as a term of years. This fact alone is in total conflict with it's purpose. An eight(8th) Circuit Court judge of Appeals in a dissenting opipion stated," that a man sentenced for life of murder could in fact do less time than a person given (75) years for a robbery" in challenging the statutes theory. A system such as the present is tenable and cannot survive.

Many judges have used a racial bias in sentencing the convicted.Its a known fact and way of life that a white individual receives far less time than that of a black. This is no secret and is clearly evident. With the institution of a point system this would cut the number down.

Before closing I would like to mentition the "severity" range. At the present a crime by title is given a severity level. Although the elements of the crime are lesser the severity range remains high. Under this presnt system a man's rehabitation is crippled and his custody level enhanced as a result. The new criteria you propose in considering mitigrating cirumstances are just indeed. It is wished that some of your proposals could apply to thoses already imprisoned.

In closing, it is felt that the Sentencing Commission should leave room enough to touch base with some of those confined now in enhancing their chances at receiving a suitable equilibrium in the change. As a proposal, maybe some type of system can be instituted whereby these people could ask for proper redress as long as it is found that their sentence is grossly disportitioned to that of the new guidelines.

I thank you for your time and I hope you will consider some of what was said. I wish I could attend your public meetings. That hurts but I must say,"God bless you for the change it was long overdue".

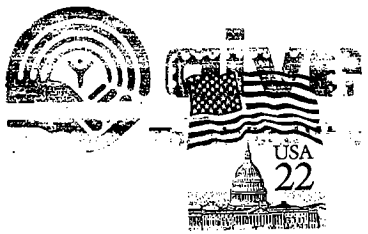
Respectfully,

Lee A. Moore #01169-025
PO. Box 33 (1-c)
Terre Haute, Indiana
47808

RE: I would be honored if you would make a response to this letter. Thank You.

Lee A. Moore #01169-025
PO. Box 33 (1-c)
Terre Haute, Indiana
47808





ATTN : All Members

United States Sentencing Commission

Wasington D.C. 20305

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October 21, 1986

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004
Attention: Guideline Comments

RE: Regional Hearing scheduled November 5, 1986 at Denver, CO.

Dear Commission Members:

I respectfully request, should your schedule permit, an opportunity to appear as a witness at the above-scheduled regional hearing. I have previously served as a state and federal prosecutor and was appointed the first Federal Public Defender for the District of Colorado. My professional activities have included numerous appearances before the United States Parole Commission and my practice emphasizes criminal defense in the federal courts. In 1978, I appeared before the Subcommittee on Criminal Justice, Committee on the Judiciary to testify with respect to S.1437. I hope that my background and experience would lend some usefulness to the public comment process which proceeds in contemplation of guidelines submission to Congress in April, 1987.

In the Comprehensive Crime Control Act of 1984, Congress established the United States Sentencing Commission while, at the same time, abolishing the United States Parole Commission. An expressed concern in abolishing the Parole Commission was that it, rather than federal judges, decided how long an offender stays in prison. Thus, various bills, from S.1 up until the 1984 Act proposed repeal of the Parole Commission and Reorganization Act of 1976 and the institution of a Sentencing Commission. The idea of a Sentencing Commission preceded congressional action by several years. Marvin E. Frankel, Criminal Sentences (New York: Hill and Wang, 1972) pp. 10-11.

In testimony before the Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, I, along with several other federal public defenders, expressed concern toward eliminating the sentencing discretion of federal judges. Congress has now promulgated certain measures to reduce that discretion. Indeterminate sentences under NARA, the Youth Act and 4205(b)(2) have been eliminated. Mandatory-minimum sentences and no-probation provisions have been included in the 1984 legislation. The Parole Commission has been abolished. Though sentence disparity can never be eliminated, a large part of the problem has already been alleviated. Charges of arbitrary and capricious decisions by the Parole Commission will be eliminated once it goes out of existence. The subjective criteria which must enter into sentencing decisions should not, however, be delegated to an administrative body. Though the objective of the Commission toward reducing sentence disparity is laudatory, the scheme proposed in the contemplated guidelines actually exacerbates the problem. As feared, though the sentencing judge has been restricted in the sentence which can be rendered, the prosecutor's charging discretion to effect a certain sentence has been enlarged.

It is noteworthy that the Commission seems to be wrestling with the difficult problem of pre-ordaining sentences as evidenced by the scope of unfinished business and the large number of subjects upon which public comment is sought. As is stated in the Conclusion to the Preliminary Draft:

> "As its work has progressed, the Commission has become increasingly aware of the difficulties of foreseeing and capturing in a single set of guidelines the vast range of human conduct likely to be relevant to a sentencing decision." (Emphasis added). 40 Crim.L.Rep. 3081.

I submit that the guidelines drafted to-date raise a number of due process considerations which will have to be litigated should they be adopted by Congress. At the writing of this letter, though I have not had occasion to incisively analyze the guidelines as much as desired, I believe a few observations are in order.

An overall review of the guidelines points out the extremely heavy burden confronting probation officers and sentencing judges once they become effective. The mere interpretation and base offense evaluation is most certainly going to lead to inconsistent and inequitable calculation of sanction units and guideline range application. Though due process challenges to the Parole Commission's application of release guidelines have previously been rejected, the factors to be considered at sentencing should this scheme be instituted pose much more

serious constitutional difficulties. See e.g. Michigan v. Tucker, 417 U.S. 433 (1974) considering the use of counselless convictions in imposing sentence. Reviewing courts are likely to afford much stricter scrutiny to the constitutional implications of improper guideline application by probation officers and court officials.

What the proposed guidelines impose upon the courts is a post-conviction mini-trial prior to the imposition of sentence. The number of factors which must be established by a preponderance of the evidence is likely to impose heavier burdens on prosecutors, probation officers, sentencing judges, as well as, public and private defense attorneys who must go forward in establishing mitigating factors. Though such difficulties may not rise to constitutional dimension, guideline application in practice may.

The examples set out in the Preliminary Draft demonstrating how the "modified real offense sentencing" works highlight the arbitrariness of the process. They further demonstrate that two or more judges may disagree as to whether "other offenses" are to be added to the value of the offense for which the conviction entered. Example No. 3 reads as follows:

> "3. The offender is indicted for two separate bank robberies in a two-count indictment. The bank robberies are unrelated and are not in furtherance of a conspiracy. As part of a plea agreement, Count II is dismissed on the government's motion. The offender pleads to Count I.
>
> The offense value for the bank robbery in Count II is not added to the offense value for the bank robbery in Count I. Because the second bank robbery is not related to, resulting from, or done in furtherance of the first, it is not considered in sentencing the offender." 40 Crim.L.Rep. 3011.

Under present case law, the sentencing judge may consider the second bank robbery in imposing sentence eventhough it was dismissed pursuant to a plea agreement. Depending upon how the offense is charged and the evidence is presented, under the proposed plan, it may present constitutional issues. Additionally, though the underlying facts of the two bank robberies must be known, many judges may disagree over whether the second bank robbery is related to the first. Certainly no criteria is set out in the example to assist in that determination.

Example No. 1 points out another problem. It reads as follows:

"1. The offense of conviction is unarmed bank robbery. At sentencing the judge finds by a preponderance of the evidence that the offender carried and pointed a firearm during the commission of the offense.

The offense value for using a dangerous weapon is added to the offense value for the robbery. The use of the weapon is related to and done in furtherance of the crime of conviction." (Emphasis added). 40 Crim.L.Rep. 3011.

This example points out a potential due process and double jeopardy problem. The U.S. Attorney elects to charge unarmed bank robbery under 18 U.S.C. §2113(a). He knows a dangerous weapon was used but elects to recommend, and/or the grand jury returns, for whatever reason, an indictment on the lesser offense. Robbery by use of a dangerous weapon under 2113(d) carries a maximum of 25 years. The base offense value for robbery under Section B231 is 36. If the offender uses a dangerous weapon, you add 60 to the base offense value bringing the total to 96. Ninety-six units carries a guideline range from 84 to 104 months, certainly less than a 25-year sentence. Thus, it is not to the prosecutor's benefit to charge the greater offense and have to prove beyond a reasonable doubt the additional element of putting in jeopardy the life of a person by use of a dangerous weapon. He can simple await the sentencing hearing and establish it by a preponderance of the evidence and gain the same result. Thus, the sentencing discretion which the Commission has tried to remove from the sentencing judge has now been vested in the federal prosecutor. By selecting the charge to be filed, he can tailor-make the sentence to be imposed and may reduce his burden of proof. This is merely one example of how the problem can arise.

The initial charging process is not the only situation where this is made possible. In Chapter Six, part C relating to Plea Agreements, the Commission has invited public comment on issues relating to the effect of plea agreements upon guideline application. Among the questions posed concern the impact of the Sentencing Reform Act on "charge bargaining" and "sentence bargaining" and whether prosecutors and defense attorneys can stipulate to the underlying facts of an offense and the offender's characteristics when such factors determine the sentencing result. 40 Crim.L.Rept. 3079. In this light, the Commission's comments are interesting.

"A related issue is procedural. Factual disputes are unlikely in the vast majority of cases, for the jury will have resolved some disputes and the presiding judge will be able to determine the presence of associated

> conduct from evidence produced during the course of the trial. Agreement among the parties, particularly when a guilty plea is entered, is likely to resolve most others." (Emphasis added). 40 Crim.L.Rept. 3012.

This seems to suggest that the parties can pre-ordain the facts to be applied in setting offense value, thereby removing that province from the sentencing court. In some jurisdictions, such as Colorado, the judges refuse to consider sentence bargains.

The distinctions between physical and psychological injury raise some interesting questions. Physical injury is broken down into four categories: severe, permanent, serious and, simply, bodily injury. The distinctions are not well-defined. Permanent bodily injury means that the victim suffered the loss, or long-term or permanent impairment of a bodily function. Severe bodily injury concerns the loss of more than one bodily function. Serious bodily injury, on the other hand, means that the victim received an injury that required medical intervention such as surgery, hospitalization or the cause of the temporary loss of a bodily function. What happens when permanent impairment is preceded by medical intervention? Do the points cumulate? What about an intervening cause? What about a permanent or severe bodily injury that results from medical intervention? A mini-personal injury proceeding after conviction becomes necessary.

Extreme psychological injury may be established by expert testimony. It is defined as a substantial impairment of the intellectual, psychological, or emotional capacity of a victim that lasts in excess of 120 days. "Significant psychological injury", on the other hand, is temporary or intermittent and may be established by a preponderance of the evidence by any competent testimony. See Section A251, 40 Crim.L.Rep. 3019. A question arises as to why less-qualitative testimony (a lay witness is sufficient) is required to establish an intermittent condition while expert testimony must support a condition in excess of 120 days.

Under Section C211, all offenses involving income taxes are evaluated on the basis of tax deficiency. This includes willful failure to file under 26 U.S.C. §7203 as well as tax evasion under §7201. In a willful failure to file case, tax deficiency is not always established by the Internal Revenue Service. Yet, a federal judge is to base offense value on the basis of the tax deficiency. Under Specific Offense Characteristics, if the offense involved a failure to pay tax when due, the base offense value is fifty percent of the base offense value specified in Section C211. If the offense involved only a failure to file where no tax was due, the base offense value is six. 40 Crim.L.Rep. 3024. If the Internal Revenue Service did not

establish this information prior to turning the case over to the U.S. Attorney, where is this information to come from? Is a "net worth" analysis to be conducted post-trial in a willful failure to file case? Does the defendant need to come forward to establish that his tax liability was less than that surmised by the government while, at the same time, acknowledging information tantamount to an evasion or false statement charge? This raises Fifth Amendment considerations.

Part E of Chapter Six solicits public comments on how to calculate the offense value for multiple crimes. The Commission points out that it "does not believe that the sentence should rise directly in proportion to the number of victims involved." 40 Crim.L.Rep. 3080. The questions posed by the Commission illustrate the extremely difficulty in adopting guideline ranges that restrict sentencing discretion. If one crime is charged, do you take into account only uncharged conduct explicitly cross-referenced by the crime upon which the conviction entered? Do you consider inchoate crimes or ignore them? Do you compound the offense value for each victim or each act in property and/or drug offenses? Do you overlap offense value when an offender is convicted of two or more crimes arising out of the same course of criminal conduct? The last question posed highlights the arbitrariness with which some guidelines may be established:

> "6. If more than one offense is committed or injury results during the same course of conduct, add the offense values of the three most serious injuries or crimes (after calculating the offense values for each according to Rules 1-5) and ignore the others." (Emphasis added). 40 Crim.L.Rept. 3080.

The discussion which follows points out the example of a car driver who recklessly runs into a bus load of passengers resulting in injuries to fifty people. Is his offense value to be compounded fifty times as compared to the offender who runs into a bus loaded with a single passenger? Though the writer agrees that it is probably unjust to increase the sentence directly in proportion to the number of victims involved, this situation points out the difficulty in reducing the sentencing discretion of the judge where these subjective factors may be considered. The problem is exacerbated when the number of victims or injuries raise the guideline range above the maximum which may be imposed by statute. For example, if a mail fraud scheme involves one or more occurrences but does not involve more than one victim, the base offense value is eight. If the fraud consisted of a scheme or artifice to defraud more than one victim (without gradation based upon number of victims), the base offense value is twelve. 40 Crim.L.Rep. 3038. The property loss table then is used to enhance the offense value.

"The table has been structured to add minimal offense values where the gain or loss is relatively low. The increasing offense values for losses or gains exceeding $20,000 recognize increased financial injury to the victim or victims in the higher level of planning and sophistication generally involved in financially successful fraudulent conduct." (Emphasis added). 40 Crim.L.Rept. 3038.

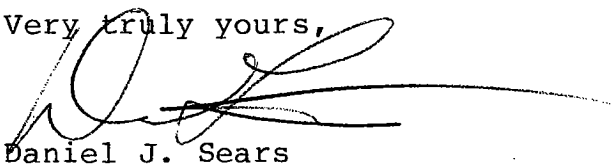
Though the Specific Offense Characteristics propose to weigh additional factors, not all relevant considerations can possibly be quantified. For instance, a five million dollar loss to a major corporation is certainly less devastating than a loss of several hundred dollars to a destitute mother of four. Unless the mother is physically or mentally infirm, is of advanced age, or has her or her family's health or safety endangered, additional points are not added to the base offense value. On the other hand, money obtained on behalf of a charitable organization, by use of accounts outside the United States, or involving a breach of fiduciary duty or public trust accumulates additional points. This analysis simply points out that all human factors cannot be contemplated in adopting written tables.

The U.S. Parole Commission has been under constant attack for invading the sentencing province of federal judges. Though Congress delegated the Parole Commission the statutory authority to adopt guidelines for release determinations, the application of the matrix table setting out salient factor scores and offense behavior has, in many cases, generated greater sentence disparity. Though Congress has now removed this release discretion by abolishing the Parole Commission, it seems we have the same processes at work through the U.S. Sentencing Commission.

Please advise if my testimony may be accommodated on November 5.

Thank you for your consideration.

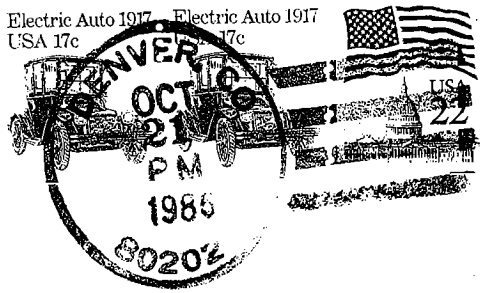
Very truly yours,



Daniel J. Sears
Attorney at Law

DJS:bj

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Washington, D.C. 20004
Attention: Guideline Comments

RECEIVED OCT 30 1986

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October 23, 1986

Suzanne B. Conlon
Executive Director
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Suzanne:

I enjoyed talking to the Sentencing Commission last week. Thank you for the opportunity.

My remarks in Chicago concerned the appropriate treatment of plea bargaining. The purpose of this letter is to offer some thoughts about the structure and contents of the Commission's Guidelines, particularly the policy of "modified real offense sentencing" (pages 10-18) and the treatment of multiple offenses (pages 168-69).

I. Modified Real Offense Sentencing.

In general, I believe that it makes a difference whether one views unadjudicated misconduct as an "aggravating circumstance" in determining the appropriate punishment for the offense of conviction or instead thinks of this misconduct as a suitable object of punishment in itself. The line between these different approaches is thin and imprecise, but the "roadmap" technique of the Draft Guidelines, which adds the entire "offense value" of uncharged offenses to the "offense value" of the offense of conviction, tilts far toward the second viewpoint. This "add on" approach not only raises troublesome issues of procedural fairness but also leads quickly to very severe sentences. I will develop this theme and some others by examining the Guidelines' treatment of several "real offense sentencing" issues.

A. Similar Offenses in a Series. Consider two illustrations that appear on pages 16 and 17 of the Guidelines:

> 3. The offender is indicted for two separate bank robberies in a two-count indictment. The bank robberies are unrelated and are not in furtherance of a conspiracy. As part of a plea agreement, Count II is dismissed on the government's motion. The offender pleads to Court I.

> The offense value for the bank robbery in Count II is not added to the offense value for the bank robbery in Count I. Because the second bank robbery is not related to, resulting from, or done in furtherance of the first, it is not considered in sentencing the offender.
>
> * * * * *
>
> 8. The offense of conviction is conspiracy to steal and forge one social security check. At sentencing the judge finds by a preponderance of the evidence that the offender stole, forged, and cashed 20 checks.
>
> All of the offenses related to the 20 checks done in furtherance of the conspiracy, or that resulted therefrom, are used to calculate the total offense value for the conspiracy.

An offender probably cannot steal 20 checks in furtherance of a "conspiracy to steal and forge one . . . check"; but leaving that difficulty aside, the illustrations reveal that the Guidelines treat a series of uncharged crimes by two offenders differently from a series of uncharged crimes by one offender. When two confederates rob 10 banks, the 10 robberies are likely to be (if not certain to be) the result of a conspiracy. All 10 robberies therefore "count." When a single offender robs 10 banks, there is no conspiracy, and only one of the 10 robberies "counts." I fail to see why the cases are different. The Commission's "modified real offense sentencing" turns outcomes on notions of causation and "relatedness" that seem to have little to do with sensible sentencing policy.

Moreover, neither the Guidelines' treatment of a series of crimes by a single-offender nor its treatment of a series of crimes by two or more offenders seems to me appropriate. As a judge about to sentence a person for a robbery, I would consider it relevant that the presentence report revealed his or her commission of nine other robberies as well.[1] This information

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[1] My assumption is that the defendant has not contested the accuracy of the presentence report. As a sentencing judge (if I had the discretion to do so), I would disregard all unadjudicated aggravating conduct that was the subject of substantial dispute. Rather make findings on the basis of a "preponderance of the evidence" as the Guidelines propose, I would assure myself, in cases in which the government's allegations rested on less than conclusive evidence, that the defendant had gone beyond a pro forma denial and had presented some credible evidence in support of his position. Although I would in this sense give the defendant the benefit of the doubt, adjudicative standards like "proof beyond a reasonable doubt" or "proof by a preponderance of

would tell me that this robber is a robber. He or she is not a youth who got drunk one Saturday night, yielded to the importunings of some unfortunate associates, and did something abberational, rotten and stupid. Similarly, he or she is not someone who foolishly became friendly or romantically involved with a criminal and agreed to drive a car on an evening when this person held-up a convenience store.[2] The defendant who has committed nine robberies is not a recreational criminal; he or she does it for a living. I do not want to "punish" the defendant for the nine unadjudicated robberies (at least I don't think so). I do, however, consider his or her character relevant to the appropriate punishment for the robbery of which he or she has been convicted.[3]

Perhaps the Commission's position is not that the additional crimes in the series are irrelevant but simply that the prosecutor should charge them. Why prosecutors should be required to charge these crimes and not the other "real" offenses that judges are to consider, however, is unclear. Why, for example, require the prosecutor to charge the "extra" robberies in illustration 3 but not the "extra" homicide in illustration 4?

Precluding any consideration by a sentencing judge of unadjudicated offenses in a series seems unfortunate, but the Guidelines' treatment of the commission of a series of crimes by two or more offenders goes to the opposite extreme. It adds together the offense values for all robberies in the series (although the Guidelines indicate at page 168 that the Commission may "cap" the process at three). Within statutory limits, this approach amounts to a policy of mandatory consecutive sentencing for unadjudicated offenses. This plainly goes beyond an assessment of the offender's character and imposes punishment for unadjudicated crimes. Moreover, when all of the offense values are added together, the punishment is likely to be very severe --

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the evidence" may imply the need for a formal resolution of factual disputes and the need for an elaborate sentencing procedure. Although my approach would employ something like the "beyond a reasonable doubt" standard, it would not allocate a formal "burden of proof" to the prosecutor. Even if the prosecutor's proof fell short, I would count against the defendant his or her failure to present substantial contradictory evidence, something that would be improper at trial.

[2] The absence of any explicit "discount" in the current Guidelines for offenders whose involvement in criminal conduct was minor or peripheral seems to me unfortunate.

[3] When the "roadmap" does not authorize a judge to consider unadjudicated "real" offenses, I am uncertain whether he or she may nevertheless consider this conduct in selecting a sentence within the Guidelines range.

more severe than even the "toughest" judges whom I know would consider appropriate.

B. Plea Bargained Charge Reductions. As my colleague Stephen Schulhofer noted during your hearings, the proposition that sentencing judges should consider some facts other than the formal elements of adjudicated crimes has not been at all controversial. The debate about "real offense sentencing" has focused on other issues, most notably the treatment of facts that a prosecutor could have charged but did not[4] and, even more, the treatment of facts that a prosecutor charged in allegations that he or she abandoned during plea bargaining. Illustration 7 on page 17 speaks to this second issue:

> The offense of conviction is obstruction of justice (Count I of a two-count indictment). The second count in the indictment, assaulting a federal police officer (the means of obstruction), is dismissed pursuant to a plea agreement.
>
> The offense value for the assault in Count II is added to the offense value for the obstruction of justice in Count I.

One difficulty with this illustration may be that it punishes a single act twice (a difficulty that I will address more fully later); perhaps only one punishment would be appropriate even if the defendant had been convicted of both crimes at trial. Moreover, even if some "add on" is appropriate because the defendant's single act invaded two interests, effectively doubling the punishment goes too far. Again the "additive" approach of the "roadmap" produces an unfortunate result.

A second difficulty with the illustration is that the result appears inconsistent with the Guidelines provision precluding the consideration of "conduct for which further proscution is barred" (page 10). The prosecution of Count II, the dismissed count, is barred by the plea agreement. The purpose of the agreement was in fact to bar the prosecution of this second count.

Perhaps the Commission meant to refer to "conduct for which further prosecution is barred by the Constitution" rather than conduct for which further prosecution is barred by agreement. Nevertheless, the due process clause probably requires the prosecutor to honor his or her bargain. Perhaps the reference was to "conduct for which further prosecution is barred by the

---

[4] As my discussion of the treatment of uncharged offenses in a series indicates, I do not share Brother Schulhofer's position that any consideration of crimes that a prosecutor could have charged but did not is improper.

double jeopardy clause" rather than conduct for which further prosecution is barred by the due process clause. The Commission's "modified real offense sentencing" may simply have been more "modified" than the Commission intended.

If this hypothesis is correct, the defect of draftsmanship can be easily corrected; but one wonders why conduct whose prosecution is barred by the double jeopardy clause should be treated differently from conduct whose prosecution is barred by the due process clause -- and also whether clever lawyers may insist on placing their clients briefly in jeopardy to insure that these clients receive the benefits of their bargains. As I noted in my remarks to the Commission, a plea agreement, at least one that results from "odds" bargaining, may reflect the prosecutor's concession that he or she is unable to prove a serious charge. It does have much in common with an acquittal.

A final difficulty with the illustration arises from a later comment (page 17):

> Factual disputes are unlikely in the vast majority of cases, for the jury will have resolved some disputes and the presiding judge will be able to determine the presence of associated conduct from evidence produced during the course of the trial. Agreement among the parties, particularly when a guilty plea is entered, is likely to resolve most others.

An agreement to dismiss the charge of assaulting a law enforcement officer may itself embody the parties' agreement that the defendant did not assault the officer. More clearly, an agreement to dismiss a charge of armed robbery in exchange for a guilty plea to unarmed robbery seems to reflect the parties' agreement that the offender did not use a gun. The illustration thus seems inconsistent with the comment. Moreover, the apparent approval of "fact bargaining" is the antithesis of the "real offense sentencing" that the Commission apparently endorsed. The Commission may have resolved the issue both ways.

If the approval of "fact bargaining" was indeed intended, the Guidelines may simply pass the discretionary determination of sentences to prosecutors and defense attorneys. These lawyers may determine the sentence that they think appropriate and then, rather than make the punishment fit the crime, make the crime fit the punishment. Our sentencing system will be as lawless as before, but the benefits of discretion will be made available only to defendants who waive the right to trial. The pressures on defendants to plead guilty will increase. As I once observed (126 U. PA. L. REV. at 566), "We would have abandoned our old discretionary regime -- a regime in which mercy could be given -- an substituted a new discretionary regime in which mercy would only be sold."

It would help if the Guidelines provided that when the

prosecutor, defense attorney, and defendant submit a factual stipulation to the court, each must certify that this stipulation reflects a full, complete, and accurate historical description of the offense and of all aggravating and mitigating circumstances that the Guidelines make relevant. Even with this provision, I wonder if some attorneys might not stipulate the facts with a wink and a nod (perhaps bending the facts without quite lying about them) in effort to secure the sentences that their plea agreements call for.

C. The Infliction of Personal Injury. An offender convicted of robbery, drunk driving, or another crime whose commission does not, as a legal matter, involve the infliction of personal injury may in fact have injured someone while committing the crime. The cross-references for both robbery and drunk driving declare: "If any victim suffered physical injury, add the appropriate value from Part A, Offenses Involving the Person, to the base offense value."

It is unclear whether the cross-reference is only to §§ A222-A225, sections that set forth the "offense values" for various sorts of injuries. These sections appear in Chapter 2 of Part A, headed "Assault and Battery." They follow § A221, specifying the "offense value" for assault and battery. This placement suggests that the "injury values" are to be added only when the offender has committed assault and battery, not when he or she has injured someone negligently. If this interpretation is correct, presumably both the base offense value for assault and battery and the "injury values" are to be added to the offense value for the offense of conviction.

The principal problem with this interpretation is that the injuries inflicted by a drunk driver ordinarily are not inflicted deliberately; and illustration 2 on page 16, a case in which a bank robber accidentally runs down a child while making his getaway, reinforces the impression that the Commission intended negligent injury to "count." (One difficulty with illustration 2 is that the child may not be a victim of the robbery as apparently required by the cross-reference -- another issue for trial and appellate litigation.)

One who inflicts injury negligently apparently does not commit any offense within Part A, and both the drunk-driving cross-reference and illustration 2 suggest that the cross-reference is not to the commission of assault and battery but only to the "injury values." Perhaps the offender need not have committed a separate crime against the person under Part A for the "injury-value add-ons" to apply.

One inequity of the "add on" approach under this second interpretation is that it apparently treats the negligent infliction of injury as severely as the deliberate infliction of injury. One possible inequity of the first interpretation is that it does not "count" the negligent infliction of injury at

all. In any event, most of the punishment for an assault is ordinarly contained in the "injury-value add-on." Thus, even if the base value for assault and battery is not included, the property offender or the drunk driver will be punished for the injury that he or she has caused almost as severely as if he or she had committed it deliberately in a separate incident. This is a far cry from treating the infliction of injury as an aggravating circumstance in assessing the appropriate punishment for the offense of conviction. Indeed, in a case of multiple injuries (one, for example, in which a drunk driver has crashed into a car and injured five people), the mandatory punishment is likely to be astronomical (although this punishment will be "capped" in a haphazard way by the maximum punishment provided for the offense of conviction -- a limit that a prosecutor can avoid by charging more offenses -- and although a later comment declares, "The Commission does not believe that the sentence should rise directly in proportion to the number of victims involved" (page 168)).

D. General Thoughts About "Real Offense Sentencing". The lines that the Commission's proposal for "modified real offense sentencing" draws on the basis of causation and "relatedness" indicate neither the uncharged conduct that may deserve punishment (if one disregards the due process problems posed by punishing crimes of which a defendant has not been convicted) nor the conduct that may appropriately influence a judge's assessment of the defendant's character in determining the appropriate punishment for the offense of conviction. These lines indicate at most the "harm" that may be attributable to the offense of conviction. Although the infliction of additional harm may be an aggravating circumstance, it should not be the primary determinant of criminal punishment. It seems less important in determining the appropriate punishment for the offense of conviction than the offender's character, conduct and mental state in committing this offense. Under the "roadmap" approach, however, every additional harm is treated as though it had been produced by a separate and independent act; moreover, every added harm leads automatically to the imposition of what is in effect a consecutive sentence.[5]

Although the Commission's "roadmap" seems to me conceptually flawed and poorly drafted, I should not leave the subject without expressing some sympathy for the Commission's dilemma. The

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[5] A separate problem, one noted by Mr. Schulhofer at your hearings, is that the cross-reference add-ons are not limited to crimes of harm-infliction. They include crimes of risk-creation. When an offender has created a risk of harm and then produced the harm that he or she risked, the "roadmap" thus leads to double-counting. It punishes the defendant twice for the violation of statutes that were intended to prevent the same evil.

entire issue of "real offense sentencing" is intriguing but plainly insoluble.

As I have suggested (51 U. COLO. L. REV. at 243), the basic dilemma of "real offense sentencing" is whether to accept substantive unfairness in sentencing or contractual unfairness in plea bargaining. There can be no escape from this unfortunate choice in a criminal justice system that routinely convicts people of crimes other than their "real" offenses. If the opponents of plea bargaining had invented the term "real offense sentencing," defenders of the status quo might indignantly accuse them of rhetorical excess. In fact, however, public officials and scholars unwilling to restrict plea bargaining have themselves used this term in a matter-of-fact way -- a circumstance that offers an interesting comment on the American criminal justice system. The alternative to "real offense sentencing" is plainly "fictitious offense sentencing" or "unreal offense sentencing" -- which in our current criminal justice system apparently refers to the offenses of which defendants have been convicted. Were the Commission to direct as much attention to the sentencing discretion that prosecutors and defense attorneys exercise in plea bargaining as it has to the problem of judicial sentencing discretion, it could begin to remedy the basic dilemma by insuring that the offense of conviction was more often the "real offense."

II. Multiple Convictions and Cumulative Punishment

Although Part E of the Guidelines, "Determining Offense Values for Multiple Crimes," remains to be drafted, the Commission has implicity resolved many issues of multiple punishment through its "roadmap" of "cross-references." It has done so, however, in an unsatisfactory way by effectively imposing mandatory consecutive sentences even for uncharged crimes. The problem remains difficult when multiple charges have resulted in convictions. The discussion that follows can offer no firm "guidelines," only some general thoughts.

For good reason, "rape hypotheticals" are currently disfavored, and one involving multiple crimes is likely to seem grisly. I have tried without success to devise another case that poses the same multiple-punishment issues, however, and I offer the one that follows with appologies:

> A rapist has (1) abducted his victim from a street to a nearby cellar and (2) raped her. As the Guidelines note (page 28), a rape is completed by "any intrusion, however, slight of any part of a person's body into the genital opening of another person's body." Following the first "slight intrusion," however, the victim has pulled away. The first intrusion has been immediatly followed by (3) a second intrusion. Two hours later, the rapist has (4) raped his victim again. Over the course of the next 12 hours, he has (5-7) raped the

> victim three more times. Then, still keeping the first victim imprisoned, he has (8) abducted another victim, brought her to the cellar, and (9) raped her. This rapist was truly a monster, for the second victim was his daughter. Thus, in his final act, he committed both rape and (10) incest.

Attempts to limit cumulative punishments for muliple crimes have relied mostly on the traditional criminal law concepts of actus reus and mens rea. Attempts focusing on the offender's acts have limited (usually to one) the number of punishments that may be imposed for a single act that violates more than one statute or for multiple crimes committed during a single "course of conduct." Those focusing on the offender's mental state have limited the number of punishments imposed for crimes committed without a "change in criminal objective."

Both of these approaches seem unsatisfactory. A better approach asks what distinct interests the offender has invaded -- interests either of the victim or, when they are separate, interests of the government. In effect, this approach takes a "victim perspective." Even this approach, however, cannot solve the problem. In the end, any attempt greatly to curtail a sentencing judge's discretion to weigh the additional punishment that "extra" offenses deserve seems likely do more harm than good. The Commission should specify one governing rule and several subordinate principles, but it probably should not do more.

The basic rule should be that a judge may not impose any punishment for an offense unless that offense has invaded a substantially different interest from the interest invaded by another crime for which the defendant has been or will be sentenced. When a defendant has committed several crimes but invaded only one "victim interest," the judge should sentence only for the crime with the highest offense value.

This rule has its clearest application in cases in which a single act violates several statutes. It does not, however, automatically preclude multiple punishment in single-act cases. The rule may sometimes pose difficult issues of interpretation. A formalistic judge might conclude, for example, that the government's interest in punishing the sale of narcotics "not in the original stamped package" is different from its interest in punishing the sale of narcotics that have been unlawfully imported. He or she might accordingly impose two sentences for a single drug sale. A more realistic view, however, would be that, although the defendant did violate two statutes, both were designed to combat a single evil, narcotics trafficking. Only a single sentence should therefore be imposed.

When, as in the hypothetical rape case above, a defendant has raped his daughter, a sentencing judge should consider the purpose of the incest prohibition. Is incest simply a crime of.

sexual imposition? Is the perceived evil that one party's participation is likely to be involuntary? If so, that interest is also protected by the prohibition of rape, and double punishment for the defendant's single act would be inappropriate. But the prohibition of incest also may reflect a moral revulsion at intercourse between family members. If so, imposing two punishments for a single act may be justified. Certainly if an arsonist, in a single act, burned down A's house and injured B (or even A) inside, the separate invasions of personal and property interests would justify separate punishments. In the federal system, overlapping criminal prohibitions are common; one bad social security check can violate ten federal statutes. Some restriction of multiple punishment therefore seems essential.

The suggested rule also might preclude multiple punishment when a defendant has committed several criminal acts. In the rape case above, when the first "slight intrusion" was followed immediately by a second intrusion, the defendant technically committed two crimes. Nevertheless, the victim would be unlikely to say that she had been raped twice. The second crime did not invade a "substantially distinct interest." The rape two hours later, however, probably would be viewed differently.

Obviously the line between offenses (2) and (3) is imprecise, and the Commission cannot offer sentencing judges a clear formula. Nevertheless, a single fist-fight technically may involve hundreds of assaults. Although 100 blows may be worse than one, 100 blows in a single fight do not seem as culpable as 100 assaults on separate victims. Judges must be allowed to draw some fine lines.

When an offender's crimes have invaded separate and distinct interests, a sentencing judge must indeed have the freedom to consider just how separate and distinct these interests are. If, at point (3) in the above hypothetical case, the victim had been asked what had happened, she might have said, "I was raped," rather than, "I was kidnapped and raped." Perhaps the kidnapping did aggravate the rape, but the victim might not have felt substantially less victimized if she had not been abducted but had been raped where the rapist found her.

The Commission tentatively suggests adding the offense values of multiple crimes together while possibly limiting the number of multiple punishments to three (pages 168-69). Alternatively, it tentatively suggests a "multiplier . . . that diminishes according to a mathematical formula as the number of separate injuries increases." The second approach seems preferable to the first, but neither seems very satisfactory. To inform the rapist in the hypothetical case that all rapes after the first three are "free" would convey an unfortunate message. At the same time, punishing the third rape as severely as the first seems inappropriate.

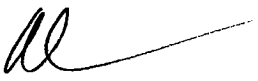
A uniform "decay factor" does not seem to capture the judgment that should be made. For example, in the above hypothetical case, the first rape of the second victim probably merits greater punishment than the sixth rape of the first victim although both may have the same offense values. Similarly, a second rape of the first victim two hours after the first may merit greater punishment than the initial abduction. The second rape may have added greatly to the overall physical and psychological intrusion while the abduction added only marginally. Perhaps, in other words, on the facts of this case, the "decay factor" for the abduction should be greater than the "decay factor" for the second rape (although both should be punished). In a different case, however, the abduction might have contributed more to the overall intrusion than the second rape. No formula seems capable of yielding just sentences in cases of multiple crimes. Again, substantial judicial discretion seems necessary.

The Commission should make clear that every additional crime that invades a distinct interest ordinarily should lead to some additional punishment. The amount of this punishment obviously must be "capped" by the offense value of the additional crime; but within this limit, the trial judge should have substantial discretion to determine how much additional punishment is appropriate. A general provision forbidding "unreasonable" or, perhaps, "unconscionable" add-ons for multiple crimes would permit appellate review and allow correction of abuses of the trial judge's discretion. Moreover, in some cases -- for example, a case in which a defendant has sold 1000 counterfeit lottery tickets -- additional punishment may reach the point not only of diminishing returns but of diminished returns. At this point, the judge should be empowered to withhold further punishment. Even were it possible to specify this point of "diminished returns" through a formula, however (and it isn't), the formula probably should not be advertised. No offender should know for certain that further criminality will not lead to further punishment.

I have never seen a one-count federal indictment. Almost every federal case poses potential issues of multiple punishment. An "additive" approach, even if capped at three offenses, might increase greatly the severity of federal sentences; so, indeed, might a "decay factor" approach. The sentences prescribed by the Guidelines for single offenses are already sufficiently severe that some disparity among judges in imposing additional punishments for multiple offenses might not

be cause for great concern. In any event, I do not see how the issue can be equitably resolved "by the numbers."

Sincerely yours,



Albert W. Alschuler
Professor of Law

00028
rec'd 11-3-86

TESTIMONY - JOHN MARTIN

STATEMENT TO THE UNITED STATES SENTENCING COMMISSION

I appreciate the opportunity to be here to address what are profoundly important issues for the criminal justice system.

Let me start by apologizing for the fact that because of the limited time between the distribution of your preliminary draft and these hearings, together with some time commitments of my own, I have not had the opportunity to give the draft report as thorough a review as it deserves.

At the outset, let me state my own bias. I believe the basic concept of detailed sentencing guidelines is a mistake. The myriad of factors that go into any just sentencing decision are not, in my view, subject to mathematical computation. It is clear to anyone who reads your preliminary draft that a great deal of hard work and thought went into its preparation. Yet the draft itself demonstrates the problems of trying to develop objective criteria to be used to make what is fundamentally a subjective judgment on the seriousness of a defendant's conduct and the factors that should be given the most weight in determining that defendant's sentence. The need to articulate guidelines places a premium on identifying objective criteria, when in fact the objective criteria may be a poor measure of the depravity of the offender's conduct.

Perhaps the clearest example of this problem is reflected in §S 212, which deals with insider trading. There the predominant factor in determining the sentence to be imposed is the amount of gain realized through the use of the inside information. Thus, there is a range from 12 to 52 in base offense value depending upon the amount of the gain involved, as compared to only a 3-point adjustment if the defendant is not an attorney, investment banker or corporate insider. With insider trading, however, the actual amount of the gain that will be realized is not something known at the time the offense is committed and is often a result of fortuitous circumstances. There are those who have traded on inside information who have actually lost money because of unexpected occurrences after the time they engaged in the stock transaction at issue. Yet their conduct is no less culpable than those who may have profited substantially as the result of events that may not have anticipated at the time of their illegal transaction. In addition, the amount that an individual profits on an insider transaction may not necessarily be attributable to the culpability of the individual's conduct, as much as to the individual's own personal financial position and his or her willingness to take substantial risks. For example, the profit a person makes through trading on inside information will vary tremendously depending upon whether that individual purchases the stock in question or purchases options on that stock. The decision on

which type of investment will be made will generally depend, not on the individual's criminality, but on the individual's basic investment philosophy, i.e., whether it is a conservative one where the investment is protected through having some stock value as opposed to a risk-taking philosophy where the investor is willing to risk a loss of all the sums invested by buying options rather than the underlying stock.

I think there are similar problems throughout the guidelines because of the predominant role given to the amount of gain realized from the criminal activity. Often the amount of gain or loss from a fraud or theft is the result of factors far from certain at the time the offense is committed.

Let me turn to some other areas of concern. One of the most important issues in a guideline system is whether the guideline sentence is to be based upon the crime charged in the indictment or the offense that the record demonstrates was in fact committed by the offender. It would be sweeping the whole guideline issue under the rug where we to make the sentencing decision rest upon the crime actually charged in the indictment. In such a case, you would be simply switching the sentencing function from the judge to the prosecutor and putting enormous power in the hands of the prosecutor to coerce guilty pleas by offering to accept a plea to a charge that does not accurately reflect the scope of the criminal conduct in which the defendant engaged. If the guidelines are to promote uniform sentences for those who engage in criminal conduct, an

individual prosecutor cannot be given the power to affect dramatically the sentence to be imposed in a particular case.

As I read the proposed draft, it contemplates that once the offense is identified the Court should look to the actual factual situation and would not be limited solely to the facts charged by the prosecutor. However, the power of the prosecutor to charge one category of offense rather than another may still affect the sentence dramatically.

If you accept the basic premise that the guidelines should apply to the actual conduct and not that as charged by a particular prosecutor, then I perceive two major problems in the guidelines. One, they do not sufficiently reward those who admit their guilt and plead guilty, and, two, they do not provide sufficient reward to those who cooperate with government investigations. If the proposed guidelines were adopted, it is my view that almost no one would plead guilty in the federal court and that therefore the courts would become overburdened by the need to try criminal cases. In addition, it would be much more difficult to make important criminal cases because the incentive to cooperate would not be sufficient.

Our criminal justice system operates with reasonable efficiency today because people who are guilty recognize that by admitting their guilt and pleading guilty they will reduce substantially the sentence that they will receive. Indeed, in many instances, it is hoped that by acknowledging guilt and

manifesting remorse the difference in result might be a sentence of probation rather than one of incarceration. Faced with a statistical table that tells the offender that by pleading guilty they will change their term of imprisonment from a range of 18 to 24 months to a range of 12 to 18 months in my view will not persuade many defendants to forego the chance that through some stroke of good fortune a jury might choose not to convict them.

I have similar concerns that the amount of credit given for cooperation will not be sufficient to induce the cooperation that every significant criminal case requires. The most important cases that were prosecuted during the period when I was United States Attorney invariably involved the testimony of criminal insiders who testified in large part because they expected substantial leniency from the sentencing judge as a result of their cooperation. It is very difficult for any offender to cooperate with the authorities. It often involves testifying against individuals who are friends of the offender and invariably involves some risk of retaliation, whether it be economic or physical. To tell a person in those circumstances that they will save at most 7/10ths of their sentence suggests to me that there will be very little cooperation forthcoming. Even more important is the need for exceptional assistance which may involve a risk to the informant's life, which the guidelines credit with only a 40% reduction. This type of cooperation often involves not only a

risk to the informant's life during the period of cooperation and testimony but the risk of retaliation thereafter. To tell an informant who, if he cooperates, places his life in danger and must spend the rest of his life in a witness protection program, that if he does so he will receive a 40% reduction in his sentence does not seem to me to be sufficient to induce the type of cooperation that is often necessary in major narcotics and organized crime investigations.

Of course, the short answer to this is to say that the prosecutor can always offer such a defendant immunity. In my view, that response is unsatisfactory because it places the sentencing decision totally outside the guidelines and outside of judicial scrutiny. In addition, a witness who has at the outset been granted immunity for his testimony is far less credible than a witness who can truthfully testify that he or she does not know the sentence that will ultimately imposed and that that sentence will be fixed by a judge who is advised of all the facts and circumstances.

One further observation I would like to make is that the guidelines seem overly severe. Indeed, they mandate jail terms in instances where under the guidelines that existed when I was United States Attorney, cases would not have been prosecuted. Because of the volume of crime in the New York area and the need to utilize federal law enforcement resources effectively, we established guidelines with the local office of the Federal Bureau of Investigation as to when cases should be

investigated. While I do not have a copy of those guidelines today, my recollection is that in bank embezzlement cases, for example, we would not investigate a case where the loss was less than $10,000. Yet under the proposed guidelines an embezzlement of $5,000 to $10,000, which we would not have investigated, has an offense value of 20 which should result in an eight to fourteen month period of incarceration. This suggests to me that, while the guidelines purport to be uniform throughout the United States, in fact gross disparities will continue to exist as prosecutors make determinations which reflect the fact that the federal resources in one part of the country are not adequate to pursue crimes for which people are receiving substantial periods of incarceration in another.

Let me close by stating as I did at the outset that I recognize that a great deal of work and thought went into the guidelines proposed and I do not wish anything I have said to be construed as denigrating that effort. I do have very real concerns, however, that the guideline system as proposed will make the criminal justice system unworkable and in too many instances result in sentences that are unjust. The symbol for justice carries in her hand a scale in which we believe a proper balance will be struck. Any system that attempts to predetermine precisely which factors may be placed on that scale and what weight they must be given will, in my view, make it impossible to reach a just result in any case.

00829
Rec'd 11-3-86

BRIEF COMMENTS OF MARVIN E. FRANKEL
ON PRELIMINARY DRAFT SENTENCING
GUIDELINES OF SEPTEMBER 1986

This Preliminary Draft of Sentencing Guidelines is on the whole a splendidly comprehensive effort to block out the range and complexities of a subject still largely unexplored. It represents valuable contributions in itself. It is also, in the breadth of its conception, a useful prolegomenon for the continuing researches and studies that the Commission envisages. Having said this in all earnestness, I must confess that my first reading reveals some evident gaps and questions of major dimension. My schedule has not contained the time, and I lack the requisite learning, for anything like a thorough critique. Instead, wishing to be helpful, I confine these brief remarks to several notes of doubt and caution.

First, the scheme strikes me as far more complex and complicated than it should be. The effort appears to seek a degree of refinement beyond what the subject will realistically bear. The system of offense values, additions, subtractions and multipliers seems likely to invite in the end such a scattered array of actual sentences as to give an appearance (whatever the reality) of more rather than less disparity.

I may have missed it in my reading, but I was not made aware of the extent, if any, to which this enterprise drew upon the experience of Minnesota and Washington.* I have no doubt

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* Cf. Frankel & Orland, Sentencing Commissions and Guidelines, 72 Geo. L. J. 225 (1984).

the pioneering work in those states was studied. But I have serious reservations concerning the total departures in these proposed Guidelines from what was derived from that experience and why it seems to have been so largely discarded. Both Minnesota and Washington developed relatively simple grids for each offense, slotting particular sentences in terms of offense and offender. I confess that I'd always envisioned a scheme of that sort as yielding about as much realistic consistency as the nature of the subject permits. Moreover, long thought was given in the two state programs to the problem of assessing the gravity of one offense as against another, an effort that does not appear explicitly in the present Preliminary Draft. If the very different and far more elaborate scheme now proposed is sufficiently better, the justification for that ought to be shown.

Second, I have doubts about the validity or desirabilty of "real offense sentencing" even when it is prefixed with the adjective "modified." The lawful ground for sentencing anyone is a conviction for an offense defined by the legislature. Nobody doubts tht a given "offense" may embrace broad ranges of widely divergent behavior. But the starting point is and should be a legislative prohibition. This may mean at some point a need for legislation far more refined than we have thus far known. But it does not entitle sentencers to punish for anything other than the "violation." To be sure, the gravity of the specific offense will vary within wide limits. And that is

a major component of what the guidelines are for. But moving from the conviction to the "real offense" sounds and feels wrong to me -- a departure from the "law" under which everyone is supposed to be operating.

Third, the system of multipliers under offender characteristics is open to serious doubt. Nobody questions that offenders vary. But a scheme that calls explicitly for doubling the sentence based upon appraisal of the offender invites in through this door much of the unpredictable disparity that the guidelines are meant to eliminate.

Fourth, I may again have missed something, but I think the guidelines should project how they will affect the overall level of sentencing -- especially since, as I recall, prison capacity is supposed to be taken into account. This vital research undertaking was a major item of the work preceding the Minnesota guidelines. If it has been done by the present Commission, it should be reported for appraisal and criticism. Will more people be imprisoned for longer? Will the result be the opposite? Or is this known? I think the Congress and the public will want to know what answers are projected.

Fifth, the stated effort to cabin prosecutorial discretion is debatable and a little inconsistent. I do not believe this is an adequate justification for the "real offense" approach. Granted, prosecutors have awesome discretion and may acquire more for a while under a guidelines system. (I grant

that for the sake of argument without necessarily conceding it.) The cure is not to adopt a dubious "real offense" approach, but to study and deal with prosecutors' charging and bargaining powers head-on. This may take a while. But everything does. It is certainly within the ongoing subjects of Commission concern.

As for consistency, I think it highly questionable to give the prosecution explicit power to reduce the sentence by as much as 40% for "cooperation" (p. 125). This is a worrisome topic and not the loveliest aspect of the criminal process. The executive, given its different problems, may want to extend great leniency to some of our greatest villains because they are willing to turn in their erstwhile colleagues. The judges are in a somewhat different enterprise, To control their sentencing authority in this fashion is not seemly. Clemency and other executive powers are more fitting.

I've already pleaded lack of time and knowledge. Reiterating that plea, I offer these very limited suggestions in the hope they may help a little to produce the great result for which we all look to this august Commission.

October 21, 1986

Marvin E. Frankel

00030
Rec'd 11-3-86

Testimony of Kenneth R. Feinberg, Esq.
Before the
U.S. Sentencing Commission
New York, New York

October 21, 1986

Mr. Chairman, and Members of the United States Sentencing Commission:

I. INTRODUCTION

I very much appreciate your invitation to address this distinguished Commission and present my initial reactions to the Preliminary Draft Sentencing Guidelines. As I have publicly stated on a number of occasions, I believe that this is the most powerful federal Commission created since the New Deal. Its vital mandate cannot be overemphasized -- to promulgate federal criminal sentencing guidelines that will assist our federal judges in their most important task, the sentencing of convicted offenders.

I wear three different hats today in submitting testimony for your consideration. First, as Special Counsel to the United States Senate Committee on the Judiciary during 1979-1980, I played a part in the drafting of the Enabling Act establishing this Commission and articulating its mandate. Second, as a consultant to this Commission, I have been involved to some degree in providing substantive input into the drafting of these very guidelines. As such, I have worked closely with members of this Commission and staff. Finally, as the former Chairman of the New York State Committee on Sentencing Guidelines, I have

been involved in the effort to draft criminal sentencing guidelines for the State of New York. I have experienced the exhilaration, and disappointment, associated with the difficult task you now confront.

In reviewing your Preliminary Draft, it is useful to keep three important points in mind. First, whatever the guidelines ultimately promulgated by this Commission, and ratified by the Congress, consolidation of criminal sentencing authority in the sentencing judge remains the foremost priority. Any guidelines must be based on the notion of "truth in sentencing," that the sentence imposed by the court will be the sentenced served, that "second guessing" by a parole authority will no longer be permitted.

Second, those who review the Preliminary Draft must remember that it is only "preliminary," a first attempt by the Commission to put guidelines to paper. I am pleased that throughout the Report, the Commission again and again expresses this view and invites critical analysis. You are engaged in an unprecedented effort. It is only right that your preliminary work be viewed as educational and informational in nature. Subsequent drafts should reflect the input which results from your decision to hold public hearings and to urge constructive participation.

The Preliminary Draft is a commendable first effort. It confronts the complex, difficult policy choices that must be made in bringing sunshine and candor to the sentencing process. This Draft moves the process forward and crystallizes key issues. I

congratulate the Commission on its work and urge the widest possible circulation of the Draft in order to achieve the broadest possible input.

II. SPECIFIC OBSERVATIONS

My experiences as one of the authors of the Enabling Act, and as past Chairman of the New York State Committee, lead me to make the following recommendations for improving the Preliminary Draft guidelines. All of my specific recommendations are based on the view that the Commission has been too ambitious in its preparation of the Draft. The Commission has tried to do too much too fast; your initial set of guidelines sent to the Congress next April should be much simpler, should leave more discretion with the sentencing judge, and must be based on research data and sentencing statistics that are as yet incomplete.

My specific concerns are as follows:

1. Absence of important sentencing data concerning current federal criminal sentencing policies -- A serious flaw of the Preliminary Draft rests in the apparent absence of current sentencing data to support and justify the sentence lengths found in the Preliminary Draft. In its zeal to disseminate draft guidelines as early as possible, the Commission has followed the unfortunate New York experience by drafting its guidelines before fully analyzing data reflecting current sentencing practices. This has resulted in three major problems. First, there appears to be little consistency in the

relative seriousness of "base offense values." Second, these values, along with the values associated with aggravating or mitigating factors, do not reflect actual time currently being served by convicted offenders. Yet such actual time could be an important "jumping-off point" from which to develop appropriate sanctions. Finally, any decision to increase actual time served that does not at least consider the potential impact on the federal prison population must be viewed with alarm.

I urge the Commission to develop a research base which can be used to justify sentencing decisions taken by the Commission.

2. Promulgation of certain sentencing factors -- Nowhere is the overly ambitious nature of the Commission product more apparent than in the decision to articulate sentencing factors not now formalized in current law. For example, I question the wisdom of Commission efforts to provide a guideline for "psychological injury," to distinguish criminal penalties associated with "Criminal Sexual Conduct With A Minor (Including Statutory Rape)" on the basis of the age of the offender, to mandate a twenty percent increase in sentence if the offender used a "special skill," and to provide in the "tax evasion" section that "unreported income is presumed to have been obtained unlawfully,

unless otherwise established by the offender." These and other examples will make the task of securing guideline approval all that more difficult. I am not suggesting that these factors are not now part and parcel of current sentencing practice; I am concerned, however, that, absent a firm statistical base for singling out such considerations, the Commission leaves itself open to political attack. I believe that "legislative reclassification" should be avoided at all costs until the guidelines are put in place and carefully and systematically reviewed on the basis of experience.

3. Modified real offense sentencing -- I generally approve of the sentencing approach taken by the Commission of looking at the underlying offense as opposed to the offense of conviction or plea. I view the Commission's approach as the best effort yet to confront a thorny, complex dilemma -- should the guidelines be based on the offender's plea or conviction, or on the totality of other evidence of misconduct? I believe that the compromise proposed in the Preliminary Draft is workable and that it walks the fine line between total real offense sentencing and sentencing guidelines fashioned on the relatively narrow basis of a plea or conviction following trial.

It is important, however, that the compromise reached in the Draft not be undercut by loose language or confusing statements. The compromise should be limited to the crime of conviction, plus any other misconduct "in furtherance" thereof. Language which permits additional "real offense" factors to be taken into account should be deleted from the Preliminary Draft. It is also important that the Commission receive extensive comment on how modified real offense sentencing will work in practice. Will it discourage plea bargaining? Will it result in lengthy, time-consuming sentencing hearings that will tie up our already congested federal courts? Will the "preponderance of evidence" standard permit the prosecutor to increase the sentence without proof "beyond a reasonable doubt?" These and other questions must be confronted and resolved but I remain guardedly optimistic that the approach taken in the Draft can be effective, workable and just.

4. Offender characteristics -- With one possible exception, I would limit the sentencing guidelines pertaining to offender characteristics to prior criminal convictions. I support the Commission's view that the age and nature of such prior convictions should be given varied weight. I would avoid any reference to predictive variables, such as drug abuse, community and

family ties and employment record, at least insofar as incarceration is involved. The only offender characteristic I might add is juvenile arrests.

My view that offender characteristics should be limited is based on the fact that the guidelines are general in nature and will apply to all offenders, not just to an individual offender in an individual case. Whatever the questionable value today of predictive variables in individual sentences, I do not believe they can be justified in the promulgation of generic guidelines affecting entire classes of offenders.

5. "Acceptance of Responsibility" and offender cooperation discounts -- The Commission should carefully reconsider its decision to promulgate a rule providing a discount for "acceptance of responsibility," which I believe, despite noncommittal commentary on this point, will be equated with plea bargaining. Not only is the currently proposed discount inadequate to provide an incentive to plea, but authorizing a reduced sentence in those cases where an offender pleads guilty rather than go to trial raises very serious issues. I believe it is bad public policy for the Commission to, in effect, sanction the notion implicit in such a rule that a defendant can be penalized for exercising his right to a trial.

I also question the value of the mandatory certification procedure which permits the United States Attorney to decide whether a convicted offender's cooperation should be factored into a final sentence. I have no problem with such a certification; it should not, however, be mandatory. The court should be able to disregard the recommendation or find cooperation in a given case notwithstanding prosecutorial opposition.

6. Too much detail -- Throughout the Draft, the Commission has made fine sentencing distinctions which I view as unwise and, at the present time at least, unjustified. In section after section -- offenses involving property, offenses involving taxation, offenses involving immigration, etc. -- the Commission opts for the view that detailed distinctions on the basis of such factors as property valuation, the amount of tax evaded or the number of unlawful aliens smuggled, should determine the appropriate base offense value. I disagree. Not only do such distinctions lack an adequate research foundation, but they also fail to provide the sentencing court with sufficient flexibility and leeway to develop an appropriate sentence. I recommend a "sliding scale" which would permit the judge some discretion in establishing the appropriate sentence. For example, tax evasion guidelines might be based on "low pecuniary gain," "moderate pecuniary

gain," and "high pecuniary gain." This may or may not be sufficient to alleviate sentencing disparity. If not, the Commission, as part of its ongoing monitoring function, will be able to provide a more detailed and discriminating guideline.

III. CONCLUSION

I offer the following concluding points for the Commission's consideration:

1. Go slow. You are engaged in an unprecedented effort. I recommend that the natural desire to provide a comprehensive, all-inconclusive guidelines system yield to substantive and political realities. The Commission lacks an adequate research base to justify the level of detail proposed in the Preliminary Draft. It would be better off to proceed cautiously, substitute judicial discretion for the excessive detail found in the Draft and use its power to monitor the guidelines as the weapon to assure an end to sentencing disparity.
2. Remember that the perfect is the enemy of the good. Not only should the critics of the Preliminary Draft be aware that any attempt to develop perfect guidelines will be unavailing, so too should the Commission keep in mind that a perfect model cannot be created. The mandate should be to develop a guidelines system which, when compared in its entirety to current sentencing

practices, will constitute an improvement. Everyone -- Commission members, professionals working in the criminal justice system, judges, offenders, victims and the public -- must keep this overriding principle in mind. The Preliminary Draft guidelines are not being developed in a vacuum; the Congress has spoken and declared the need for the development of limitations on unfettered sentencing discretion. The remaining issue is how best to achieve appropriate limitations on such discretion. That is the real challenge.

I again appreciate this opportunity to testify and congratulate the Commission on its initial effort. This Preliminary Draft is proof-positive that the Commission is making headway in accomplishing its appointed task.

800031
rec'd 11-3-86

ADDENDUM

to

Testimony of Owen S. Walker
Federal Public Defender for the
District of Massachusetts
Before the United States Sentencing Commission

October 21, 1986
United States Court House
Foley Square
New York, New York

Problems in the "Role in the Offense" provisions (§§A311-A314) of the September 1986 Draft Guidelines.

Introduction

The purpose of this memorandum is to point out some serious problems which exist in the Role of the Offense sections of the Guidelines, Chapter Three, Part A, §§A311-A314, as well as to comment on Chapter VI, Part F, concerning treatment of aggravating and mitigating factors.

1. Role in offense vs. manner in which offense is committed.

Because Chapter Three, Part A is entitled "Role in the Offense", the first reaction of most people looking at Part A is that it applies only to cases in which the crime in question was committed by more than one person. Common sense suggests that, if one commits a crime by oneself, there is no question of how

great or how little one's role was. Indeed, A313 states that if "the offender was either the sole participant or shares comparable responsibility with another offender", no adjustment is made under Chapter Three, Part A to one's Chapter Two total offense value. Nevertheless, §A312 says something quite different: that if "the offender supervised another person . . . or used a special skill, trade, training, education, or public position to facilitate the commission of an offense", his total offense value is to be multiplied by 1.2. The commentary indicates that a sole participant who uses professional expertise qualifies for the adjustment. The sections contradict each other and must be clarified.

In other words, Part A mixes two essentially different concepts: the role an offender played in a (multi-offender) offense, and the manner in which an offender (or group of offenders) committed an offense. It is therefore suggested that either (a) a new Part be created to cover the manner in which the offense is committed or (b) Part A be changed (both in title and in content) so that it explicitly covers both role and manner.

2. The guidelines or policy statements should recognize that in some circumstances a reduction in sentence is called for because of the manner in which an offense is committed.

As noted above, the guidelines provide a sentence increase by a factor of 1.2 if professional expertise was used in the

commission of an offense. But the guidelines do not (yet) recognize that there are many cases in which the manner of committing an offense substantially mitigates the offense.

> Example 1: Over a period of time a person embezzles a total of $10,000 from a fund, but between the various acts of embezzlement returns a total of $9,500.

Although the person is just as guilty of a $10,000 embezzlement as one who takes $10,000 with no intention of returning the money, he surely should be treated differently from the latter.

> Example 2: An 18 year old youth saws off a shotgun on a dare, knowing that possession of a short-barrelled shotgun violates the law. He then puts the gun in his attic, and forgets about it.

The young man is no less guilty than a person whose possession of an illegal shotgun is probably for a far less innocent reason, and should be treated differently.

> Example 3: A man maintains a joint savings bank account with his retired father, whose monthly social security payments are electronically wired into the account. The father dies, and the funds continue to be wired into the account. It is undisputed (and independently verified) that the man calls the local Social Security office twice shortly after his father's death to notify the office of the death. The payments nevertheless continue and eventually the man starts spending the money.

Unlike the more normal case, where the offender regularly forges and cashes the deceased relative's Social Security checks, the offender here made positive steps to rectify the situation, but was eventually unable to resist temptation. A similar situation, not uncommonly prosecuted in federal court:

Example 4: O, when cashing his $300 paycheck, is mistakenly given $3000 by the teller, and keeps the money.

Clearly a person who keeps a bank's money mistakenly given to him is a much less serious offender than one who sets out to steal from the bank.

Sometimes offenders commit offenses in such a way they are bound to get caught, and the fact they have done so may be a relevant sentencing consideration.

Example 5: A person forges an endorsement to himself on a stolen check and cashes it at his own bank, using his own identification. The person knows that it is inevitable he will be caught.

The person has not adopted the more normal procedure of using false identification to cash a stolen check, thus attempting to avoid detection. Here, as happens not infrequently, the person has committed the offense knowing he will eventually be caught. While the fact that the offense has been committed in a bumbling manner may not call for substantial mitigation, there are clearly cases where ineptitude may be appropriately considered.

Senate Report 98-225, the chief source of legislative history of the Sentencing Reform Act, suggests the Commission, in formulating its guidelines, consider some other mitigating circumstances relating to the manner in which an offense is committed. Thus, it is proposed in the Report that the Commission examine whether an offense was committed on the spur of the moment and "whether the offense was committed in a manner

plainly designed to limit the danger to the victims." (Committee Report, p. 170).

It is therefore suggested that the Commission's guidelines or policy statements in some way allow judges, in determining sentences, to take into account the manner in which the offense occurred, if the manner in which it occurred suggests that the conduct was less serious or blameworthy than normal or that the offender was less dangerous than average.

It is perhaps worth noting in addition that a concept analogous to the manner in which an offense is committed is the purpose for which it is committed. In many sentencing situations, judges appropriately consider what the offender's purpose was in committing the crime. Example 2 above is really a case where reduction is appropriate because the offender's purpose was not as serious in the ordinary case. Another example:

> Example 6: O1, who is in financial straights because of a major family illness, commits an embezzlement to forestall a mortgage foreclosure on his modest home, intending to return the funds. O2 embezzles an equal amount in much the same manner and loses it at the racetrack.

Other things being equal, O1 should not be treated as severely as O2.

3. Inadequate Reduction for Minimal Role in the Offense.

Section A314 provides that if an offender was a minor participant in the offense, his Chapter Two score is reduced by a

factor within a range of .5 to .7 depending on the offender's relative culpability and the nature of the criminal conduct involved.

The fact that the minor-role reduction is not a fixed figure, but varies within a range of .5 to .7, shows a recognition by the Commission that it is impossible to attach a specific number to the role-in-the-offense concept. That concept embraces such a huge variety of human conduct that to try to quantify it by means of a single number would be unthinkable.

The problem with §A314--an exceedingly serious one--is that, although it alleviates the sentences of many minor offenders, it simply does not permit enough of a reduction in the cases of a huge number of even more minor offenders actually prosecuted in federal court. There is nothing magical about the numbers .5 and .7--they are essentially arbitrary--and being arbitrary they will without any doubt lead to grave injustice in many cases. For in fact, as anyone familiar with the day to day operation of the criminal justice system well knows, there are many cases where certain offenders' roles are so limited that they should receive a much more substantial reduction than .5. For example, in a great many of the major multidefendant fraud cases now prosecuted in the federal courts, particularly cases in which there are 6, 8, 10 or more defendants, the range of culpability (assuming guilt of all offenders on all counts) ranges all over the lot, from highly culpable to relatively minimal. In many such cases,

the prosecutor has no intention of requesting substantial imprisonment--or imprisonment at all--for many of these minor offenders; they are prosecuted for the simple reason that, in the government's opinion, they were guilty of the crimes charged.[1]

> Example 7: Several persons are prosecuted for a fraudulent scheme which deprives investors of a total of $6 million. The major offenders are highly sophisticated, use fake names, and are fugitives from indictments for similar behavior in another part of the country. Towards the end of the scheme, O, at their request, delivers documents to two or three investors. O knows that the major offenders are involved in illegal activity of some sort but does not know the extent of the scheme or the background of the major offenders, and does not profit at all from the scheme.

Although O is, as a technical matter, just as guilty as the major offenders, he clearly deserves a much more substantial reduction than .5 from the guideline sentence for the crime. A similar example:

> Example 8: Several persons are prosecuted for a boiler room operation which deprives investors of $1 million. Those prosecuted and convicted include the organizer of the scheme, other managerial personnel, an accountant, various salesmen, and others. Most of the salesmen, spurred on at daily meetings by the organizer (who hands out weekly cash prizes to the most productive salesmen of the week), have made 30-40 telephone calls a day to potential customers, each of which calls

[1] In some cases, the minor offenders are prosecuted because the government, while believing them guilty, hopes to make deals with them in exchange for their testimony.

includes misrepresentations. Among the others involved is O1, a housewife who in answer to an advertisement has taken a part-time job with the company as a bookkeeper. She realizes after a period of time that the company is making misrepresentations but has little time to think very much about the subject. Also involved is O2, a salesman who stayed with the company for only a week and made no money but knowingly made fraudulent statements over the telephone during the week he was employed.

Major fraud cases often include many minor offenders, in part because, although the minor offenders know they are committing crimes, they are often duped themselves to some extent by the leaders of the scheme. But the minor offender problem is by no means limited to fraud cases. It occurs as well in violent crimes and drug cases.

Example 9: O, an elderly man who has led a blameless life, in a moment of weakness is persuaded by his fast-talking nephew to buy a ski-mask which O suspects or knows his nephew may be planning to use in a bank robbery. The nephew robs the bank and, unbeknownst to O, robs several other banks, in one of which he uses a gun and seriously injures a customer of the bank.

As a legal matter, O is guilty of all of the robberies and quite possibly of the assault as well. He clearly deserves punishment, but equally clearly does not deserve more than a small fraction of O's punishment.

Example 10: O is the wife of a heroin dealer. She has told customers who have called the house in search of heroin where to find her husband, and on one or two occasions has reluctantly assisted the heroin operation by giving specific

> customers who have come to the house bags of heroin which O has left for them. There is undisputed evidence that O has taken steps to get divorced from O if he does not stop selling drugs.

Once again, O, being a coconspirator with her husband in the eyes of the law, is equally guilty with her husband of heroin distribution crimes. She clearly deserves a far lower sentence, however.

The above examples of offenders (all based on actual cases), while they do not represent the "average" offender in federal cases, are by no means atypical. Indeed, any experienced judge, clerk, Assistant U.S. Attorney, probation officer or defense lawyer has run into such cases by the hundred. In many cases like these, almost <u>all</u> judges, no matter how tough their sentences may be on more serious offenders, give very low sentences, including probation. The guidelines, even with the .5 reduction, would appear to call for many years imprisonment in many of the cases. In other words, the guidelines, enacted to cure sentencing <u>disparity</u>, may well force judges to change their behavior in cases where they now act quite <u>uniformly</u>. The possibility exists, then, that the guidelines will not achieve their purpose but instead will substitute a far worse injustice than disparity--long prison terms for undeserving offenders.

It is no answer to this concern to say that such cases can be dealt with by the judge going outside the guidelines, as provided in 18 U.S.C. §553(b). The court can go outside the

guidelines by finding that the minimality of the offenders role "was not adequately taken into account by the Commission in formulating the guidelines". When the Commission has explicitly taken the role of the offenders into account in §A314 and provided no more than a .5 reduction, query whether a judge is permitted to go lower. And if in such cases some judges think they can go lower than .5 and others think they cannot, this very difference in opinion will create its own disparity.

It seems imperative, therefore, that there should be more flexibility with respect to role in the offense than §A314 provides. The .5 to .8 range should perhaps be dropped altogether in favor of a guideline allowing a judge simply to reduce the total offense value in proportion to the offender's role in the offense. Because the Court of Appeals will be looking over judges' shoulders, it is unlikely that such an amended guideline would be abused. At the least, the Commission is urged to indicate--either in §A314 itself or in a policy statement on mitigating circumstances in general--that the .5 to .8 role-in-the-offense range is presumptive only and that a judge may and should give a greater reduction where appropriate.

4. The "position of control over a criminal enterprise" provision, §A311.

Section A311 provides that an offender who was "in a position of control over a criminal enterprise" shall have his

Chapter Two score multiplied by a number between 1.5 and 2 depending on the size of the enterprise and the nature of its criminal activities. Five specific criteria are stated for consideration by the judge in determining the appropriate multiplier.

Once again, the Commission has been realistic in assigning a range rather than a specific number to the "position of control" concept. Yet there are serious problems with §A311.

First, it is not clear whether the provision applies only to the top person in the enterprise or to other higher-up persons in the enterprise as well. Since the degree of control is not listed as a factor to be considered in determining the multiplier, it appears that §A311 may be aimed solely at the top person. Yet is that sensible? Why should not a person who is second in command of a large enterprise not be penalized--to a lesser degree, of course--for his position as well? Furthermore, if the enterprise is run by two equal partners, shouldn't they both be penalized accordingly? Section A313 prevents any Part A adjustment if an offender showed comparable responsibility with another offender, so that an upward adjustment is specifically prohibited in the case of equal partners running a major criminal enterprise.

Second, the 1.5 to 2 range is highly arbitrary. Assuming it means anything to assign numbers to the position-of-control concept, what is the judge to do in cases where the listed

criteria indicate a position of control where, for example, a 1.3 adjustment is in reality more appropriate than 1.5? Either the judge interprets §A311 to require a 1.5 adjustment since the offender is in fact "in a position of control" (which is unfair to the defendant, who deserves only a 1.3 adjustment) or the judge interprets §A311 to prevent any position-of-control adjustment at all (which may be unfair to the government).

Moreover, there are problems with including the position-of-control guideline in the "Role in the Offense" section of the guidelines. For one thing, a person who is in control of a large enterprise may have a limited role in a specific offense.

> Example 11: O runs a gambling organization, large enough to qualify for a 2.0 adjustment under §A-311. He has agents who collect debts for the organization but discourages them from using strongarm tactics and prohibits their using weapons. One of his agents, A, makes a routine monthly visit to a customer to collect gambling debts. When the customer stalls, A, who has been drinking, seriously wounds the customer with a knife.

Although O is as guilty of the assault as is A, and clearly deserves some punishment, he can hardly be said to have played any role in the offense as it actually occurred. That is to say, he is culpable not because of his role in the offense as for making the offense possible. Furthermore, it is questionable whether, just because O was in control of the enterprise, he should get an offense score twice that of A. Example 11 is quite different from a mob chieftain who gives specific orders to a

henchman to break the kneecaps of someone who has incurred his displeasure. The chieftain, while not on the scene of the crime itself, played a major role in the offense, for which he very likely deserves to have his total offense score doubled.

For another thing, including the position-of-control factor in the Role in the Offense section may prevent an upward adjustment when the organizer commits a crime by himself.

> Example 12: O runs a large gambling organization which would ordinarily qualify him for the 2.0 adjustment under §A311 for an offense committed by himself and others. Entirely on his own, however, he enters into an arrangement to borrow a large sum from an undercover FBI agent posing as a shady financier. The purpose of the loan is for O to expand his organization to another city. He is prosecuted under the Travel Act. His secretly taped conversations clearly demonstrate his leadership over his existing organization.

Since O was a sole offender, by reason of §A313 no adjustment can be made under §A311 to reflect the fact that O is in fact in a position of control over an enterprise.

5. Double punishment for use of professional skill or breach of public trust.

A relatively minor point with respect to §A312 is that, in some cases, it seems to provide for double punishment for the use of professional skill or public position in the commission of an offense. With respect to fraud and related offenses, an increase is already provided for breach of a public trust (+12) and for breach of a fiduciary duty.

6. The Guidelines should explicitly recognize that mitigating circumstances are not uncommon

In Chapter Six, Part F of the draft, the Commisssion requests comment on the treatment of unusual aggravating and mitigating circumstances, stating: "The Commisssion requests comments on the treatment of aggravating or mitigating factors that occur only rarely but are serious concerns in the few cases where they do arise."

The wording of this request is very troubling, for it seems to recognize neither the infinite variety of circumstances which give rise to prosecution nor the inability of a guideline system based on numbers to capture the essence of the circumstances under which many crimes are committed. The wide variety of acts, patterns of behavior, and human circumstances which come before the courts--particularly the federal courts--is extraordinary. Although it would be an exaggeration to say that every federal case is unique--there are many routine cases--one can say that there are a great many cases which differ significantly from the norm.

Chapter Two of the draft Guidelines has been quite thorough in considering and quantifying the elements of conduct which aggravate typical crimes in each category. Yet, except for the role-in-the-offense reduction, the Guidelines contain almost nothing about mitigating circumstances present in many criminal

offenses. As stated above, it would be extremely unfortunate if the Commission does not explicitly recognize that there are many circumstances in which all judges give particular offenders much lighter than the average sentence for the offense of conviction--and they do so not out of leniency but because, given the particular circumstances, justice so requires. One reason for this, of course, is that under the criminal law's rules of vicarious responsibility, offenders who have done very little can be technically guilty of a great deal.

The Commisssion is therefore urged to give judges considerable latitude when it comes to mitigating circumstances. In particular, it is urged to write policy statements which recognize that mitigating circumstances are not "few" and do not occur "only rarely", but to the contrary occur frequently.

rec'd 11-3-86

JACK B. WEINSTEIN
CHIEF JUDGE
UNITED STATES DISTRICT COURT
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

STATEMENT TO UNITED STATES SENTENCING COMMISSION HEARING ON PRELIMINARY DRAFT SENTENCING GUIDELINES,
NEW YORK, NEW YORK
TUESDAY, OCTOBER 21, 1986

For Release: Tuesday, October 21, 1986

First, I want to express the gratitude of our court to the members of the Commission for having undertaken this difficult--some would say impossible--task.

Let me first sum up the views on this Preliminary Draft generally concurred in by the judges in my court:

(1) The prison penalties to be imposed would require many times more prison time than at present. The result would be unnecessary cruelty, unacceptable costs in prisons and welfare, and far less rehabilitation than we now accomplish. To propose mandatory sentences of 15 or more years in prison for peasant women from Africa and South America, couriers who smuggle drugs out of economic desperation, is to show no sense of the kind of real people and problems we meet in court. Such cases when not aggravated now command an average effective sentence of about 20 months.

If these proposals were to be adopted, you would have to reserve at least three times the prison space we now require for people sentenced in the Eastern District. In failing to analyze the present real terms served as against your proposed requirements for prison, the report is unsatisfactory.

(2) The proposals would increase the work of our court enormously. Any defense counsel worth his or her salt would require a hearing with proof of the facts predicate for a sentence. There would be almost no point in pleading guilty since the prison terms are so long and the discount for a plea so small (at most 20% [p. 123]). (See also ex. 7, p. 17--dismissed counts are still predicates for higher sentence.) Trials and hearings would be multiplied. We would have to almost double the size of our court. Will anyone pay the price? Have you computed the price?

(3) You have failed to take advantage of the superb federal probation system that has been developed over many years. By cutting probation as a substitute for prison you ignore our experience that probation can work in many cases to serve the community through rehabilitation of offenders.

(4) The draft is much too detailed and rigid. For example, to make such a detailed schedule for smuggling aliens, so that time in prison depends on whether 1 to 4, 5 to 10, or more aliens were smuggled is almost amusing (p. 104). Perhaps

"low, medium and high" would be justified. This kind of matter must be left to the judge. Judges can ask whether the smuggler did it for profit or friendship, whether he acted cruelly, whether he sought to reunite families and so on; whether he smuggled four aliens or five is hardly the most pressing or probative consideration.

Because of a relatively few disparate sentences at either end of the spectrum, you propose a rigid, inflexible, procrustean bed that does not comport with the wisdom and experience that our judges, prosecutors and probation services have acquired. Why do you not start slowly, with only the least possible constraints on the judges? Then, as experience warrants, you can add to or modify your guidelines. To destroy a whole viable system for some theoretical gain seems unwise, terribly expensive and cruel.

(5) Much more research is required on the possible effects of any guidelines. Do the thorough research first; experiment slowly; take advantage of a great deal of pragmatic experience with a system that at least works, even though it needs improvement.

I urge you not to take too narrow a view of your work. On page after page of your draft report, the emphasis, as I read it, is on prison as the preferred sanction. This undue emphasis on imprisonment is, I believe, undesirable. In addition, many of

the proposed terms are too long, particularly since a term once imposed is not reducible by a Rule 35 motion directed to the judge alone, as in the past; now the prosecutor's consent is required. Nor will the Parole Board be able to ameliorate too harsh a sentence in the future, as it has been able to do in the past. The Parole Board's grids are a helpful starting point for maximum sentences since at least they are based upon experience.

Imprisonment is not, and cannot be, the primary solution to our serious crime problem. Other means are required, including a variety of forms of probation as an alternative to prison. Probation, if properly utilized, is not a lenient approach to sentencing. It is a practical method of dealing with a myriad of social and sociological problems inundating the courts and the correctional system.

Do not, I urge you, ignore alternatives to prison. Do not deemphasize alternative methods of control such as strict probation, half-way houses, fines, community service, strict home detention and institutional treatment in the community. If you do, you will unnecesarily add enormously to the taxpayer cost in supporting prisons, prisoners, and prisoners' families on welfare. You will destroy families, adding to the risk of yet another generation of criminals from amongst those children growing up unsupervised by incarcerated parents. And you will cut off means of livelihood and community support from prisoners who will find

it much more difficult to engage in lawful and wholesome activities upon their release.

Alternative sanctions can work well to protect the public in many instances. But they require the money and the support of the legislature and commissioners such as yourselves if they are to work effectively. The judges of my court know this based on long experience with a tremendous case load.

We have in our court in Brooklyn one of the great probation offices, typical of the federal system your draft would almost destroy were it adopted. It is presently headed by Dr. Ralph Kistner, who has many years of probation experience as well as an outstanding academic background. Each member of the staff is required to have, or be seeking, a Masters' Degree and have other extremely high qualifications. The Probation Department has proven innovative in developing both rehabilitative and fiscally feasible programs as alternatives to imprisonment in many cases.

In 1982, our Probation Department began using community service as an alternative to imprisonment for cases of nonviolent crimes which are not drug related. This innovative sentencing option has proven so successful that it has been legislated into new law. 18 U.S.C. § 3563(a)(2), § 3563(b)(13) (1985) (effective date November 1, 1987). The community service program places offenders in unpaid positions with non-profit or tax-supported

agencies to perform a specific number of hours of service within a given time limit as a condition of probation. The goal of the community service program is the rehabilitation of the offender through service to the community. At present over 200 defendants in the Eastern District of New York are involved in beneficial community service programs--as an alternative to prison--in many private and public agencies and religious organizations, including the Salvation Army, the Catholic Dioceses of Brooklyn and Rockville Centre, and the Aleph Institute. Many of the individuals sentenced to community service have continued that service even after they have completed their sentences. They develop a social awareness and concern which they had not previously exhibited.

One of the programs now available as an alternative to imprisonment is home detention, or "house arrest," as it is sometimes called. A defendant selected for this program is placed on probation under strict monitoring and is not permitted to leave home except for employment, emergencies, medical necessity or religious activities. Savings of a substantial nature are realized by the community when the breadwinner is allowed to continue his or her employment, thereby preventing the family from becoming a public welfare charge. The defendant remains on the tax rolls and is also in a position to pay restitution or damages, if appropriate. More difficult to measure but no less obvious, house detention prevents the breakup of the defendant's family and the consequent psychological and

physical disruptions which cause trauma, even to subsequent generations, through the effect on the prisoner's children.

In addition, our Probation Department, like those of all United States Courts, offers specialized services to persons placed under its supervision. These services include treatment for those addicted to narcotics, alcohol or gambling, and mental health treatment for individuals for whom this is a special condition of parole or probation.

The Drug Treatment Unit has been highly successful in working with one of the most difficult types of offenders placed under supervision. Only through intensive counseling, stringent monitoring of their activities and drug testing can there be any hope of reclamation for most of these defendants. This unit has been highly successful. It is acclaimed throughout the country for achieving its aim of protecting the community by returning the drug abuser to the community as a productive citizen, with total abstention from the previous drug habit.

The establishment in 1983 of an Alcohol and Gambling Treatment Unit has permitted a probation specialist who is a certified New York State alcohol rehabilitation counselor to work closely with individuals in a therapeutic setting. Treatment includes individual and group therapy and arranging support services for family members. The unit has also developed a close referral and liaison relationship with community resource

agencies such as Alcoholics Anonymous, Al-Anon, Al-A-Teen, and Gamblers Anonymous.

In 1983 the Probation Department established a Mental Health Treatment Unit to meet the rising need for special services to those individuals on probation and parole who have emotional and psychiatric problems. Individuals in this unit are seen frequently at our offices and in their homes. An employment counseling session is held where needed and there is a group therapy session held monthly by the Mental Health Specialist. We have referral services and treatment programs with marital counseling, individual therapy, crisis intervention and support groups available. The Probation Department has for many years served as one of the field placement units for social work schools which require clinical work for their graduate students.

For a number of years the Department has also maintained a Bureau of Prisons liaison unit. It established a "through-care" service for offenders while they are incarcerated in order to maintain family ties when individuals return to the community. Officers conduct an orientation session for inmates sentenced to prison terms to determine any outstanding needs of the inmate in the community, such as the welfare of the family. Officers regularly visit institutions and half-way houses to prepare inmates for their subsequent release on parole by providing them with information about what will be expected of them upon release.

A large percentage of those finding their way into the criminal justice system are the hardcore unemployed from inner cities. Many lack any type of employment skills. They have never worked. They have no sense of a work ethic. An analysis of 100 unemployed probationers in the Eastern District of New York in 1980 revealed that nearly all were males, generally of a minority group, single or separated, over 31 years of age, with no marketable skills. Faced with the dilemma that the clients were not only unemployed but were also, for the most part, unreferable due to their complete lack of skill in job-searching, a special Employment Placement Unit was created. A program held once weekly, called a Pre-Employment Workshop, focuses on many of the problems encountered by the unemployed, particularly those dealing with where to look for a job and how to prepare for an interview, as well as ways of handling questions regarding a prior criminal record. This program has been highly successful in placing many individuals who had never previously been employed.

Officers in the Employment Placement Unit, acting as catalysts, have been bringing officials of the Bureau of Prisons together with business leaders. Representatives of the National Alliance of Business have met with the staff of the Federal Correctional Institution in Otisville, New York, and representatives of the Private Industry Council have met with officials at the Federal Correctional Institution in Danbury,

Connecticut. A Business Advisory Council to the Bureau of Prisons was created--a novelty in the Federal Prison System. The Assistant Vice President of the New York Telephone Company, George Kennelly, and scores of businessmen have cooperated in this work. Prison training programs and prison industries have been evaluated by this group of private businessmen, and modifications are being suggested to keep the Bureau's training programs in line with actual and projected business needs, so that upon release inmates will be more adequately prepared to enter the job market.

We must utilize, to the greatest degree possible, the religious, medical, educational and probation services in the community. The cost is much less than imprisonment. The Bureau of Prisons estimated that for fiscal year 1986 the average cost of imprisoning one inmate is $15,468.70 a year and may rise to as high as $26,000 in maximum security settings. Provision of rehabilitative services such as those I have described is far more cost-effective than incarceration. One probation officer who can effectively monitor a specialized caseload of 25 home detainees can save the government approximately $336,717 in costs annually.

How absurb is it, therefore, that our court's fine probation system is being threatened with extinction. The salary for a probation officer is so low that the talented people we need are not available. State probation officers of much more

limited qualifications, and of whom much less is demanded in the way of work, writing and intensity of supervision, are getting $4,000 more per year to start. We cannot now, for budgetary reasons, fill effectively the few vacancies we have and we are short ten positions that have been denied us largely on the ground of fiscal stringency. Exclusive reliance on increasing terms of incarceration only detracts attention, effort, and resources from our undervalued probation programs.

Money must be made available for this work. Is it not a disgrace that people who need help to break the drug habit--a habit that both engenders crime and funnels money into the drug market, making the drug trade possible--have no place to go for treatment? Money is also needed for education. We must cut the use of drugs in this country as a necessary step to cutting the flow of drugs from abroad.

Turning to suggestions for improvements of the draft on sentencing guidelines, I would like to briefly highlight a few of our concerns in the eastern District.

(1) Even the low preponderance of the evidence standard recommended for sentencing hearings will not prevent a great many defendants from requesting a hearing on the facts which would, under your proposals, become vital predicates for a precise sentence. I favor such hearings. See my opinions in United States v. Fatico, 441 F. Supp. 1285 (E.D.N.Y.), rev'd, 579

F.2d 707 (2d Cir.); on remand 458 F. Supp. 388 (E.D.N.Y.); aff'd, 603 F.2d 1053 (2d Cir. 1979). It is hard to know how much of a burden on the courts this new set of hearings will require. Presumably the rules of evidence will not be rigidly applied. Yet I would estimate that a large increase in criminal work load would result. This would probably require at least one more judge in our district alone.

(2) If pleas of guilty are given little fixed weight in reducing sentences and the number of pleas are then substantially reduced--as I think is likely --the criminal work load in our district would approximately double. This would probably require at least six more judges in our district alone.

I would suggest allowing the court to approve a plea agreement with reduced terms unless there was a clear abuse of discretion by the United States Attorney. We have seen no pattern of abuse in our court. Such agreements are essential to obtain cooperation and information needed by the government.

(3) In one of the examples of how modified real offense sentencing would work, you give no weight to the finding of a shotgun in a convicted cocaine distributor's apartment. [See Ex. 6 on p. 16.] I believe all the judges in my district would consider possession of such a weapon aggravating and would impose a heavier sentence. There are many indicia of

dangerousness not directly connected with the particular crime charged that a sentencing judge should consider.

(4) As I read the report, 180 points are given for almost all one kilo heroin and coccaine offenses. [See p. 56.] Presumably this would apply to most common drug carriers, commonly referred to as "mules." Our sentences for such carriers with no record and no control over the operation are on the order of three years, which means service of about 20 months. Your draft plan, as I read it, would lead to sentences of 168-210 months. [See p. 140.] This seems very harsh. Many of these carriers are ignorant women from underdeveloped countries who cannot resist the lure of a few hundred dollars in view of the extreme poverty of their families. We sentence hundreds of such poor women from Africa and South America each year. I doubt whether heavy sentences will deter them--and more important, whether such sentences will deter the drug suppliers from using these unfortunate people.

(5) As I read the report, long prison sentences will be mandatory in many cases since the report says probation will be "in addition to any other sanction." [See p. 143.] The examples and options at page 142 suggest that probation in most cases would not be an alternative to prison, in the Commission's tentative view. Any such interpretation, in my opinion, would be intolerable. (See also, p. 167, stating flatly that the guildelines "will not permit [many] to be sentenced to

probation.") As I have indicated, our court finds probation highly useful in many cases. Probation should be assigned sanction units. Supervised probation should be limited so that satisfactory completion of a limited term (5 years now) should suffice. We could have unsupervised probation after this five-year sentence for the full term that would have been required if the defendant had been sent to prison. Any conviction during that extended period could then result in imprisonment. This is much the method of special drug crime parole today. In sum, probation should, as now, be available generally as an alternative, not merely as a supplement to prison in any serious case.

(6) One of the flaws in the 1985 criminal law reforms was the elimination of the split sentence. As you know, we formerly could provide a "split sentence" such as "five years to serve six months, the rest on probation." This gave the defendant a taste of prison and gave the court and probation officers control during the probationary period by the threat of the remaining term being served if the terms of probation were violated. This technique was widely used. In a multiple count conviction we can still obtain much the same effect by a short prison term on one count, and a consecutive long term on the other counts with execution suspended and probation. As I read your proposals this program would no longer be open to us because the first term would be required to be quite long in many cases.

(7) What will be the rule on multiple count convictions? Will consecutive or concurrent sentences be mandatory or discretionary and under what guidelines? Any decision by the Commission on this point will be of great significance. Mandatory consecutive sentences grant enormous power to the prosecutor. Your proposed rule on p. 168 of cumulating the defendant's three most serious convictions would result--under your guidelines, as I read them--in sentences of 45 years or more in many of our drug cases. A common drug importation case, for example, is usually charged as conspiracy, importation, and possession with intent. On the other hand, mandatory concurrent sentences provide too little punishment in some cases. This matter is best left to the court's discretion.

In closing, I would like to turn once again to my serious concerns about the draft report's overemphasis on compulsory lengthly terms of imprisonment. In Volume II of The Gulag Archipelago, Solzhenitsyn relates how during the terrible times of Stalin, when prisoners were being sent to Siberia in droves, the official word came down: "Reduce the number of prisoners." (Alexander Solzhenitsyn, The Gulag Archipelago, Vol. 2 at p. 112, Collins/Fontana ed. 1975 (translated by Thomas P. Whitney)). The Soviets dealt with the problem by shooting, starving, beating and working prisoners to death.

We must meet our own problems, which include prison overcrowding, recidivism, and the growing subculture of

ex-convicts unable to integrate into our culture and communities, in a more acceptable way. We must find alternatives to prison. We must begin to face and deal with the causes of crime in this country. We must avoid the unworkable solution of simply building more prisons.

We recognize the great difficulties of the task Congress and you have set. You must devise a system for sentencing that treats uniformly all those who should be treated alike while providing for flexibility in individual cases; that grades sentences according to crimes and just desserts when few, including members of Congress (as reflected in the hodge-podge of disparate penalties in our statutes), can agree on degrees of heineousness; that balances the weight to be given notions of morally deserved punishment, incapacitation, specific deterrence, general deterrence and rehabilitation in assessing penalties, when each of these goals may point in a different direction; that is harsh and just, yet merciful and understanding at the same time; that sentences the criminal to long prison terms and in many cases "throws away the key," as large numbers of citizens prefer, while ensuring that we can afford to build and staff the necessary prisons; and that does not shift too much arbitrary power to prosecutors who would, under a system of rigid, prefixed sentences, decide terms of imprisonment by their charges.

You can reduce the burdens you have and make a greater contribution to an effective system of justice by building upon, not by destroying, the present system.

00033
Rec'd 11-4-86

STATE OF DELAWARE
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CRIMINAL JUSTICE COUNCIL
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October 20, 1986

Dave Tevelin, Deputy General Counsel
US Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, DC 20004

Dear Dave:

I enjoyed your presentation before the NCJA Board of Directors on October 17, and look forward to receiving copies of your preliminary draft report. You apparently have accomplished a lot in a short period ot time.

As requested, enclosed find the May 1, 1986 report of the Delaware Sentencing Accountability Commission, along with some brochures recently developed. The legislative bills recommended passed the House but were never considered in the Senate. The standards are under review by our Supreme Court. Virtually, all the resources recommended in the May 1 report (mostly additional offender supervision slots in accountability levels 3 and 4) were funded for the current fiscal year and are either under way or under development.

By way of comments, based on my cursory review of the draft I saw in Washington, I do have a few comments. These are my own personal views, not meant to be representative of any of the organizations with which I am affiliated.

1. You should try to structure a continuum of punishment to allow for marginal standard increases in punishment for marginally more serious (or more frequent) offenses. Delaware has proposed but one way to effect this.

2. You should try to estimate a cost/punishment/year for each sanction. This becomes very important when decision-makers are trying to select an appropriate policy choice among several options.

I may have more comments after a more thorough review.

Thanks,

Thomas J. Quinn
Executive Director

TJQ/jt

Enclosure(s)

cc: Hon. William Chandler, III
File

TQL04686(D7)

00034
Mc'd 11-5-86

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
PROBATION OFFICE

October 14, 1986

RAYMOND L. FRANK, JR.
CHIEF PROBATION OFFICER

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United States Sentencing Commission
1331 Pennsylvania Ave. N.W., Suite 1400
Washington, D.C. 20004

ATT: Guidelines Comments

Dear Commissioners,

After reviewing the September 1986 Preliminary Draft of the Sentencing Guidelines, I have two comments to make. They are attached on separate pages per your request.

Sincerely,

Fred S. Tryles
Senior U. S. Probation Officer

FST:ds

All real offense behavior should be considered in sentencing, not just the offense behavior involved in the conviction. Plea bargains often lose all relationships with reality.

Further, with disclosure, the defendant and his counsel have the right to challenge information contained in the Prosecution Version of the Presentence Report. The sentencing judge can make a finding based upon the preponderance of evidence presented. It may be unwise to create artificial barriers to what material may or may not be considered.

The courts can impose restitution under the Victim and Witness Protection Act far greater than that contained in the conviction.

Concurrent sentences are treated as one sentence.

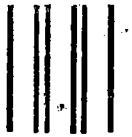
Concurrent sentences should be counted per offense, not lumped together as one. It appears you are using the same weak thinking as the Parole Commission. Very often state and local prosecutors in an attempt to clean up outstanding cases will offer concurrent sentences to motivate offenders to enter pleas of guilty. The offense behavior may span several months or years and involve several separate acts. Yet, the state courts will show concurrent sentences. This is patently unfair to the community. Concurrent sentencing rewards the offender. Each offense in excess of one become " free bees." Bundles of separate crimes become interlocked as a result of plea bargains or as a result of state law. We perpetuate this injustice by not counting the separate offenses. Offenders learn that multiple crimes have no cost.

State courts in Michigan have no choice but to impose concurrent sentences for all offenses unless an offense was committed while the offender was on bail or on supervised probation. In those instances, the concurrent/consecutive question become discretionary for the sentencing judge.

For fairness and accuracy we should count convictions and concurrent sentences singly.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
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CHIEF PROBATION OFFICER

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October 14, 1986

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U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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ATTN: Guidelines Comments

Dear Sir:

The following comments are directed to the preliminary draft of the sentencing guidelines specifically as they relate to acceptance of responsibility and cooperation found on pages 123 through 126.

It is my personal opinion that the possible 20% reduction for acceptance of responsibility in conjunction with a possible 40% reduction under the cooperation provisions are excessive. It is felt that as stated the reductions could in effect penalize an individual who has not been involved in an ongoing criminal activity in that having acted alone he is not in a position to provide the type of assistance which could result in a 40% reduction of the total offense value.

An example of this is found in a rough illustration using the guidelines in which several bank officers are involved in a loan fraud and an individual teller is involved in an embezzlement. Assuming an equal loss in these two offenses ($50,000.00) the individual teller who is given the maximum credit of .20 under remorse is unable to help himself under the cooperation statute and ends up with a total of 28 sanction units resulting in a possible period of incarceration of 16 to 22 months. The hypothetical remorseful bank officer, who testifies before the Grand Jury against his codefendants, is given an additional 30% reduction which results in a total sanction units figure of 19 for which he will be imprisoned from 8 to 14 months. It is felt that the broad heading Post Offense Conduct should include a combined heading for acceptance

of responsibility and cooperation which would preclude the apparent inconsistency as indicated above.

Thank you for the opportunity to respond to the preliminary draft.

Sincerely yours,

Robert P. Longshore
Supervising
U. S. Probation Officer

RPL:csm

Rec'd 11-5-

DEPARTMENT OF HEALTH & HUMAN SERVICES Office of Inspector General

OCT 29 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 Mr. Chairman:

Thank you for your letter of October 1, 1986 enclosing the "Preliminary Draft of Sentencing Guidelines for United States Courts". We believe the Sentencing Commission has produced a thoughtful and workable approach to criminal sentencing.

We have the following additional comments. With respect to Part F (Offenses Involving Fraud and Deception), specifically Section F211, we note that fraud involving a single victim and a single transaction has a base offense value of 6. Fraud involving a single victim with multiple transactions has a base offense value of 8. Finally, a fraud involving more than one victim has a base offense value of 12. Under this ranking structure, a fraud against a United States department or agency could only be ranked as high as 8, which we feel is too low. We suggest that fraud offenses against United States government departments and agencies should be recognized as a discrete category of offense, with an appropriate base offense value attached, i.e.:

> "4. If the fraud consisted of a scheme or artifice to defraud a department or agency of the United States, the base offense value is 12."

Due to the size and vulnerability of Federal departments and agencies, very substantial and damaging fraud schemes are perpetrated against them. Even though only one "victim" is involved, government departments and agencies necessarily depend to a large extent on the good faith of those filing claims for government monies. For this reason, the base offense value of such cases should be 12.

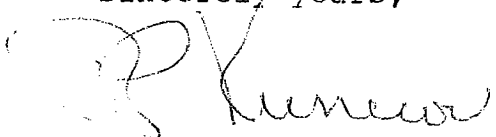
With respect to Section A416 (Restitution), we would reiterate our suggestions contained in our letter of September 17, 1986. While imprisonment is a powerful deterrent, imprisonment should be augmented by full restitution whenever the defendant has the means to pay in

cases where government has suffered economic loss as a result of criminal acts. The amount of restitution should include (1) payment of losses due to the full scope of the wrongdoer's misdeeds (and not just due to the counts on which the wrongdoer was convicted), (2) the cost of detection and prosecution, and (3) interest at at least the appropriate Treasury bill rate. This "full restitution" should be ordered to be returned to the department or agency affected, as opposed to being returned to general revenue.

A revision of Section A416 could be accomplished by giving sanction unit credit to individuals who pay restitution as a part of their criminal sentence. It should be emphasized that individuals should receive such credit only when payment is actually made. In addition, we would suggest that a limitation be placed on the number of sanction unit credits which could be earned by a defendant when making restitution. Such a provision would be advisable to prevent a defendant from avoiding imprisonment together by making restitution.

Thank you for the opportunity to submit our views on the draft sentencing guidelines.

Sincerely yours,



Richard P. Kusserow
Inspector General

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rec'd 11-7-86

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Executive Director and
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Archibald R. Murray

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Criminal Appeals Bureau
Philip L. Weinstein

Attorney-in-Charge
Phylis Skloot Bamberger

October 31, 1986

Mr. Paul Martin
United States Sentencing Commission
1331 Pensylvania Avenue, N.W.
Suite 1440
Washington, D.C. 20004

Dear Mr. Martin:

I enclose a copy of my written comments on the Draft Guidelines. These reflect my views of the issues.

If I can help in any other way, please call me.

Very truly yours,

PHYLIS SKLOOT BAMBERGER

PSB:wc

Enclosures (1)

WRITTEN SUBMISSION OF
PHYLIS SKLOOT BAMBERGER
FOLLOWING THE
UNITED STATES SENTENCING COMMISSION HEARING
OF OCTOBER 21, 1986

October 31, 1986

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A review of the draft sentencing guidelines (hereinafter "draft") raises concerns with respect to both the concepts upon which the draft is based and particular provisions. I shall deal with some conceptual difficulties first and then the particular problems.

A. MODIFIED REAL OFFENSE SENTENCING (MROS)

1. Rejection of crime of conviction as the basis for sentence is based on faulty premises and incomplete analysis of criminal procedures.

I believe the crime of conviction should provide the basis for sentencing for the reasons set out in the previously submitted position paper filed by the Federal Defenders. The disadvantages of the crime of conviction system described in the draft (p.14-15) are overcome by easily accomplished modification of criminal procedures. The Commission was concerned that many statutes are written in general terms, leaving the precise methods of committing the crime unspecified. Therefore, concluded the Commission, the details of the crime charged are unspecified, making difficult determination of a sanction commensurate with the method of commission. For example, fraud committed against an inexperienced elderly person may be viewed as more reprehensible than a fraud against an experienced and greedy businessman. However, the cure for this imprecision rests not with MROS, but with simple modifications to existing procedures which will describe the specifics of the illegal conduct. The requirements

for the indictment can be modified to include precision in charging rather than merely a statement of the statutory language. Even if the language of the charging document is not modified, the government can be required to supply through discovery procedures (F.R.Crim.Proc. 16 and notes) the information of the specific means of commission. Finally, in a plea allocution a defendant could be required to outline the details of the conduct constituting the actus reus of the crime. In sum, MROS should not be used to cure a lack of specifity in the governing statute because there are more precise and appropriate cures for this long-noticed defect.

The second reason given in the draft for using MROS is that aspects of a crime, which are not elements of the crime, are nonetheless relevant to sentencing. However, the examples given by the Commission and the cross references indicate that many aspects of the crime of conviction are either other crimes, which should be separately charged by proven, or characteristics of the offender, which are not affected by MROS and are taken into account in other guideline provisions. The Commission's concern that conduct constituting an element of the crime of conviction may be performed in a more or less aggravated manner and that such conduct should be sanctioned in proportion to the level of seriousness is well taken. However, such punishment is not based on MROS, but on conduct that constitutes an element of the crime of conviction.

The third reason given for not using the crime of conviction is that it provides potential for enhanced prosecutorial power, that is, the prosecutor will be able to determine the sentence by including in the indictment whatever crimes are necessary to cumulate to the sentence he wants to have imposed. However, it is not the use of offense of conviction sentencing that is the source of the prosecutor's enhanced discretion. Rather, it is only if the Commission insists on mandatory cumulative sentencing that the prosecutor would have the power to control the sentence through the number of counts charged. If cumulative sentencing is not mandatory, an appropriate sentence can be imposed, whatever the number of crimes charged, which does not reach the cumulated sentence for all counts. (While the Commission appears to leave cumulation an open question (pp.167-69), it also appears to require it (p.10)).

2. MROS as set out in the draft is over-inclusive.

The draft makes clear that real offense sentencing is modified by requiring that there be a specific cross-reference to other crimes in order for them to be considered in sentencing. While the idea of using cross-references is an appropriate one, MROS as envisioned in the draft is too broad and, as such, raises due process issues. The definitions of MROS, which vary significantly on different pages of the draft, and the examples on pp.15-16 demonstrate this over-inclusiveness:

> It [MROS] means that an offender will be sentenced on the basis of the conduct necessarily involved in the offense of conviction, plus the conduct done in furtherance of the offense of conviction and any injuries resulting from such conduct.

P.5.

> These include unlawful acts or omissions that were done in furtherance of the crime of conviction, as well as threatened, attempted, or completed injuries or harms that resulted therefrom.

P.10.

> . . . only those real elements (not necessarily found as elements of the crime charged) that are importantly bound up with the conduct that constitutes the crime charged.

P.15.

> . . . [harm that is] related to and results from the [crime].

P.16.

The examples included in the draft illustrate the breadth afforded by these definitions:

Example 2 (p.16): the child hit by the speeding getaway car driven by the co-defendant after the bank robbery. The speeding getaway is said, in the draft, to be in furtherance of the crime. In fact, the getaway is not part of the robbery, but occurs afterward. Further, the act causing the injury (driving the car dangerously) was not performed by the defendant, and there is no indication that the defendant knew or approved of use of a speeding car. Thus, aspects of the conduct are treated as

sanctionable based on a standard of strict liability. The use of the strict liability standard would subject the defendant to sanctions even if the defendant planned something other than the use of a speeding vehicle or even disapproved of its use.

Example 4 (p.16): a death resulting from a drug sale is treated as a sanctionable homicide. The death should not be sanctioned as part of the sale unless the seller knew that the dosage or the nature of the drug was likely to cause death. The imposition of the sanction in this example, as in the prior example, is based on strict liability. The seller may have in fact warned the buyer of the strength or potency of the drug or been misled as to the lethal nature of the drug, but the seller would still be subject to sanctions due to the death.

Example 8 (p.17): punishment for conspiracy to forge and cash one check is enhanced by the forgery of twenty other checks without any finding that the twenty checks were part of the conspiracy rather than separate illegal acts. They result in sanctions although they may not have been be forged and cashed in furtherance of the conspiracy of which the defendant was convicted.

3. A proposed standard for limiting the scope of MROS.

Any use of MROS should be limited to consideration of the crime charged, acts in furtherance of the crime charged, and the harm intended or caused by the defendant's recklessness. If the aggravating accompanying conduct is a new crime, all the elements of the new crime should have to be established by the

prosecutor at sentencing. Application of the above standard by the judge should be required as a threshold determination before cross-referencing is applied to enhance the sanction. Cross-referencing will not be automatic, but premised on a finding that conduct and harms are adequately related to the crime and the offender.

MROS also requires additional substantive revision allowing the defendant to interpose defenses to cross-referenced crimes. These may include coercion, duress, self-defense, or mental impairment.

B. PROCEDURES AND FUNDING NECESSARY FOR ACCURATE FACT-FINDING AND DUE PROCESS

The additional fact-finding required by MROS demonstrates the need for incorporation of procedures into the sentencing process which assure that the fact-finding is accurate. The failure of the draft to include such procedural due process reveals another significant problem.

Due process requires that information used to determine sentencing be accurate. The complexity of MROS, the numerical value system, and the mandatory use of the factors and numerals emphasize the need for accuracy and reliability in fact-finding. Currently the judge is free to disregard a factor that is difficult or time-consuming to prove and resolve. Under MROS, this will no longer be possible.

At the hearing on October 21, 1986, Commissioner Robinson

asked why the present fact-finding process used in a system which allows the judge to disregard a disputed assertion, but does not guarantee that the judge actually does so, is not sufficient in the proposed system. The presently used fact-finding system is not adequate to protect against all use of mistaken fact. Moreover, retaining the present procedure along with the proposed system for sentencing insures a greater frequency of due process violations because the judge has no discretion, must consider every factor raised by the case, and must determine if each factor is established by a preponderance of the evidence. Thus, to avoid violation of due process, the Commission must demand the necessary funding for the Probation Department and the defense attorneys assigned under the Criminal Justice Act, and must seek expanded procedures, regardless of the time they require, to assure accurate fact-finding.

1. Adequate Funding for Probation Departments and assigned counsel.

Under amendments to Federal Rules of Criminal Procedure 32(a)(1) and 32(c)(2)(B), which are to take effect in November 1987, the probation officer must determine the sentencing classifications and categories, the sentencing guideline range believed to be applicable to the case, and any mitigating or aggravating factors warranting sentencing outside the guidelines. Rule 32(a)(2)(D) and (E) requires the pre-sentence report to state the financial, social, psychological and medical cost to

victims, and the extent of non-prison programs and resources available to the defendant. Thus, the burden of beginning the sentencing process and providing the groundwork for the sentencing decision rests with the Probation Department. Each of the many factors listed in the draft and given sanction points must be evaluated by the probation officer and guideline range must be suggested.

In making these judgments the Probation Department cannot rely on unverified hearsay and conclusory investigative agency reports and on the part of the pre-sentence report now labelled "prosecutor's version of the crime." Rather, the judge must be provided with the appropriate kind of information necessary to determine whether a particular factor is established by a preponderance of the evidence. There must be independent verification of information relied upon in sentencing and a standard of reliability must be required if the numerical evaluation is to be fair. Thus, the Probation Department's investigation must be far more extensive than it is currently. This will require training, additional staff, access to experts (particularly with respect to the physical or psychological condition of any victim, the damage to property, and the scope of the crime), and whatever funding is otherwise necessary. For example, while it may be sufficient to include in the present sentencing system assertions based on unverified hearsay and conclusory investigative agency reports because the judge can

disregard them, such information is not sufficiently reliable for the judge to make a finding that a factor in the guidelines is present. The probation officer will have to conduct an interview with the source of the information, have an expert available to examine a witness for psychological injury, or determine if the defendant was a drug abuser ten years earlier.

Similarly, assigned counsel must have the staff and funding necessary to investigate, to refute allegations made by the prosecutor and the probation officer, to supply complete information, and to prepare its own case on the relevant scored factors. Counsel must have experts to evaluate a victim's claim of injury or to evaluate property damage. Counsel must be able to investigate and produce evidence of defenses to cross-referenced crimes and specific offense characteristics. Accordingly, funding for assigned counsel and defense experts and investigators must be increased and adequate numbers of lawyers made available.

2. <u>The required evidentiary hearing to satisfy due process requirements must be included in F.R.Crim.Proc. 32</u>.

The hearing to be afforded is of critical significance. Amended Rule 32 does not envision an evidentiary hearing. To the contrary, it provides counsel only with an opportunity to comment on the pre-sentence report and to speak on behalf of the defendant, and allows the defendant personally to present any information in mitigation. It does not provide for any evidentiary hearing at which the government is required to produce evidence and testi-

mony on disputed relevant issues and during which the defendant is given the opportunity to cross-examine witnesses and produce its own witnesses.

The draft (p.17) talks of the government's burden and level of proof and the right to present witnesses and cross-examine. However, it does not explicitly require a sentencing evidentiary hearing, and affords no due process procedures. For example, it does not require that the government produce witnesses rather than rely on hearsay, so there may be no witnesses present to be cross-examined by the defense. Indeed, amended Rule 32 authorizes only an adjournment of a sentencing hearing until any disputed issue is resolved and then refers only to counsel's right to speak, implying that the issues will be resolved without an evidentiary hearing.

In addition, p.8 of the draft permits a sentence to be based on any information produced at trial, in the pre-sentence report, or the sentencing hearing. However, as discussed above, disputed information in the pre-sentence report often can only be tested at an evidentiary hearing. Significantly, under the proposed system probation officers are required to make assessments that are usually reserved for judges. The enhanced role of probation officer and the report emphasizes the need for a procedure to provide the opportunity to contest the assessments. The trial evidence is also not necessarily appropriate for consideration at sentencing. Evidence at trial relates to far more than the

elements of the crime. However, the jury verdict relates only to finding the elements of the crime and should not be used as verification of evidence not needed to establish the elements. Furthermore, an item of evidence not relevant to an element of the crime may remain unchallenged at trial because it is irrelevant to guilt or innocence. A challenge to such evidence at trial may be prejudicial to the defense on the issue of culpability. For example, a defendant claiming he is not the one who committed a bank robbery is not going to contest the amount of money allegedly stolen. The use of such unchallenged evidence at sentencing without an evidentiary sentencing hearing is certainly unfair and possibly unconstitutional, for it requires a defendant to dilute his trial rights in order to protect his sentencing rights, or to protect his trial rights and risk being sentenced on inaccurate information.

The Commission's assurances, expressed by Judge Wilkins, that there will exist a right to an evidentiary hearing are welcome but the draft does not include an explicit requirement for a hearing. In addition, Judge Wilkin's assurances must be translated into a specific request for a change in Rule 32 if they are to have the force of law. Absent a stipulation with the defense, the government must be required to prove at the sentencing hearing every specific offense characteristic or cross-reference and all other factors it will want to rely upon. Furthermore, the defense must have early access to the pre-

sentence report and its recommended guideline as well as the right to compulsory process in order to prepare, respond and defend.

C. THE LACK OF AVAILABILITY OF PROBATION UNDER THE DRAFT IS CONTRARY TO THE STATUTE AND ITS LEGISLATIVE HISTORY

1. The statutory requirement of an initial in-out determination.

In the testimony of Chief Judge Jack Weinstein and at the conclusion of the October 21, 1986, Regional Hearing, a question arose concerning the use of alternate guidelines to authorize probation. The Commission appeared to believe that a probation guideline as an alternative to an imprisonment guideline could not be provided for because of 28 U.S.C. §994(b) and the requirement that imprisonment ranges must include no more than a 25% or a six month difference between the maximum and minimum sentences. As I understand the reasoning, only a score of sanction points which permits a maximum sentence of six months in custody also permits a sentence of probation, and probation can never be imposed if the maximum prison term is more than six months.

However, this view of the statutory mandate is incorrect. The determination of whether probation is an appropriate sentence should be an independent decision and not one that is merely a function of a point system designed to determine the length of incarceration. The design of the draft is, therefore, inconsis-

tent with the statute and its history, both of which rest on an assumption that the primary and initial sentencing decision is whether probation or imprisonment is the appropriate punishment for a particular defendant who commits a particular crime.

The statutory language makes clear that the in-out decision is separate from the decision of how long to incarcerate. The equal treatment of probation and custody as alternate sanctions is manifest from 28 U.S.C. §994(a)(1)(A) and (a)(1)(B), which set out the type of sanction as the first sentencing decision and the length of the type of sanction as the second sentencing decision. Under 28 U.S.C. §994(b), the 25% or six month differential applies only if the first decision is that the defendant should be imprisoned; the 25% or six month differential does not affect the choice of sanction. 18 U.S.C. §3551 and §3553 reinforce the dual nature of the sentencing decision and the independence of the two parts of the decision. Section 3551 states that both probation and incarceration are sentences. Section 3553(a)(2) describes factors to be considered by the judge in deciding the sentence. These factors go beyond those numerically quantified by the draft and include promotion of respect for the law, "just" punishment, provision to the defendant of needed educational and vocational training, medical care or other treatment in the most effective manner, as well as an appraisal of the kinds of sentences available. In many instances these factors will indicate that

probation is the appropriate sentence. These factors are not quantified by the draft and are not capable of being quantified. They are, however, a required part of the court's sentencing decision and instruct that the court must make an initial in-out determination based on these considerations.

2. An appraisal of the probation system is needed to establish probation guidelines as required.

As noted, to determine the range of offender and offense characteristics for which probation is an appropriate sanction, the judge must consider "just" punishment, provision to the defendant of needed educational and vocational training, medical care or other treatment in the most effective manner, as well as an appraisal of the kinds of sentences available. To enable the judge to make such considerations and to prepare probation guidelines, the Commission should undertake a review of federal probation services, their actual supervision levels and potential levels, and the available services and programs in each community which can be imposed as conditions of probation and alternatives to incarceration. The study should seek to determine those categories of offenders, including both those who are now sentenced to probation and those now sentenced to custody, properly sanctioned by probation with appropriate conditions. Any study must necessarily include private and public programs for drug and alcohol rehabilitation, family counselling, education, vocational training, special programs for unmarried

mothers, and community service. Appraisals of program needs and the costs as well as the relative merits of public or private facilities must be examined. The Probation Departments must be consulted and the expertise of federal probation officers sought. Indeed, probation officers in the federal system who regularly supervise probationers in a variety of programs subject to a range of conditions are among the best sources of information about these critical subjects.

Accordingly, to comply with the statute, the Commission should revise the proposed structure to incorporate as a separate decision governed by appropriate guidelines, the in-out decision, and by setting up an entirely separate set of guidelines for length of probation terms which do not come within the statutory 25% differential limitation, and for conditions of probation.

D. SOME PROBLEMS WITH PARTICULAR PROVISIONS

1. The presumption in the income tax provision that unreported income is unlawfully obtained income (p.44) is violative of the Tot - Gainey - Leary line of Supreme Court decisions requiring that the fact presumed is more likely than not to be derived from the fact proven.

2. The shift, in the income tax section, of the burden of proof to the defendant to show his income was legally obtained (p.44) violates the due process presumption of innocence and the Fifth Amendment right against self incrimination.

3. The relative weights attached to various special offense characteristics resulting in add-on sanction points are irrational. Example: the use of a person of less than 18 years of age to assist in a drug offense requires an add-on of 18 points to the base value (p.58); by contrast, if the defendant and another go in disguise on a highway or on another's premises with intent to hinder exercise of a civil right only 12 points are added to the base offense value (p.84).

4. The double counting of offender and offense characteristics is unfair and appears vindictive. Example: 21 U.S.C. §848, makes it a crime to commit a continuing series of narcotics violations (three or more violations), while supervising five or more people and obtaining substantial income from the conduct. The draft requires that such a crime be given 120 sanction points or the total of the points for the three or more predicate acts, whichever is greater (pp.58-59). Paragraph 2 on page 59, to the extent that it is comprehensible, appears to require that the base offense values of any of the three or more predicate offenses resulting in convictions before the §848 conviction then be added again to the base offense value for the §848 offense. Then, §A311 (role in the offense) requires a doubling of the sanction points with no additional conduct beyond that in the statute (playing a major role is the essence of the statute), and without consideration of the factors listed in §A311. Then,

§C323 authorizes a sentence beyond the guideline range if the pattern of conduct yields a substantial portion of the defendant's income. The result is that although Congress has described behavior punishable by a minimum term of ten years, the guidelines require 24 years, with no aggravating behavior, by counting the same conduct four times.

5. There are inconsistencies with the statute. Example: the guidelines (p.127) require 3 points if the offender is determined to have been an opiate abuser within 10 years of the current conviction, or if the offender failed a urine test at arrest or while on bail. However, §994(d) permits consideration only of current drug addiction and only if relevant to sentencing. Example: Option 1 (p.142) requires use of all sanction points, but mistakenly equates those points with the maximum term in a guideline range and requires that punishment be at the maximum of the range. This conflicts with the requirement of §994(b) that the judge have sentencing discretion if a 25% range is used in the guidelines. Example: restitution must be made regardless of income (p.158). The statute says a restitution order must consider income (18 U.S.C. §3664) and modification is permissible if income changes (18 U.S.C. §3663(g)).

6. There are internal inconsistencies. Example: there are instructions to multiply the adjusted offense score by the adjustment for criminal history (p.10), which are inconsistent with instructions that the two are to be added (p.131).

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Rec'd 11-7-8

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October 27, 1986

Honorable William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pensylvania Avenue, NW
Washington, D.C. 20004

Dear Chairman Wilkins:

Thank you for the invitation to provide testimony at the public hearing on the preliminary draft of the sentencing guidelines in Denver, Colorado on November 5, 1986.

I regret that my general observations are negative since it was my desire to be positive at the time I accepted the invitation. An honest analysis from my viewpoint as a federal probation officer does not allow me to do so. Comments are not designed to be critical of the Commission's work but are directed at the legislation that has required the Commission to seek ways to accomplish the revamping of federal criminal sentencing practices. I realize that negative responses without some alternative proposals for thought and consideration are not very beneficial. I have offered some thoughts on some of those items which may possibly contribute to development of other alternatives if justified.

I chose to give general observations of various sections and then concentrate on some of the specific problems which will be encountered by federal probation officers.

Sincerely,

Perry D. Mathis

Perry D. Mathis, Chief
United States Probation Officer

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Attachments

GENERAL OBSERVATIONS

The U.S. Sentencing Commission has one of the most tremendous tasks Congress has ever given to any one agency in accomplishing a mandated goal of restructuring the entire federal criminal sentencing process. The Commission is seeking comments from everyone involved in criminal law and from the general public. Appreciation is expressed to the Commission for the unprecedented attempt to accomplish the task and for the opportunity for expressing observations, concerns, and reservations about the Preliminary Draft of Sentencing Guidelines.

The goal expressed by the Commission is that rehabilitation must be secondary to other sentencing goals, especialy protecting society. Federal Probation Officers have always shared this goal by asking themselves the same question with each case -- Can we control this offender in the community? If the answer is "no", our efforts are focused on custody sentencing.

The non-binding Senate resolution in 1984 to be used as a guide prior to the enactment of the guidelines indicated that federal prison space must be treated as a scarce resource and prison resources should be "reserved for those violent and serious offenders who pose the most dangerous threat to society". Courts were urged to consider "the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant has not been convicted of a crime of violence or otherwise serious offense". It seems reasonable to believe that Congress intended for that resolution to be continued as a goal after the enactment of the guidelines.

Congress has abolished parole in its present form and it appears that the preliminary guidelines have abolished probation as a meaningful alternative to incarceration. Whereas supervised release has been substituted for parole, incarceration appears to have been substituted for probation. This is partially evidenced in the guideline statement that "the selection of fourteen (14) sanction units as a level below which a court may sanction an offender without imprisonment was intended to establish a range of units (0 - 14) that was broad enough to permit the court to give minor offenders (including repeat violators of the most minor statutes) probation or other non-imprisonment sentences". It is thankfully noted that the Commission has emphasized that these are highly tentative guidelines and subject to change.

It is the opinion of many federal probation officers that the courts have accomplished the task of protecting the public by controlling the activities of offenders who fit a definition of being more than minor offenders but are not violent or dangerous. This has been accomplished by probation supervision and related controls.

That probation is a viable alternative to incarceration for more than minor offenders is attested to by the number of offenders under probation supervision in the federal system as compared to the number

violating probation to a degree requiring revocation. National figures for federal cases show:

Year	Number of Offenders on Probation	Number of Offenders Requiring Revocation	Percentage of Revocation	Percentage of Probation Success
1984	67,051	2,637[1]	3.9%	96.1%
1985	69,947	3,034[2]	4.3%	95.7%
1986	74,862	3,310[3]	4.4%	95.6%

1. Of these violators, 665 had new major violations
2. Of these violators, 793 had new major violations
3. Of these violators, 771 had new major violations

(major violations are defined as wanted, arrested or convicted of new offense allowing for a penalty of more than 90 days imprisonment or $500 fine, or sentenced to more than one year probation)

Number of offenders under probation supervision and percentage of success represent many more categories than minor offenders. These figures indicate the possibility that probation could perhaps be used more, not less, than it is used presently if the system were given alternatives such as home detention, more community treatment centers, etc.

Several significant and usable alternatives to incarceration are suggested in the guidelines. Community confinement, home detention, ordering intervals of custody under 18 US.C. 3563(a)(11), are alternatives designed to be used with offenders who pose risks but are not violent or dangerous. Under the proposed guidelines, the missing ingredient to using these alternatives will be the offenders to place into them. Most offenders who qualify for probation will not be those who need the extra sanctions.

Commission guidelines are so dedicated to the Congressional directions toward eliminating disparity they are also eliminating much possibility of discretion. The degree to which activities will be directed will bog the system down into a quagmire of red tape from which there is no escape. Addressing minute details of how a court should establish offender "acceptance of responsibility" or which technical condition of probation or supervised release should be considered "less serious" or "more serious" when violated is tantamount to destroying professional judgment in areas in which these professionals have demonstrated a high degree of competency. These minute details further complicate a complex system.

There is a minimum twelve-step process which must be applied in each case to determine the required sentence. Some of those steps are simply a natural sequence of events in any criminal case. Some of them have additional actions which must be completed before moving to the next main step. Some of those actions will create controversy which can be resolved by the probation service but certainly some will have to be resolved in mini-hearings on a higher level. After moving through each step and determining the mandatory range of sentencing, the court then must determine the appropriate specific sentence within the range. The law provides that the court must state on the record not only any reasons for going above or below the guidelines but must also state the reason for imposing the specific sentence within the guideline range, those reasons transcribed and furnished to the probation service and, if custody is ordered, the Bureau of Prisons (reference 18 U.S.C. 3553(c)). Even though appeals are possible only when the court sentences above or below the guidelines, the specificity of reasons for imposing a certain number of months within the range could within itself create controversial arguments prolonging the sentencing process. It is recognized that the law gives no discretion in this matter.

The Commission's fundamental decision, as stated, of whether to base sentencing guidelines on real conduct in which the offender engaged or only on the conduct for which the offender was convicted, will determine the content of any guideline system. The Commission tentatively developed a modified-real offense system. Even this builds into it the possibility of a hearing by the court which would be "less formal than a trial". These are the type things referred to in the previous paragraph and will have to be resolved as the judicial officer attempts to complete the scoring process in which he/she will be involved. However, the modified-real offense system which allows consideration of all conduct (threatened or accomplished) committed in furtherance of the crime of conviction seems to offer a fair compromise to the "real offense" and "conviction offense". The cross-references provide information which will allow the judicial officer to reference many of the threatened or accomplished harms. While some of the cross-references may require hearings (level of psychological harm), others will not (use of a firearm). The main problem will be the disagreements which ensue about the difference between "real offense" as opposed to "modified-real offense".

The Offense Conduct proposal uses a systematic approach to apply specific offense characteristics and uses cross-references to lower or raise the final score for that section. They give specific directions to follow and supply definitions which seem clear and will allow the scorer to complete the section if all the information is supplied in the investigative material available. Some of those items, however, will require determinations to be made in either formal or informal hearings. The establishment of the level of psychological injury, for instance, will require a court hearing. Using an example of bank robbery where the offender abducted a victim teller and later raped the victim. The offender may be charged with bank robbery in federal court and not with rape. Psychological injury results and a determination must be made if the rape was committed in furtherance of

the crime. If it was not, to what extent was the psychological injury a result of the bank robbery as opposed to that caused by the rape? These and problems such as the lack of necessary information in investigative reports seem to be the primary obstacles at arriving at final scores.

Offender characteristics provide aggravating or mitigating adjustments to the final score. The court is allowed to adjust the sentence provided the reduction does not exceed 20% of the total offense value. The guidelines provide guidance to the court in its efforts to determine the percentage of reduction. One is acceptance of responsibility by surrendering to authorities before charges are filed or an arrest warrant is issued. This sometimes takes place in the federal system because an offender's attorney is aware that by doing so he may be able to have charges filed of lesser seriousness than by waiting for a Grand Jury indictment ---- is this sincerely accepting responsibility for the offense and taking steps toward rehabilitation? Perhaps, and perhaps not, but when items such as this are provided in a regulatory manual they will be seized upon by the sophisticated offender and create opportunity for lengthy dialogue. Voluntarily making restitution of a substantial nature before sentencing is a very worthy goal and helps the victim but some offenders cannot pay "substantial amounts" because they are poor and they may suffer more because of it (food stamp or social security violators). The courts presently give consideration to those who accept responsibility for their acts and it is done on an individual basis. The problem is not should it be done but how to determine if it is valued at 10% or 20% and to whom it should be applied.

The U.S. Attorney can double the sentence reduction adjustment by certification of cooperation. In order for an offender to take advantage of that mitigation he/she would probably have to be heavily engaged in other criminal activity before coming into the system or be intimately associated with the criminal element. The sophisticated criminal can end up with a reduced sentence whereas the lone offender who has no such involvement and knowledge must suffer those consequences. How does a bank embezzler in a small town bank know of other similar or unrelated crimes in the community to give sufficient information to qualify for a reduction of 20%, 30%, or 40%? Will the U.S. Attorney even ask for such help? This system is unfair to many offenders, allows the truly serious offender to obtain a reduced sentence and allows the U.S. Attorney to influence the sentence more than the judge's own discretion will allow (the sentencing judge shall apply the cooperation adjustment in accordance with the certification of the U.S. Attorney . . .). Offenders involved in more criminal behavior can cause mitigating circumstances to have more effect on their sentence than offenders who are less involved in criminal behavior. This seems to allow unfair disparity and further removes sentencing determination from the court. However, since the Supreme Court ruling allows this consideration, it could be adjusted to be more in line with the judge's determination of acceptance of responsibility and allow both considerations to receive a maximum consideration of 20% or 40%.

The Criminal History Score presents no major obstacles for a scorer except a need for clarification and redefinition of some of the items. The section which addresses points for drug history equates that score with an adjudicated sentence of imprisonment where an offender served less than three years. While agreeing that drug use contributes to criminal behavior, for the item to be considered along with criminal history raises concerns of this presenter. Those concerns are addressed specifically under a separate attachment. That attachment also deals with some of the practical problems a probation officer needs to have clarified in order that this particular section can be accurately performed. The proposed score table provides similar results as the alternative approach, requires less computation, and is the preferred method.

There are many questions posed in the preliminary draft of the guidelines. One of great interest is "How should sanction units be converted into sentences other than imprisonment?" The question appears to be asked more for the purpose of determining if some sanction units should be used to require the court to impose enough non-imprisonment sanctions to satisfy a portion or satisfy all the sanction units within the guideline range and provide further restraints upon the offender. This presenter will use the question for another purpose.

Something must be done with the sanction units which will allow the courts to elect probation as a viable alternative sentence. The only way a court can place an offender on probation under the guidelines is if he/she qualifies for a range of sentencing from 0-6 months. The exception to that is by using 18 U.S.C. 3563(b)(11) which would expand the use of a probation sentence where the offender qualifies for a sentence range up to a maximum of 18 months (24 sanction units) provided the court orders custody of 2 - 12 months at intervals during the first year. It appears reasonable to feel that an offender who must go into custody for twelve months in order to qualify for three years probation might prefer to serve another six months (reference is twenty-four sanction units requiring 12 - 18 months in custody) and not be faced with the restraints of probation supervision for three years. There are many offenders under probation supervision now who received un-executed sentences in excess of 18 months who are being successfully controlled, are working, paying taxes, and are not contributing to the over-capacity of the federal prison system. If courts are not allowed to continue this practice, the tax paying public and the offender who could be controlled successfully outside prison will suffer unnecessary hardships. One alternative to convert sanction units to a probation sentence is presented under the Determining the Sentence section attached.

The federal probation officers in this district will not panic with any new responsibilities it must absorb. They are compotent professionals with many years of experience in the criminal justice field. They will carry out the laws and regulations in a fashion that is professionally done but they need someone to take notice of the problems as they see them. The sentences proposed are too high and will likely overburden the prison system and call for the

establishment of geriatric prisons. The U.S. Parole Commission in our region has handled duties professionally under the laws and regulations which governed its existence. Staff members have frequently responded to emergency situations by placing violators in custody immediately. The courts have processed the sentencing of criminal offenders in a manner that has protected the public to the highest degree possible. This is evidenced in the success rate of those under probation supervision as cited earlier. If there are offenses which are considered serious enough within themselves to demand incarceration, and there are some, then Congress should address them, prohibit non-incarcerated alternatives, and provide minimum/maximum terms which must be served. It is recognized that is not the issue and that the Commission must proceed as directed.

In an article in the Kansas City Star under the date of October 26, 1986, a description was given of the FBI's development of criminal profiles through the National Center for Analysis of Violent Crimes. The program has been in existence for ten years and has resulted in the gathering of information about characteristics and behavior patterns of offenders which assists in solving crimes. One law enforcment agent who has received the training was quoted as saying, "Anytime you're working with human behavior you're going to find atypical situations and variables you haven't encountered before. There's no cookbook and there never will be a cookbook." That statement can be paraphrased to say there is no cookbook to assess and score human behavior. There are too many variables and combinations of those variables which must be evaluated on an individual basis.

The Sentencing Commission has a job to do and is addressing the issues in a straight forward manner in efforts to comply with Congressional directives. It was this witness' desire to be positive about the new sentencing laws but an analysis of its effect does not allow positive feelings. It will cause the expenditure of millions of dollars and will result in a program which will delay and overburden the system.

Respectfully submitted,

Perry D. Mathis

Perry D. Mathis, Chief United States Probation Officer

PDM/jw
Attachments

CRIMINAL HISTORY SCORE

(Chapter Three - Part C)

Drug Use.

Item 1.E indicates that 3 points are to be added if the offender had a positive urine test for certain drugs at the time of arrest, during the pretrial release period, during the presentence release period, or if the offender is determined to have been an abuser within ten years of the current conviction.

Awarding 3 points for this item equates it with a conviction for which the offender served less than 3 years. This appears too heavily weighted. The margin for error for one positive urine may be too great to award 3 points and may present much opportunity for demands to present testimony on procedures in collecting, testing, and verification of results.

All offenders are not tested for drugs at the time of arrest, during the pretrial release period or during the presentence process. If the offense is drug related, if the offender has a drug history, or if the probation officer observes behavior indicating possible drug use, a urine specimen is taken. Otherwise, it may not be taken. This general procedure presents some problem with the proposed guideline and perhaps every offender should be subject to urinalysis if the item is counted here.

Magistrates do not require pretrial release supervision in every case and those offenders not subject to supervision may not be seen for any purpose, including urine collection, until the case has been adjudicated. Offenders on pretrial release supervision face possible sanctions for drug use whereas those not on supervision may also be abusing drugs but no sanctions are awarded because no urine samples were collected and tested.

If an admission on the part of an offender that he abused certain drugs is used to award a sanction of 3 points, offenders will stop admitting drug use to probation officers when interviewed for the presentence investigation. Presently drug abusers admit their problem because many tend to view it as a mitigating factor for criminal behavior. Officers need this information in efforts to do an accurate report and to assist in the supervision process. What level of evidence is needed to determine the offender is a drug abuser in order to justify a sanction of 3 points --- an admission, prior hospitalization or treatment, etc? The officer is required to use 10 years as the determining point of counting the three points. This gives no recognition to the offenders efforts to get off drugs during that time. If the offender underwent drug treatment eight years ago and there is no evidence that he abused drugs since then, he will receive three points just as an offender presently using drugs. An alternative consideration is suggested to allow something less than the 10 years factor, especially if there is evidence that the offender successfully completed a treatment program and has not abused drugs

for a period of five years. Practical experience of probation officers supports findings that past drug use helps predict future criminal behavior. However, the problems with the scoring instructions defined herein are major ones.

An alternative to consider is to weigh drug abuse along with other items (Part E. - Other Offender Characteristics) where it would be given less weight than past instances of adjudicated criminal conduct. It could be addressed by allowing the court to consider drug use in setting the sentence within the 25 percent range. If there is a preponderance of evidence presented in "other offender characteristics" to indicate drug abuse it could be considered as one of the justification for sentencing at or near the maximum limits of the guidelines. This procedure would not "play a role in the decision of whether or not to incarcerate the offender" but it would offer some consideration to practitioners and researchers observation" that there is a strong association between substance abuse and criminal activity". It also can be considered for justification in adding special conditions of drug treatment, home detention, community confinement, etc.

Prior Sentences.

For purposes of the criminal history score the probation officer is instructed to treat two or more prior sentences as one if they are imposed concurrently. This instruction needs further consideration and clarification. Does it mean sentences which are ordered to run concurrently with each other or does it mean sentences which are imposed at the same time? If two sentences are imposed in different jurisdictions for different crimes but ordered to be served concurrently, are they to be counted as one sentence?

Example:

6-16-77	Second Degree Murder (Count I); Aggravated Battery (Count II)	State Dstrict Court No. 1	9-30-77, Count 1 amended to voluntary Manslaughter. Offender committed to Secretary of Corrections for a term of 1-20 years on Ct. I. Offender committed to Secretary of Corrections for term of 1-20 years on Count II. Sentences ordered to serve concurrently with each other.

Note: Offender paroled in 1980.
Parole later revoked.

9-21-80	Sale of Marijuana (two counts)	State District Court No. 2	On 12-12-80, the offender was sentenced to Secreatry of Corrections for a term of 1-10 years in each count, sentenced to run concurrently with each other and concurrent to sentence imposed on 6-16-77.

Interpretation of the prior sentence guidelines would result in the sentences imposed on 6-16-77 and 9-21-80 being counted as one sentence. This does not appear to be an equitable method of counting prior sentences. If the two sentences imposed on 9-30-77 had been ordered to be served consecutively they would have been counted as separate sentences for the criminal history score and yet those offenses were related, occurred at the same time, and were imposed by the same court. The sentence imposed on 12-12-80 was not related to the first two cases, occurred at different times, was imposed by a differrent court, and yet would be counted along with those cases as one sentence since it was ordered concurrent with them.

Proposal to minimize the prior sentence problem. Prior sentences that are charged or adjudicated together (e.g., three theft charges) would be counted as a single prior sentence except when the sentences were imposed for offenses separated by an intervening arrest (e.g., two theft sentences and a third theft sentence for an offense occurring after the arrest for the first two theft charges would be counted as two prior sentences even if all three theft sentences were imposed at the same time). If two prior sentences were imposed at different times, they would be counted as separate sentences even if they were served concurrently. This is similar to the present Parole Commission instructions for scoring prior records.

Juvenile Sentences.

The guidelines require that juvenile sentences be counted for offenses against persons, including residential burglary and drug trafficking. Some juvenile courts destroy records after a period of time and some do not. Offenders in jurisdictions where records are maintained will be penalized whereas those in jurisdictions where records are destroyed will not have those sentences counted against them.

A general rule in most juvenile courts throughout the country is that records are maintained on offenders until they reach age 21. The Commission's desire to capture important juvenile indicators of risk that are likely to be available across most jurisdictions can best be accomplished by the option which is presented for scoring rather than counting all juvenile offenses for all offenders regardless of current offender age. This limitation will guard against discrimination where offenders live in jurisdictions where records are never destroyed as opposed to jurisdictions which routinely destroy records after an offender attains age 21.

Decay Factor for Prior Sentences.

The decay factor presented which considers crimes of violence or crimes of distribution of drugs regardless of date of sentence should be preserved. The "optional" decay factor accurately states that the date of sentence is more easily available than the date of release and cites that as a reason for selecting the option to limit consideration of prior sentences to those imposed within a certain interval of time (15 years). No reason is articulated which would preclude combining the options to use a decay factor of fifteen years based on date of sentence while retaining crimes of violence and those involving distribution of drugs regardless of any time limitation.

Sentences Resulting from Tribal Court Convictions.

While these sentences may be good indicators of problems an offender has caused, it appears that there are too many variables which could exist to justify equating these sentences with sentences imposed in other courts. Availability of accurate records, tribal family influences, other political influences, offender representation, etc. raise questions of importance that should be addressed prior to counting these sentences on the same level as other sentences.

Criminal History Score Table.

The criminal history score table is not as complex as the alternative approach. The alternative approach provides similar results as the table so there appears to be no reason to require a three step process to accomplish the same objective.

DETERMINING THE SENTENCE

(Chapter Four)

The Commission has posed the question, "How should sanction units be converted into sentences other than imprisonment?"

Unless some method is adopted to allow conversion of sanction units to other than imprisonment, the ability to elect a probation sentence will be so limited that numerous offenders who otherwise could be successfully supervised on probation will be incarcerated.

This writer's review of present guidelines indicated that the only cases in which probation can be selected without some term of imprisonment are those where the sanction units are less than 14. If 18 U.S.C. 3563(b)(11) is used to satisfy the minimum period by "intervals of custody", the range of sanction units which will allow probation is increased as follows:

Sanction Units	Sentence Guideline Range	Minimum Custody Under 18 U.S.C. 3563(b)(11)
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Premise: Presently probation impacts differently on individuals due largely to special conditions imposed. For example, a special condition to reside in a halfway house or participate in a drug treatment program impacts significantly on the individuals liberty.

Proposal: Assign sanction units to the special conditions of probation that limit the freedom of offenders and are punitive (as well as rehabilitative) in nature. Specifically the conditions of (1) Reside in a halfway house, (2) home detention, and (3) participation in a substance abuse program. For example, four sanction units available for each condition.

If sanction units are assigned for these conditions, credit them with 4, 8, or 12 units before reaching the point where the court would have to impose some imprisonment.

Example 1:

Offender has a sanction unit score of 32. Present sanctions would call for a custody range of 20 - 26 months. Based upon a preponderance of the evidence the offender needs drug treatment and halfway house placement since he is unemployed and has few community resources.

Give offender credit for eight sanction units which would lower sanction total to 24. Present sanction units would call for custody of 12 - 18 months.

Sentence alternative would be probation (3 - 5 years) with special conditions of:

1. Custody under 18 USC 3563(a)(11) for 12 months (satisfies the minimum 12 months)

2. Halfway house placement to follow custody - 120 days (4 units)

3. Participate in a substance abuse treatment program (4 units)

Example 2:

Offender has a sanction unit score of 18, Present sanctions would call for a custody range of 6 - 12 months. Based upon the preponderance of evidence, the offender needs substance abuse treatement and additional sanctions such as home detention.

Give the offender credit for 8 sanction units which would reduce the sanction score to 10. Present sanction units would allow a probation sentence. Impose the following sentence:

Probation (3 - 5 years) with the following conditions:

(1) Participate in a substance abuse program (4 units)
(2) Home detention, i.e., at his residence from 9:00 P.M. to 6:00 A.M. for 120 days (4 units)

CONDITIONS OF PROBATION

(Chapter Four A412)

PROBATION REQUIREMENTS OF 18 USC 3563(A)(2) FINE, RESTITUTION, COMMUNITY SERVICE ORDERS

18 USC 3563(a)(2) will require the imposition of a fine, restitution, or community service as a condition of probation in felony cases.

COMMENT

The present probation statutue, 18 USC 3651, authorizes the court to require restitution for "any offense" and places no limit upon the offenses committed. However, 18 USC 3651 is to be replaced by the new probation statute and the new conditions of probation are listed under 18 USC 3563. 18 USC 3563 specifically states that the court may require an offender to "make restitution to a victim of the offense pursuant to the provisions of section 3556". Section 3556 states "The court in imposing a sentence on a defendant who has been found guilty of an offense under this title . . . may order . . . that the defendant make restitution to any victim of the offense in accordance with the provisions of sections 3663 and 3664." Reference to 18 USC

3663 further shows that restitution orders will be limited to those defendants . . . "convicted of an offense under this title . . ." and certain sections of 49 USC 1472.

Probation cases (and custody cases) in which an offender has not been convicted of an offense under Title 18 or certain sections of 49 USC 1472 cannot be required to make restitution. An example would be an offender convicted of a Food Stamp Violation under Title 7 or False Statements and Conversion of Social Security Benefits under Title 42. This district has used the present probation statute, 18 USC 3651, to order restitution in those cases but that will not be possible after November 1, 1987. Unless changes are made in 18 USC 3563 to allow the court to require restitution in offenses other than "offenses pursuant to the provisions of section 3556" that restitution under Title 7, etc., will not be possible.

If a court is unable to order restitution in some cases or if there is no restitution issue in some cases, the requirements under 18 USC 3563(a)(2) will be restricted to a fine or community service. If the "Ability to Pay" approach is used for fines, the court could eventually face the prospect of requiring community service as the only alternative available.

A fine or restitution may not be appropriate for some cases but neither is an order for community service. While the community service section of the guidelines has not been developed, community service is generally defined as a contribution of an offender's time and talents to a public agency. A public agency cannot be forced to accept the voluntary services of a felon so access to some agencies who use volunteers will be precluded. The liability issue involving the use of volunteers has caused some agencies great concern and has even resulted in the closing of one organization specifically established for the purpose of coordinating community service placement for criminal defendants. Some offenders simply do not have the "talents" to perform community service or may be faced with transportation problems, child care problems, etc.

The requirements of 18 USC 3563(a)(2) have merit used as a discretionary condition but will present many practical problems to the court and probation service as a mandatory condition in felony cases. Rural areas and ghetto communities will present aggravating problems in efforts to accomplish the intent of the legislation by requiring fines and/or restitution on those unable to pay or by requiring community services in areas where the opportunities for such service is non-existent.

PROBATION REQUIREMENTS UNDER 18 U.S.C. 3563 AGREEMENT TO ACT AS INFORMER OR SPECIAL AGENT OF ANY LAW ENFORCEMENT AGENCY

18 USC 3563 lists mandatory and discretionary conditions of probation but does not specifically list a condition which has been added by the U.S. Sentencing Commission Preliminary Guidelines. That requirement (item K, page 144) states "The offender shall not enter into any agreement to act as an informer or special agent of any law enforcement agency."

COMMENT

This is recognized as a sound policy by the courts and the U.S. Parole Commission. However, there are a few exceptions to this general rule and if those exceptions are not continued the rule will be difficult to enforce. The U.S. Parole Commission provides for the exception to the rule in Section 2.40-05. Some courts have adopted the same exception to that rule to allow a probationer to assist law enforcement agencies under certain controlled situations. Many of the federal law enforcement agencies have established their own guidelines for use of informants and confidential sources. Some of those persons have been and presently are on probation/parole.

The Sentencing Commission Guidelines allow for a reduction of base value scores due to cooperation with the U.S. Attorney (through law enforcement agents) for before-sentencing cooperation. There may be times when this continued cooperation is necessary even after final sentencing. A decision should be made concerning the value of probationers/supervised releasees acting as informants under limited controlled situations vs. the present rule prohibiting involvement under any circumstances.

PROPOSED REVOCATION OF PROBATION PROCEDURES

(Chapter Five)

To qualify for probation under present proposals, the sanction units must be less than 14 (commentary page 141). The sentence range in probation cases is 0 to 6 months (guidelines table). Thus the only "guideline range applicable to the offender at the time he was sentenced to probation" (page 155) would be 0 to 6 months except those who qualify under 18 U.S.C. 3563(a)(11).

Revoking probation under the present proposal would be:

Lesser Technical Violations	---	3 months
More Serious Technical Violations	---	6 months
Unlawful Behavior Violations	---	6 months plus 90 days

COMMENT

A mandatory condition of probation in felony cases is a fine, restitution or community service. Thirteen other technical conditions must be imposed plus other discretionary conditions such as custody for intervals of time, participation in a drug/alcohol treatment program, mental health treatment, etc. The term of probation in felony cases is one-to-five years.

Cases in which fines, restitution, drug/alcohol/mental health treatment are involved require much expertise on the part of the probation officer and many probationers reluctantly cooperate only because the consequences of failure to cooperate offer enough incentive to do so. Consequences of facing 3 months, 6 months, or 6

months plus 90 days will not offer much incentive to many of them to cooperate. A drug/alcohol abuser may be required to attend numerous counseling sessions and submit to numerous urinalysis each month. A "Home Detention" program may be required. When faced with those requirements plus office, community, home and employment visits from the probation officer, it is suggested that many may elect to accept 3 months, 6 months, or 6 months plus 90 days rather than be on probation for one-to-five years.

Proposed Alternative One

Consider allowing the court to impose a sentence up to the maximum sentence of the offense for which probation was originally granted.

Lesser technical violations	25% to 50% of original statutory sentence available of the convicted offense
More serious technical violations	50% to 75% of original statutory sentence available of the convicted offense
Unlawful behavior violations	75% to 100% of original statutory sentence available of the convicted offense

Proposed Alternative Two

Consider allowing a maximum sentence of one year upon revocation of probation:

Lesser technical violations	--	4 months
More serious technical violations	--	8 months
Unlawful behavior violations	--	12 months

Proposed Alternative One and Two would perhaps give the probation officer more control over the probationer's behavior and offer more incentive to the probationer to comply with conditions of probation requiring restitution, fines, drug/alcohol/mental health treatment. It would also allow the court to maintain a 25% variation in probation violations as are required in the guideline table for other sentencing even though under Proposal One the actual sentence to be imposed would be determined by the statutory guidelines rather than from the guideline table. It is recognized that this may be too severe for probation violation.

The present system used by the courts has been a satisfactory solution for revocation matters. The individual court is much more able to weigh the information presented and arrive at a just

disposition of the case without requirements that specified terms be imposed for specified violations. The proposed alternatives are in recognition of the apparent eventual removal of that system from the federal court.

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Revocation of Supervised Release

Supervised release cases will, in effect, place the type offenders who heretofore were administratively handled by the U.S. Parole Commission under the jurisdiction of the court. It may be several years before these offenders begin appearing in court for revocation purposes but they will appear in greater percentages than probation violators have appeared and will add to the workload of the district court. The present proposal for revocation is determined by the same principal of determining "lesser technical violations" and "new criminal behavior" but have provided for sentencing based on the term of supervised release, not to exceed one-sixth of the initial term of imprisonment. Some of the terms of imprisonment upon revocation may offer enough consequences for an offender to comply with release conditions while other ones do not. An offender who has already served a number of years (five years, for example under a Class D felony) may scoff at the idea of remaining under supervision for a period of two years when he can get away from those controls through a four month sentence for a "lesser technical violation". If a case involved an original incarceration term of 14 months (sanction units 26), the term of imprisonment available is two months (one-sixth) or four months (one-third). This is not sufficient for many offenders. The situation is simply presented to call attention to practical problems a probation officer may encounter with enforcement efforts. The federal probation service is accustomed to dealing with these type offenders under supervision but the courts are not accustomed to dealing with them after sentencing. They will present additional problems to an understaffed judiciary. Which court will have the responsibility for revoking supervised release --- the court of original jurisdiction or the court in the district where supervision violation takes place? If it is the district of supervision the Clerk of the Court must be involved in a transfer of jurisdiction in the case. If it is the district of original jurisdiction, the warrant must be issued by that court and the offender transferred by the Marshal's Service.

Issue for Comment

Question 1: What conditions of supervision should be considered less serious and more serious?

The circumstances of the violation involved and the period of time covered by the violation could change it from less serious to more serious. It appears impossible to say that any one technical condition of probation should be classified as less serious or more serious.

Examples:

C. The offender shall not leave the judicial district without obtaining permission from the probation officer.

The offender leaves the judicial district without permission and returns three weeks later or leaves the judicial district without permission and returns two months later. Absence for three weeks may be less serious than absence for two months.

E. The offender shall answer inquiries of the probation officer and follow the instructions of the probation officer.

Failure to follow instructions to telephone the officer on a date certainly would be less serious than failure to report to a drug abuse counselor on a date for counseling or urine drops.

H. The offender shall maintain reasonable hours, shall associate only with law-abiding persons, and shall not associate with individuals with criminal felony records unless granted to do so by the probation officer.

Failure to maintain reasonable hours could be considered less serious than associating with felons without permission. Even though an offender may not have permission to associate with felons, the circumstances surrounding that association may determine whether it is less serious or more serious.

Classifying individual conditions as less serious or more serious goes too far in attempts to direct what should or must be done in the event a particular condition is violated. Surely Congress did not contemplate directing a court to impose a three-month sentence if an offender violated condition B, F, G, or M; a six-month sentence for violation of condition C, F, or H; or six months plus 90 days if an offender violated condition D or L. There are too many variables which could be present to aggravate or mitigate the circumstances leading to the violation to classify a condition as less serious or more serious than another condition.

Question 2: To what extent should a probation officer have discretion in dealing with persons under supervision before formally reporting violations to the court?

Federal probation officers are highly trained in dealing with persons under supervision. Their casework is reviewed by supervisors and there are administrative controls presently available to guard against too much leniency. The courts have granted discretion in supervising persons since the inception of probation. To direct a probation officer to report to a court when an offender leaves the judicial district for a period of time or fails to work regularly for three months will entangle the probation service and the court in volumes of paperwork and is an unnecessary direction of an officer's activities. A requirement that new arrests and/or convictions be reported to the court and giving the probation officer discretion in reporting

technical violations, depending upon the particular circumstances surrounding the events, is workable and reasonalbe.

Question 3: What credit, if any, should be given to an offender for time successfully spent on supervision?

Proposed limitations on the sentence to be imposed for probation violations will present real, practical problems which will hinder probation officer enforcement efforts. Allowing credit for time under supervision would further reduce the proposed 3 months, 6 months, 6 months + 90 day limitation. If a probationer has violated imposed conditions to a degree that it must be revoked, there is no reason to award credit for time under supervision. If, for example, one month credit is allowed for each year of supervision successfully completed, what sentence could be imposed under the present revocation proposal in a five-year probation sentence if an offender has a lesser technical violation after three years under supervision?

Example: Felon A is placed on 5 years probation, ordered to participate in a drug abuse treatment program, participate in a home detention program, and make restitution. When the probationer realizes that the court could only give him 3 or 6 months for a violation, it will be very difficult for a probation officer to enforce the special conditions. While the service of the revoked sentence will not relieve him of the obligation to pay restitution, it will certainly become a much more difficult task to collect for a victim who has to independently seek restitution payment. This district has already observed the problems some victims have in obtaining restitution payments where there are no government controls over the offender. To reduce the amount of incarceration even further by awarding credit for time under supervision will make enforcement of conditions even more difficult.

Clarification Requested.

On probation and supervised release when the violation involves new criminal behavior what is the standard of proof needed? Will the Court have discretion to act prior to a new conviction or wait until after a conviction depending upon the nature and circumstance of the new criminal behavior? Does unlawful behavior mean an arrest, a formal charge, or a conviction? Presently, the U.S. Parole Commission and courts do exercise discretion in this area.

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UNITED STATES GOVERNMENT

memorandum

DATE: October 30, 1986

REPLY TO ATTN OF: Perry D. Mathis, Chief U.S. Probation Office
District of Kansas

SUBJECT: U.S. Sentencing Commussion Public Hearing
Denver, Colorado

TO:

Honorable William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission

Please substitute the attached **Page 5** into the **attachments** in the packet I mailed to you on October 29, 1986. We inadvertently printed two page 5's from the General Observations.

Perry D. Mathis

PDM/jw

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-113

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PROB 2
(Rev. 4/84)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

PRESENTENCE REPORT

NAME (Last, First, Middle)					DICTATION DATE
KING, J. C.					August 9, 1985
ADDRESS			LEGAL RESIDENCE		SCHEDULED SENT. DATE
Route 6, Box 271 Guntersville, Alabama 35976 Phone: 582-8832			SAME		August 19, 1985
					DOCKET NO. CR-85-A-00218-01
					CITIZENSHIP United States
AGE	RACE	DATE OF BIRTH	PLACE OF BIRTH (verified)	SEX	EDUCATION
36	White	8-1-48	Marshall County, AL	Male	3rd Grade
MARITAL STATUS			DEPENDENTS		SOC. SEC. NO.
Married			One (wife)		567-74-3232
FBI NO.			U.S. MARSHAL NO.		OTHER IDENTIFYING NO.
702-211-Y7			15117-001		

OFFENSE

18 USC 922(a)(6) - Firearms , Count 1
18 USC 1202 (a)(1) - Firearms, Count 2

PENALTY

Count 1--$5,000 and/or five years or both/$50 Assessment Fee
Count 2--$10,000 and/or two years or both/$50 Assessment Fee
(Restitution Law does not apply in this offense)

CUSTODIAL STATUS	DATE OF ARREST
Arraigned on 7-18-85 and released on $500 unsecured bond	7-18-85 SUMMONS

PLEA

GUILTY on 8-19-85

VERDICT

GUILTY on 8-19-85

DETAINERS OR CHARGES PENDING

None

OTHER DEFENDANTS

None

ASSISTANT U.S. ATTORNEY	DEFENSE COUNSEL
Shirley I. McCarty	Will Beard (Retained) P.O. Box 626 Guntersville, Alabama 35976 Phone: 582-3189

DISPOSITION

ISS and defendant is placed on probation for a period of THREE (3) YEARS.

SENTENCING JUDGE	DATE	PROBATION OFFICER
C. W. Allgood, USDJ/Birmingham	08-19-85	James G. Cary, USPO

OFFENSE:

Prosecution Version. A two-count indictment was returned by the July 3, 1985, Grand Jury for the Northern District of Alabama charging King with Illegal Possession of Firearms.

According to ATF files, on November 3, 1983, J. C. King provided a false written statement during his purchase of a Remington 30-60 rifle, Model 7400, from K-Mart store, Number 4312, Huntsville, Alabama, a federally licensed firearms dealer, by falsely certifying that he had not been convicted of a felony offense.

ATF files further revealed that on June 5, 1984, King had in his possession one Stevens, Model 107B, 12 gauge shotgun, no serial number; one Colt, Lawman MK III, .357 revolver, serial number 88153L; one Remington, Model 7400, 30-60 caliber rifle, serial number 8159766.

On that same date, King had in his possession the above described weapons while camping at Honeycomb Campground, on Lake Guntersville, Marshall County, Alabama. Late in the afternoon King became involved in an argument with John and Norman Fischer and Brad Allen, as the two Fischers and Brad Allen were in the process of running King's trotlines. King took the shotgun from a vehicle, walked to the waters edge, and fired shots at Allen and the Fischer brothers as they attempted to get their boat out of the area. All three of the boaters were struck with shotgun pellets.

Victim Impact Statement: According to the ATF files Brad Allen received $100 from the defendant to cover medical expenses. Norman David and John Fischer received $50 each from the defendant to cover medical expenses. In view of this outside-of-court settlement, it is not believed that the court needs to order the defendant to make any further restitution.

PRIOR RECORD:

12-2-65	No drivers license	Marshall County Court, Guntersville, Alabama, DK# 2421	Paid $33 fine and costs.
2-8-66	Reckless driving	Marshall County Court, Guntersville, Alabama, DK# 2422	Paid $30 fine and costs.
3-1-66	Assault and battery	Marshall County Court, Guntersville, Alabama, DK# 77	Nol-prossed by agreement.
8-16-66 (Age 18)	Possession of a still	Marshall County Court, Guntersville, Alabama, DK# 199	Sentenced to one year and one day. Susp and placed on three years prob. Prob. revoked on 8-25- 67. Def. served until he was released on 5-25-68. Def. represented by W. D. Wilks, employed counsel, Guntersville, AL.

King and others were arrested by Marshall County deputies on 1-19-66 at a still site in the Manchester Community of Marshall County. His probation was revoked for being involved in a fight.

6-2-67	Grand larceny	Marshall County Court, Guntersville, Alabama, DK# 6533	Dismissed on preliminary hearing.
7-8-68	Disorderly conduct	Municipal Court Guntersville, AL DK# 656	Paid $25 fine and costs.
8-24-70	Disorderly conduct	Municipal Court Guntersville, AL DK# 722	Paid $17.50 fine and court costs.
3-1-71	Speeding	Municipal Court Guntersville, AL DK# 1274	Paid $10 fine.

PRIOR RECORD: (continued)

5-24-71	Assault with intent to murder	Marshall County Circuit Court Guntersville, AL DK# 1089-G	Nol-prossed by agreement.
9-21-71	Peace proceeding	Marshall County Court, Guntersville, Alabama, DK# 19608	Dismissed due to lack of prosecution.
12-2-71	Improper passing	Marshall County Court, Guntersville Guntersville, AL DK# 20976	Paid $10 fine plus costs.
7-13-73	Assault and battery	Marshall County Court, Guntersville, AL, DK# 24945	Nol-prossed on notion of the state.
6-29-73	Speeding auto	Marshall County Court, Guntersville, AL, DK# 25700	Paid $25 fine and costs.
9-19-73	Public drunkness	Municipal Court Guntersville, AL DK# 6797	Nol-prossed.
6-25-79 (Age 30)	Assault with intent to murder	Marshall County Circuit Court Guntersvill, AL DK# CC-78-122	On 9-5-84 sentenced to two years. Susp and placed on six months probation. Def. rep. by Randy Beard, retained attorney, Guntersville, Alabama.

King and his wife, her son, and her son's girlfriend were at a dance at the VFW Club in Guntersville. Another party at the next table knocked down a tall stack of beer cans that had been stacked up on King's table. King and another individual got into a fight, and King cut the other individual with a pocket knife on the leg, chest, back, and under-arm. It required around 400 stitches to sew up the cut places.

PRIOR RECORD: (continued)

9-18-82	Possession of prohibited beverages	Municipal Court Guntersville, AL DK# 5-4771	Nol-prossed.
11-2-82	Insufficient life preservers	Marshall County District Court Guntersville, AL DK# DC-80-883	Dismissed for lack of prosecution.
7-30-84	Assault first degree	Marshall County District Court Guntersville, AL DK# DC-84-63	No billed by the Grand Jury.
10-23-84	Assault second degree	Marshall County Circuit Court Guntersville, AL DK# 84-148	Upon motion of state and at request of prosecuting witness, case dismissed.
12-8-84	Speeding	Municipal Court Guntersville, AL DK# 5-8503	Nol-prossed.
2-14-85	Reckless endangerment	Marshall County District Court Guntersville, AL DK# DC-84-1284	Case dismissed.

PERSONAL AND FAMILY DATA:

Defendant. J. C. King was born on August 1, 1948, the third of four children born to Tommy and Della LeMaster King. He was raised by his parents in Marshall County all of his life. He still maintains close contact with his parents.

Parents and Siblings.

Father. Tommy King, age 72, resides at 2110 Jordan Street in Guntersville. He has been on a disability retirement for several years.

Mother. Della LeMaster King, age 84, resides at 2110 Jordan Street in Guntersville. She is a housewife.

Brother. Welch King died on July 4, 1985, due to cirrhosis of the liver.

Sister. Opal Ramsey, age 38, resides in Leeds, Alabama. She is employed with the City of Leeds.

Sister. Virginia Naylor died in December of 1984 due to leukemia.

MARITAL:

The defendant marrried Ruby Adams in Trenton, Georgia, on July 3, 1971. They obtained a divorce in Marshall County Circuit Court in equity on June 17, 1982, under Docket # DR-82-202. The Kings remarried in Marshall County on July 3, 1982. There have been no children born of this union and none are expected.

EDUCATION:

King claims to have completed the third grade at Arab Elementary in Arab, Alabama, dropping out of school in 1958. Due to a fire in the mid '70's, King's school record could not be located.

EMPLOYMENT:

From June of 1985 to the present, King has been employed as a truck driver and mechanic for Joe Cloud in Warrenton. He is paid $300 per week.

From September of 1984 to June of 1985, King was employed with Jerry Harbin at A-1 Auto Gulf in Guntersville as a mechanic. He earned $175 to $200 per week.

From June of 1984 to August of 1984, King was employed as a truck driver and mechanic for Whitaker Construction Company in Guntersville. He was paid $3.75 per hour.

EMPLOYMENT: (continued)

From January of 1983 to June of 1984, King was employed with Joe Smallwood at Smallwood's service station in Guntersville. He was employed as a mechanic and service station attendant and paid $200 per week.

King was employed from 1977 to 1981 with Louie Womack as a mechanic and truck driver earning $200 per week.

Although this employment record looks sketchy, King has always been able to find work either as a truck driver, mechanic, or service station attendant. Many of his former employers are no longer in business, but King has always been able to find work along these lines. He is known as a very hard worker and good mechanic by all of his former employers.

HEALTH:

Physical. J. C. King is a 36-year-old white male who stands 6 feet 1 inch tall and weighs 180 pounds. He has blue eyes and blond hair. He has tattooed on his right arm "Born to Be Loved" and on his left arm "Born to Be A Loser." He has a three-inch scar on his left chest and two-inch scar on his chin. At the present time, he is in fair health. He has arthritis in his back and only 60% use of his left arm due to a gunshot wound. He denies any drug problems and admits to drinking on weekends approximately one case of beer when he is financially able to do so. Even though King denies that he has a problem with alcohol, considering the past problems that he has gotten into while drinking, he is seen by this officer as a problem drinker on occasion.

Mental and Emotional. King has never received any psychiatric treatment. He understands fully the charges facing him and can assist his attorney with his defense.

FINANCIAL CONDITION:

Assets:

Item	Equity
Home & Lot, McDonald Subdivision (Value $35,000)	$ 25,000
1985 Chevrolet Monte Carlo (Value $14,000)	0
1973 Dodge Van (Value $300)	300
14 Foot Fishing Boat, 35 HP Motor, Trailer (Value $500)	500
Pop-Up Camper (Value $1,100)	1,100
Checking Account $150	150
Total Assets	$ 27,050

FINANCIAL CONDITION: (continued)

Liabilities:

FHA (Home & Lot, Monthly Payments $88)	$ 10,431
GMAC (1985 Chevrolet, Monthly Payments $258)	14,971
Total Liabilities	$ 25,402

EVALUATION:

Probation Officer's Assessment. The offense for which J. C. King is now charged is pretty indicative of him. He does not go out of his way looking for trouble, but yet he never walks away from it once he is confronted with it. Once engaged in the confrontation, King's idea usually is to win at any cost; and in the past he has won more battles than he has lost. While I do not support the notion that shooting someone for running your trotline is acceptable, that custom has existed on Guntersville Lake for many, many years, especially if the perpetrator was stupid enough to stand up to the person whose trotline they were running. However, the real issue in this case is the fact that J. C. King does not have a right to own or possess a firearm and should never touch another one again.

J. C. King only poses a threat to those who cross him and confront him. Generally speaking he is a hard working, more often than not, law-abiding citizen. I believe that probation with the special conditions agreed upon would be a sufficient deterrent for this type of offense.

Probably the most significant developmental factors contributing to King's current and past violent behavior was the way he was raised. He was raised in the Mill Village, a section of Guntersville where fighting and settling disputes in the street was commonplace. King has a limited intelligence and does not express himself very well verbally. He generally speaks,when angered and confronted,with his fists or whatever weapons are available; however, he does not become aggressive until crossed or confronted by other people. King does accept responsibility for the offense but tends to rationalize his behavior pointing out that the other people were running his trotlines. He does appear to be motivated to change his behavior. His biggest strengths are the fact that he has always kept work and supported his family to the best of his ability. His biggest weaknesses are the fact that he has a tendency to abuse alcohol on occasion. He also has a limited mental ability and a short temper. When confronted and antagonized by other people, he generally resorts to physical violence.

King's estimated salient factor score is 7, and the offense severity rating is Category 3. If King is sentenced to custody, he will likely serve between 14 and 18 months before parole.

EVALUATION: (continued)

Special Sentencing Provisions. No restitution needs to be ordered in these cases. A $50 assessment fee is required in both counts.

Respectfully submitted,

James G. Cary
U. S. Probation Officer

RECOMMENDATION:

A plea agreement in this case calls for King to enter a plea of guilty and be given a suspended sentence. It also calls for a special condition of probation for King to serve sixty days in a CTC and receive alcoholism treatment as directed by the probation office. I concur fully with the plea agreement in this case.

If placed on probation, King will be supervised as a high activity case for at least the first year. He will be required to serve his sixty-day sentence at the CTC in Huntsville at the Salvation Army Lodge. He will continue to be employed as a mechanic and truck driver for Joe Cloud of Route 1, Guntersville. He will continue to reside with his wife at Route 6, Box 271, Guntersville, Alabama. I plan on using the special condition of probation for alcoholism treatment if a problem arises.

Voluntary Surrender. Should the defendant be sentenced to custody, he is a suitable candidate for voluntary surrender.

Respectfully submitted,

James G. Cary

James G. Cary
U. S. Probation Officer

APPROVED: Milton E. Moon

OFFICER IN CHARGE

00034
Rec'd 11-7-86

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*WASHINGTON, D.C. OFFICE
† NOT YET ADMITTED TO PRACTICE IN ILLINOIS

WRITER'S DIRECT DIAL NUMBER

October 31, 1986

BY MESSENGER

Susan Hayes, Esq.
Associate General Counsel
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Ms. Hayes:

In connection with my appearance before the Sentencing Commission next Wednesday, I am enclosing written testimony on behalf of myself and certain other antitrust lawyers having experience in criminal antitrust cases.

I look forward to seeing you in Denver.

Sincerely,

Mark Crane

Mark Crane

MC/kc
Enclosures

STATEMENT TO THE UNITED STATES SENTENCING COMMISSION COMMENTING ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES

October 31, 1986

The undersigned are practitioners of antitrust law with many years of experience in the prosecution and defense of criminal antitrust cases. We have been active members in the leadership of the American Bar Association Section on Antitrust Law, but we are presenting our personal views, which reflect our experience in the antitrust area. This statement does not reflect - and is not intended to reflect - the position of the Section of Antitrust Law or the American Bar Association.

We have previously submitted a statement dated June 10, 1986 (the "June 10 Statement") setting forth our views on sentences for organizations convicted of antitrust offenses. Mark Crane individually submitted a letter dated July 10, 1986 dealing with the sentencing of individuals convicted of such crimes. This statement is intended to supplement those views by commenting specifically on the preliminary draft of the Sentencing Guidelines of the United States Sentencing Commission ("Preliminary Guidelines").

Computation of Base Offense Values

The Preliminary Guidelines propose that the base offense value of an antitrust violation be determined by the dollar-value of commerce affected by the violation. We agree

with the Sentencing Commission that this is the best available measure for the base offense value of an antitrust crime. Although in civil litigation antitrust injury is based upon the amount of the overcharge, the task of determining the amount of the damages suffered by the victims requires a complex hearing involving the testimony of expert economists and statisticians. See the June 10 Statement, pp. 7-8, for further discussion. Any such hearing would needlessly - perhaps hopelessly - complicate the sentencing procedure. However, anything less than a full hearing on damages would be inadequate and could have an unfair collateral estoppel effect in the subsequent civil proceedings which customarily follow antitrust convictions. Under these circumstances, the volume of commerce involved in such cases is a fair, although by no means exact, barometer of the damage to society resulting from the commission of this economic crime.*

In allocating the share of the commerce attributable to each participant in the conspiracy, the Preliminary

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*The amount of commerce involved in the offense should not be left to a probation officer. Although sometimes the amount of sales can be determined from the annual reports of the corporations convicted, in many instances the amount of sales of the specific product involved during the period of the violation will not be discernable without a detailed review of the books and records of the corporation. This is a time-consuming task beyond the usual competence of probation officers. The amount of sales could either be determined from the record in the criminal case or by specialized auditors appointed by the sentencing judge to review the books and records of the corporation.

Guidelines call for the greater of the total value of commerce involved in the conspiracy divided by the number of such participants or the volume of commerce actually involved for each participant.* This results in a minor participant in the conspiracy being held responsible for greater harm than he or she may have caused. For example, where there is a conspiracy among three firms -- Firm X which had 90% of the sales affected by the conspiracy and Firms Y and Z which each had 5% of the sales -- the base offense value for Firms Y and Z would be 33% of the total sales of the three companies, substantially beyond their role in the conspiracy. This is inconsistent with our experience, which indicates that those companies with small amounts of sales affected are the followers and not the leaders of a conspiracy. Therefore, we recommend that the volume of commerce actually done by each participant in the conspiracy be used as the measure for the base offense value.

The assumption that the amount of the overcharge is 10% of the volume of commerce appears to be as reasonable an estimate as any for the average injury in all price-fixing

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*In determining the appropriate share of commerce, we assume that the use of the term "participant" in the guidelines refers to the business entities involved in the conspiracy rather than also including all of the individuals involved. Otherwise, the sales of an indicted company with an indicted officer would be counted twice. Perhaps this point should be clarified in the final guidelines. We also assume that "participant" includes both indicted and unindicted co-conspirators so that the percentages will accurately reflect each defendant's market share.

cases. However, the Sentencing Commission should recognize that the actual percentage overcharge may vary significantly between industries. For example, in the retail food industry, which operates on tight profit margins, the amount of the overcharge is considerably less than 10%. In contrast, instances of price-fixing in the defense contracting industry may involve overcharges far in excess of 10% of the contract price. We believe that the automatic use of this assumption is a factor leading to excessive fines, a subject to which we will return later.

We also agree with the Sentencing Commission in the use of multipliers to change the base offense value to reflect aggravating and mitigating circumstances. Reducing a base offense value by multiplying it by a number within the range of .5 and .7 is a reasonable way of reflecting a minor participant's role in an antitrust conspiracy. However, multiplying the base offense value by 1.2 in the case of a participant who "directed or supervised" an antitrust conspiracy may not give the sentencing judge enough latitude to recognize degrees of control. We suggest that, in the case of a directing or supervising participant, the sentencing judge have discretion to multiply the base offense value by a number within the range of 1.2 to 1.5.*

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*In making this suggestion, we are assuming that the multiplier in § A311 for a person in control of a criminal

Jail Sentences For Individual Executives

In the June 10, 1986 Statement, we strongly advocated mandatory jail sentences as the most effective deterrent against antitrust offenses. We whole-heartedly support the Sentencing Commission in setting a minimum jail term for individuals convicted of an antitrust crime under normal circumstances. As set forth in the Preliminary Guidelines, a participant convicted of engaging in restrictive pricing or marketing agreements among competitors will be subject to a minimum jail sentence of at least two months unless he or she is a "minor participant" and the amount of commerce attributable to him or her is less than $50 million. See § A314. We agree that, in the case of minor participants, a judge should have discretion in determining whether a jail sentence is appropriate, but otherwise it should be mandatory.**

[footnote continued]

enterprise will not apply to persons convicted of antitrust offenses. The term "criminal enterprise" is used in the Preliminary Guidelines to denote certain specific offenses often associated with organized crime (see pp. 63-74), and it seems reasonable to conclude that it has the same meaning in § A311. This is not entirely clear, however, and the Commission may wish to clarify this point in the final guidelines.

**With regard to other antitrust offenses, there is no minimum sentence because the jail term ranges from zero to six months. Since the vast majority of criminal antitrust cases involve restrictive pricing or marketing agreements, we are not troubled by the lack of a minimum sentence. If other antitrust offenses become the subject of frequent criminal prosecution, the Commission can re-examine this subject.

Increasing the base offense value by twelve where the convicted individual is a repeat offender is appropriate, although we doubt that there will be much recidivism among antitrust offenders who have served jail terms. We also support the proposal in the Preliminary Guidelines that, where there is a fixed group of participants and a single type of product or service involved, the violation is to be considered a single offense even if there were multiple agreements.

Where we differ with the Preliminary Guidelines is in the rapid escalation of minimum sentences. In antitrust cases, it is not uncommon for a participant to have a $50 million share of the commerce involved in a price fixing or market allocation conspiracy over a period of years.* In such a situation, the minimum jail sentence would be eighteen months. While we recognize that the sentencing judge will be able to reduce or increase the jail term depending on the convicted participant's role in the offense, a minimum sentence of 18 months under normal circumstances is far too high.

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*Although an argument can be made that the commerce involved should be limited to the five-year statute of limitations period, this is inconsistent with the notion that multiple agreements were all part of a single conspiracy. If the conspiracy is unitary, all of the commerce involved should be counted for sentencing purposes. While this may not affect the sentence in large national conspiracies, it adds deterrence in small conspiracies and is consistent with the concept of real offense sentencing.

We recommend that, absent aggravating circumstances, the minimum jail sentence for an antitrust offense never exceed six months regardless of the amount of commerce involved and escalate gradually from two months to six months as the amount of commerce increases. In order that the recommended minimum jail sentences for antitrust offenses will correspond with the base offense value guideline table for jail sentences in § A411, we suggest the following base offense values for antitrust offenses:

Amount of Commerce	Base Offense Value*
Up to $3 million	14
$3 million - $25 million	16
Over $25 million	18

There is little or no deterrent effect to a business executive from jail sentences in excess of six months. The certainty of time in jail rather than the length of time in jail is the principal deterrent. The individual executive, who never expected to spend a day in jail, will have lost his freedom and will have felt the stigma of going to jail. The impact of such a jail sentence will also be substantial on his or her co-workers. The only societal value being served by requiring a longer jail term is punishment. If the sentencing judge decides that a sentence

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*The disadvantage of this approach is that the maximum sentence for an antitrust offense under the sentencing guidelines would be less than the three year maximum permitted under Section 1 of the Sherman Act even if a multiplier is used to take into account any aggravating circumstances. 15 U.S.C. § 1. However, we know of no instance where the maximum jail sentence for an antitrust offense has been imposed in the past.

higher than the minimum is warranted under the circumstances, so be it. However, the judge should not be required to sentence an individual to more than six months.

In sentencing an individual executive convicted of an antitrust violation, we believe that the base offense value should be determined by the amount of commerce that was within the individual's control, not by all of his employer's commerce affected by the offense. For example, if a regional sales manager of X Corporation is convicted of participating in a conspiracy to fix prices, the base offense value should be determined by the amount of commerce involved in the regional area where he or she had responsibility and not for the corporation's national sales. Of course, if the individual is the Vice President responsible for national sales, the corporation's sales of the affected product in the United States would generally determine the base offense value.

Fines For Individuals

The Sentencing Commission has set forth two alternative approaches for determining fines for individual offenders: (i) the proportionate ("ability to pay") approach and (ii) the harm-based deterrent compensation approach. We believe that, in setting fines for individuals convicted of antitrust crimes, the ability to pay approach is far preferable to the harm-based deterrent compensation approach. First, there are ample means available to the victim of an antitrust

conspiracy to recover its damages. All the victim has to do is to pursue its treble damage remedy. A conviction of an antitrust offense is prima facie evidence of the liability of the defendant and, as a practical matter, the victim need only show its damages to recover three times that amount plus its attorneys' fees. 15 U.S.C. § 16(a). In addition, the company which employed the convicted individual is almost invariably also convicted, and it may be fined up to one million dollars.* Consequently, a fine for an individual based upon the harm caused by his or her action is not necessary to compensate the victim.

Second, a fine based upon the harm caused by the offense is simply too high for most individuals to pay. The Preliminary Guidelines provide that the recommended fine for an individual conspirator be 10% of the volume of commerce of his or her employer involved in the conspiracy.** See page 7 above for comments on this method of allocation. Because the

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*We know of no instance when an employee was convicted of an antitrust crime when the company he or she worked for was not also convicted.

**The Preliminary Guidelines use the greater of the total value of commerce involved in the conspiracy divided by the number of such participants or the volume of commerce actually involved for each participant to determine the participant's allocable share of commerce. For the reasons stated earlier, we believe that the later test should be the exclusive test for determining the dollar value of commerce attributable to each participant. If the alternative test is used, unreasonably large fines will be even more commonly available.

maximum fine for an individual is $250,000, a single person acting for one employer would reach the maximum statutory fine when the volume of commerce involved in the violation and attributable to that employer exceeds $2.5 million. From our experience, the commerce involved in a majority of such conspiracies exceeds $2.5 million. Few of the individuals convicted of antitrust offenses will be able to pay such a hefty fine. Given the magnitude of the fines, many convicted executives would be forced to file bankruptcy to the detriment of the bankrupt's creditors.

Since a harm-based approach would generally require fines in excess of the maximum permissible individual fines, the fine will not generally reflect the harm caused by the offender's actions. Rather, it will represent a percentage of the harm done which will decrease as the harm increases. The more harm done, the smaller the percentage of the harm the fine will represent, which we regard as inconsistent with the philosophy behind harm-based fines.

A harm-based fine also seems inappropriate because the individual offender does not directly benefit from his crime. It is the company for which he or she works that is the recipient of the overcharge. While requiring a corporation to pay a fine based upon the amount of the overcharge may further

the goal of recouping ill-gotten gain, a fine against an individual does not serve that same purpose.*

Finally, a fine based upon the individual offender's ability to pay would permit the sentencing judge to take into account better the statutory factors that Congress requires him or her to consider in imposing a fine. See 18 U.S.C. § 3572(a). These factors include the offender's ability to pay the fine, the burden the fine will impose on the offender, any restitution already made as well as other equitable considerations. We believe that, in an antitrust case where the amount of damage is difficult to calculate and can never be determined precisely even in a full civil trial, consideration of these factors is especially appropriate. The individual offender should be punished for participating in the conspiracy but it is impractical to expect that individual to pay a fine based upon the amount of the harm caused.

If the Sentencing Commission concludes, contrary to our views, that harm-based fines are superior for antitrust offenses, we suggest that the percentages be adjusted to reflect the fact that the proposed fines escalate so quickly that, even in a small price fixing case, the individual offender will be unable to pay the fine imposed. We believe

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*The fact that the suggested fines are tied to the amount of commerce involved, which represent only a rough estimate of the amount of harm actually caused by the offense, also mitigates against the use of harm-based fines for individuals convicted of antitrust offenses.

that the suggested fine for individuals should be 5% of the volume of commerce for the first one million dollars and 1% of the volume of commerce over one million dollars up to a limit of the defendant's annual compensation and any dividends received from his or her employer. This will permit the sentencing judge to impose a fine which takes into account the harm resulting from the conspiracy and to still consider the statutory factors Congress enumerated in 18 U.S.C. § 3572(a).

We are also troubled by the Sentencing Commission's proposal to require an individual offender to submit to 160 hours of unpaid community service for each $5,000 of fine that he or she is unable to pay over a reasonable period of time. Under the Preliminary Guidelines a substantial number of individual offenders will be subject to the maximum fine of $250,000 and many of them will not be able to pay a large portion of the fine. One hundred and sixty hours (approximately one month of work) for each $5,000 that the offender is unable to repay could lead to the absurd result that an individual would have to provide 8,000 hours of community service (50 months of work) if he does not have any money to pay the fine.* This result smacks of involuntary servitude and should be rejected. This proposal is particularly troublesome if the fine is determined through the

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*If the individual offender continues to work a regular job and provides his 8,000 hours of community service by working eight hours a day on Saturdays, he would be providing community service for almost 20 years (1,000 Saturdays).

harm-based approach rather than the ability-to-pay approach and provides further evidence that the proposed fines increase too rapidly. If the amount of the fine is determined by the ability of the offender to pay, these concerns, while still present, are substantially reduced.

Fines For Organizations

Under the Sherman Act, an organization convicted of engaging in restrictive pricing or marketing agreements among competitors is subject to a maximum fine of one million dollars. 15 U.S.C. § 1. In addition, it is subject to a civil suit for treble damages.* Standing alone, the treble damage remedy is a highly effective deterrent to price-fixing and other antitrust offenses regardless of the size of the conspiracy. Because of the availability of the treble damage remedy, fines of the magnitude recommended in the Preliminary Guidelines are not necessary to recover the improper gain from the convicted organization.

The Preliminary Guidelines recommend that an organization convicted of an antitrust offense be fined 50% of the commerce involved in the conspiracy. Because the statutory maximum fine is one million dollars for organizations, the Preliminary Guidelines would require the imposition of a one

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*Although price-fixing schemes may be difficult to uncover, Congress has tackled this problem by providing treble damages to encourage suits by "private attorneys general."

million dollars fine where there is at least two million dollars in commerce attributable to that organization. Applying the standards literally, the suggested fine would be the same whether the conspiracy involved only two million dollars of commerce or several billion dollars (the amount of commerce involved in the Corrogated Container cases, which resulted in many nolo contendere pleas). We believe that this inequity will bring disrepute upon the guidelines and will cause the sentencing judge to ignore the guideline fines for corporate antitrust offenders.

Not only are the proposed organizational fines ineffective when applied to large conspiracies, they are unduly harsh when applied to small conspiracies. A fine of one million dollars is confiscatory when imposed on a small company whose share of the commerce in the conspiracy is two million dollars and who was a minor player. The consequences of such a fine could be the elimination of the company from the market, thereby reducing competition. The unknowing shareholders of this organization stand to lose all of their investment whereas a shareholder of a multi-billion dollar company will hardly be impacted.

Because the guideline fines could destroy the small company and have a minor effect on the large company, we propose that the fines for organizations be revised as follows:

Amount of Commerce	Percentage of Fine
Up to first $1 million	10-15
$1 million - $10 million	5-10%
Over $10 million	1-5%

This suggested fine schedule would permit the sentencing judge more discretion to consider the impact of the fine on the company, its shareholders and competition in the industry. While it would not eliminate the problem of large companies paying a much smaller percentage of the harm caused by its actions, it does narrow the gap somewhat.

Even if there were not a one million dollar limit on fines for organizations convicted of antitrust offenses, we would still support revising the suggested schedule for fines in the Preliminary Guidelines. A fine of fifty percent of the amount of sales involved in the violation is roughly five times greater than the Commission's assumption as to the average harm caused by the violation. When coupled with the treble damage remedy available to civil litigants, the organization could be required to pay eight times the amount of harm caused by its actions. In a large price-fixing case the amount ofthe fine, using the figure of fifty percent of commerce, could be in the hundreds of millions of dollars. We believe that such a fine would be disproportionate to the harm caused by the violation and could force competitors out of the market, a result antithetical to the antitrust laws. Moreover, the results could be so harsh and unreasonable that we believe that judges would not impose the guideline fines in many instances even if the statutory maximum were raised.

Probation For Organizations

The Preliminary Guidelines request comments on when corporate probation should be used rather than a fine and when the two should be used together. They also request comments on the appropriate conditions of corporate probation.

We have great skepticism over the efficacy of corporate probation for antitrust offenses, at least in the case of publicly-held companies. Such companies tend to be run by professional managers who are sensitive to the publicity that follows a criminal antitrust indictment. They are usually prompt to remove the offenders and institute remedial programs. These may fall into disuse in time, but not during the time probation would usually remain in effect. Moreover, monitoring compliance with probation for an antitrust offense is a complex project, involving large departments of large companies. A probation officer would not normally be equal to the task. He is too busy and his experience is too focused on the administration of individual probation. Appointment of special auditors to monitor the probation is, we believe, an unnecessary expense given the tendency of public corporations to police themselves in the wake of conviction.

Probation may be more useful in the case of smaller, privately-held companies, which are less responsive to the adverse publicity inherent in a conviction and have fewer public bodies to oversee them. Probation may be particularly

appropriate where the owner or chief executive has also been convicted. In addition, it would be desirable to substitute probation for a fine when a small company would be impaired as an effective competitor if it paid the fine.

If probation is to be imposed on a corporation convicted of an antitrust offense, the conditions should be carefully controlled because many conditions would do more harm than good. Restitution is inappropriate because the proof of antitrust damage would unduly complicate the sentencing hearing. See June 10 Statement, pp. 7-8. Preventing the corporation from competing in various markets should be avoided because it would reduce competition -- an anomalous remedy in an antitrust case. Compelling community service by the corporation imposes the penalty on innocent employees rather than the convicted executives.

Other terms of probation that may be appropriate under certain circumstances are (i) prohibiting certain individuals from participating in price setting or in sales activities, (ii) prohibiting contacts with competitors over prices, (iii) prohibiting the exchange of price lists, and (iv) instituting or revitalizing an antitrust compliance program. We believe that the termination of the individual responsible for an organization's participation in the conspiracy is also an acceptable alternative in the most egregious circumstances. It would be unwise, however, to try to monitor even these conditions through a probation officer.

Sworn statements as to compliance by a responsible corporate officer should be sufficient except where there is some reason to believe that a violation of probation has occurred.

Conclusion

We would be remiss if, in closing, we did not commend the Sentencing Commission and its staff for its work. The Preliminary Guidelines are thorough and thoughtful. They are well on their way to providing a consistent framework for sentencing that has been lacking in the past. The amount of work done is amazing, especially given the short time in which it has been accomplished.

The Preliminary Guidelines reflect first rate legal scholarship. The final guidelines should be an effective aid to sentencing judges. We hope that our comments, although limited to one small portion of the whole, will aid in achieving that result.

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SUMMARY OF TESTIMONY
OF
TOVA INDRITZ
FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF NEW MEXICO
BEFORE
UNITED STATES SENTENCING COMMISSION
NOVEMBER 5, 1986
DENVER, COLORADO

My name is Tova Indritz. I am the Federal Public Defender for the District of New Mexico. I have been in the Federal Defender office for ten years -- five as an Assistant Public Defender, and the last five as head of the office. In that time I have personally represented several hundred defendants in federal court and my office has represented thousands of clients. A great many, but not all, of our clients end up being sentenced. Our district covers the whole State of New Mexico. At present our district includes four active and one senior district judges, plus magistrates.

I have reviewed the preliminary draft of the sentencing guidelines promulgated by this Commission. I appreciate very much the opportunity to appear before you and to share my views.

The Federal Public Defenders, while all separately appointed by the respective Circuit Courts, cooperate and pool our thoughts when we can. We recognize the paramount importance to our clients and the federal criminal justice system of these

new guidelines. Therefore we have formed a committee of six defenders who have solicited input from all of us, pooled our thoughts, and been in contact with this Commission. Ed Marek of the Northern District of Ohio heads these efforts. Through our committee we will prepare and submit a comprehensive analysis of the Preliminary Draft.

However I would like in the time allotted me to make a few general comments of my own, and then to address two specific areas, the use of foreign convictions and the use of Indian tribal convictions.

1. The guidelines are too complex.

First, the guidelines and the methodology of application are very complex. There will be thousands of people who will need to understand them in order to apply them -- probation officers, trial and appellate judges, federal defenders, prosecutors, and private practice lawyers who may take a federal case only once or twice a year. The complexity will surely lead to differing interpretations, and consequently a great deal of litigation on whether they were correctly applied.

2. The guidelines call for sentences that are far too long.

Presently there is a great variation between the symbolic sentence and the actual time served. For example, a person might receive a fifteen year sentence with parole eligibility pursuant to 18 U.S.C. §4205(b)(2) and actually serve ten months in prison. The symbolic sentence is what the public reads in the newspaper

and carries whatever deterrent effect there may be. As the Commission moves to make the sentence pronounced the same as the actual time served, it seems to be increasing logarithmically the number of person-years to be served.

Even now the Bureau of Prisons is overcrowded. Just recently federal prisoners were sent frm FCI La Tuna in El Paso to two county jail contract facilities in New Mexico (Lea and Valencia Counties). At the same time the Bernalillo County Detention Center increased their rate for federal prisoners from $62.50 per day to $90.00 per day. Local jails are probably a short-term solution, but not a long term solution as their own populations increase. Federal prison beds, and the conseqeunt costs, will multiply quite dramatically if these guidelines are implemented.

One example is murder cases. We have a disproportionately large share of the federal murder cases in New Mexico, because of our Indian land and other federal land cases. Right now a person who faces a life sentence can receive a sentence considerably less and even if he or she does receive a life sentence, parole eligibility occurs after ten years. Most murder cases are not random violence, but intra-familial disputes. Presently we have four murder cases pending in our office. Two involve men charged with killing their brothers, one is a battered wife who killed her husband, and the fourth is a case of self-defense involving two young men who were only slightly acquainted. All arose on

Indian reservations. Under the new procedure, these persons, if convicted, would have to serve thirty years.

The costs in terms of both human lives and taxpayers' dollars are just too high.

3. Due process is lacking.

The modified real offense methodology allows for the use of hearsay without sufficient constitutional safeguards in terms of confrontation, standard of proof, and numerous other important constitutional rights. It will lead to prosecutorial over-charging.

It will also lead to the need for mini-trials on each collateral allegation, or at least due process should lead to such procedure.

4. The guidelines' narrow range will lead to a loss of judicial flexibility.

Judges are entrusted with substantial discretion in many areas of the law, civil and criminal. Their checks and balances are the appellate courts and the judicial selection process. In some ways sentencing is one area where a great deal of judicial flexibility should be allowed. Instead of trying to anticipate every possible permutation in the guidelines, the guidelines should provide wider ranges for the exercise of judicial discretion in order to account for the circumstances of each case and individual.

For example, age is a factor that may operate differently in different cases. Sometimes youth is mitigating; an 18-year-old may be held to a lesser standard than a 30-year-old. Sometimes old age is mitigating; a 70-year-old with health problems mght deserve a lesser senence than a 40-year-old. This is but one example of where more discretion should be left to the sentencing judge.

5. There is no guideline or proposal as to when probation ought to be imposed.

There are significant categories of cases where probation is the appropriate sentence. That area is not adequately addressed in these guidelines.

I do wish to address two specific areas in more detail.

I. FOREIGN CONVICTIONS SHOULD NOT BE COUNTED.

The present guidelines propose that "sentences resulting from foreign convictions are counted if they are for conduct that would be criminal if committed in the United States" at p. 130.

I have represented several persons in New Mexico state prisons who elected to return to Mexico, and in one case Canada, to serve their American sentences pursuant to the prisoner transfer treaties. 18 U.S.C. §4100 et. seq. In June of this year, I was appointed by the federal courts to go to Peru to represent an American who was in Lurigancho Prison in Lima, Peru, probably one of the world's worst prisons. I saw first-hand

something of the criminal justice and prison systems in Peru. Other defenders have made similar trips to Turkey, Mexico, Bolivia, Canada, and other counties to represent Americans incarcerated there who wished to return to the U.S.

It is difficult to convey to Americans the reality of the very real lack of what we call due process in other countries' criminal justice systems.

One night in Lima I took to dinner a Peruvian prosecutor and a criminal defense lawyer. They were interested in how the U.S. justice system functions. I explained our system of jury trials, burden of proof, presumption of innocence, and the requirement of a unanimous jury verdict. I told them about a recent trial one of my assistants had where there was a defense of self-defense in a murder case and the jury acquitted. The prosecutor was quite taken aback at my explanation of the jury system and the need for unanimity. When I said that the jury had acquitted in this particular case, she opened her eyes wide with disbelief and said, "You mean the jury doesn't have to do what the prosecutor tells them to?" She could not conceive of the possibility of an acquittal in the Peruvian courts and was genuinely surprised to hear of such a possibility in our system. The U.S. Consular officials with whom I worked on the prisoner transfer also told me that once a person is charged with a crime in the Peruvian system, there is no possibility other than a finding of guilt; the only question is how long it will take.

I want to bring to the Commission's attention a case from the distinguished Second Circuit Court of Appeals, Rosado v. Civiletti, 621 F.2d 1179 (2nd Cir., 1980). In that case four Americans had been tortured and wrongly convicted in Mexico. They transferred back to the United States under the U.S.-Mexico prisoner transfer treaty to serve out their sentences. One of the provisions is that the foreign crime be one which is also a crime in the U.S., 18 U.S.C. §4101(a), the sole condition this Commission would apply. They were convicted of narcotics offenses. But as the Second Circuit describes in great detail, those convictions under Mexican law, "manifested a shocking insensitivity to their dignity as human beings and were obtained under a criminal process devoid of even a scintilla of rudimentary fairness and decency." 621 F.2d 1179, at 1182. These U.S. citizens brought a habeas corpus action to set aside their Mexican sentences, under which they remained incarcerated in the U.S. The Second Circuit accepted as true the detailed descriptions of electric shock to these prisoners' genitals, hanging by a handcuff from the ceiling, other repeated tortures, and extortion by corrupt officials. See id. at 1183-1186. However, the Court held that the interests of enabling future Americans detained in the "brutal," "outrageous" and "horrible" conditions of Mexican prisons to return home mandated that the Court not overturn these petitioners' convictions.

In the Rosado opinion, the Court gave examples of other countries' tortures and brutalities, id. at 1189. The opinion also refers to the Congressional hearings on the situation of Americans in Mexican prisons. U.S. Citizens Imprisoned In Mexico: Hearings Before the Subcommittee on International, Political, and Military Affairs of the House Committee on International Relations (Part I), 94th Cong., 1st Sess. (1975); (Part II, 94th Cong., 2d Sess. (1976).

The movies "Midnight Express", "Missing", "Kiss of the Spider Woman", and "Z" may have fictional names, but they do not portray fiction.

Where another country's panoply of rights, including rights to due process, confrontation, cross-examination, compulsory process, presumption of innocence, burden of proof beyond a reasonable doubt on the prosecution, and the right to effective assistance of counsel and appointed counsel do not match our own, then foreign convictions should not be counted.

Likewise, where police practice torture, coerced confessions, and the like, foreign convictions should not be counted.

Because it will be difficult for each judge, probation officer, or court official to analyze whether, for example, the British system measures up to our standards but that of Mexico, Peru, or Turkey does not, foreign convictions should never be counted.

II. INDIAN TRIBAL COURT CONVICTIONS SHOULD NOT BE COUNTED.

About 20% of the cases handled by the Federal Public Defender office in New Mexico arise on Indian reservation land. We have had several hundered such cases over the years. In New Mexico we have 19 Indian pueblos, the Mescalero and Jicarilla Apache reservations, and a substantial portion of the Navajo reservation.

Under 25 U.S.C. §1302(7), the Indian tribal courts cannot impose a sentence exceeding six months imprisonment and a $500 fine for any one offense. Thus the tribal courts by definition handle misdemeanors.

Under 25 U.S.C. §1302(6), referred to as the Indian Civil Rights Act, there is no right to appointed counsel. The great majority of Indian defendants are indigent and cannot afford counsel. Moreover, some tribal courts refuse to allow lawyers to appear before them, on the theory that it jeopardizes the traditional modes of control over tribal members. Counsel in tribal courts is rare. Some tribal courts do have a system of representation, but through non-lawyer "advocates", like paralegals, whose quality and zeal vary considerably. Tribal judges are very rarely lawyers.

The U.S. Civil Rights Commission has recently been investigating allegations of abuses in tribal courts. There is information to believe that abuses, for political ends or otherwise, are rampant. Even where tribal court officials

operate with the utmost good faith, the quality varies widely from tribe to tribe and one area of the country to another. Tribes are generally poorly funded with limited access to training for an annually-rotating staff.

I recall one client of mine who was arrested, brought before a tribal judge, "tried", convicted, and sentenced, all in less than a half hour. I later made an agreement with the tribal judge that the sentence would be suspended if my client would leave the reservation and not return for one year.

There is no provision in the guidelines to require that the crime be an offense in the non-Indian legal world. In the Jicarilla Apache tribal laws, two examples of offenses punishable by jail time are wearing curlers in the courtroom, and letting one's bull roam freely in the pastures.

Because of the general lack of due process and counsel in the tribal courts, I urge this Commission not to count Indian tribal court convictions.

III. ONLY COUNSELED CONVICTIONS SHOULD BE COUNTED.

At the present time even arrests that do not result in convictions are listed in the presentence reports in the District of New Mexico. By contrast, here in the District of Colorado, only actual convictions are listed.

My view is that if we really believe in our constitutionally guaranteed rights, only convictions which meet

those time-tested standards should be counted. See United States v. Tucker, 404 U.S. 443 (1972).

I appreciate very much the opportunity to present my views and would be willing to respond to any questions the Commission may have.

Respectfully submitted,

Tova Indritz

Tova Indritz
Federal Public Defender
District of New Mexico

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rec'd 11-7-86

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October 30, 1986

Honorable William W. Wilkins, Jr.
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Dear Judge Wilkins:

Thank you for the invitation to appear and address the Commission on Wednesday, November 5th. It is my understanding that you wish to have a written summary of some of my views prior to my oral testimony. I apologize for the delay in providing you with this written response, but know that you will understand the competing needs of representing my clients in court.

Let me state at the outset that I am aware that the Federal Public Defenders have been and will be filing position papers in response to the proposals of the Sentencing Commission. I have worked with the members of the Federal Defender Legislative Committee over the years and am confident in their ability to represent the defender point of view. I do not feel that regional differences are that significant, nor do I feel that the experience and philosophy of criminal defense lawyers differs that much. We are a fairly homogeneous group dealing with common problems, and thus we share common perceptions about the criminal justice system and in particular sentencing. I also know that the Committee has had substantially more time to study the proposals of the U.S. Sentencing Commission, and therefore I place even more faith and reliance in their perceptions.

I find the preliminary draft of the sentencing guidelines very disturbing for a number of reason. Most significantly, the sentence ranges proposed in the guidelines are extremely harsh. Many more people will be going to prison under this new system than under current practices. I have applied the guidelines to a couple of situations where my client received probation and have been shocked to see the amount of actual time that would have to be served under the guidelines. For example, a young man who broke into an unoccupied cabin (a dwelling) in Rocky Mountain National Park and stole some food would have to serve around four years despite the lack of a prior criminal record.

Another client of mine, a postal employee, who embezzled an item of third class mail containing pornographic literature, would have a guideline range of at least six to twelve months without any prior record. Finally, a client of mine who had knowledge of the making of a large quantity of counterfeit money and who exercised control over the printing press by storing it in a rental locker at the request of the principal, and who himself passed one of the twenty dollar notes, would receive at least forty-two sanction units for a sentence of thirty to thirty-six months, even if he had no role in the manufacture of the counterfeit money. If such a role, however minimal, were determined by the court, the offense value would be substantially increased. In the case I'm referring to the quantity of money actually printed by the principal was in excess of $500,000 adding 48 sanction units and calling for a sentence of 78 to 96 months. The young man in question was a college student with no criminal record who assisted his friend, a man who employed him on a part time basis as a mover while working his way through school.

Taking a second place only to the harshness of the guidelines is my concern for the loss of flexibility in sentencing and the attempt to divest the court of its discretion and its traditional role in the sentencing process. I suspect that many judges will take seriously the presumptive sentence range even if they find it personally offensive or inapplicable in a given case. The implementation of the guidelines, the standardization of sentencing into a rigid and mechanical formula, and the threat of government appeal will ultimately cause judges to "toe the line" and surrender their individual judgments to the "cold" sentencing formula. Another major concern I have is the lack of incentive for "rehabilitation" built into this system. To a great extent the new sentencing process suffers from some of the same problems inherent in the parole system. With the exception of the Youth Correction Act, inmates trade incentives for the "benefit" of knowing early on how much time they will have to serve. I realize that "rehabilitation" is a disfavored concept, but believe any penal system should build in incentives for hard work, education, drug rehabilitation, and other types of self improvement while in an institution. With the exception of a reduction of sentence for "cooperation" there is no such incentive in this system. A workable solution might be to allow reduction of sentence or discharge upon certification by the Bureau of Prisons that an inmate has shown sufficient signs of rehabilitation to be released and that further incarceration would serve no purpose regarding protection of the public.

Another area of major concern is the impact of the sentencing guidelines on the judicial process. The sentencing process becomes far more complicated under the guidelines. Judges, probation officers, and counsel for both the government and the defendant will have to spend a great deal of time applying the guidelines and litigating over the meaning or lack of meaning of certain terms and concepts. Everything from the determination of the "modified real offense" to the meaning of "drug abuse" and the applicability of evidence of "other crimes" should create a judicial nightmare. The application of traditional concepts of due process such as the need for hearings to determine whether a defendant should be held accountable both primarily or secondarily for crimes for which he has not been convicted is a particular problem. It is true that courts have traditionally had no restriction placed upon what they can consider in sentencing, and that judges consider a great deal of non criminal conduct in determining a defendant's "character". Nonetheless, the use of a point system with aggravating and mitigating factors requires much more attention to be given to the determination of these factors because of the precise application being made. This necessarily creates much more room for dispute. Furthermore, the harshness of the guidelines will undoubtedly result in more criminal trials and thus a greater impact on the judicial system, not to mention the prison system which will need to be developed to house the greater number of people who will be going to prison under the new sentencing law.

Another area of great concern about the new sentencing guidelines is the philosophy that is expressed regarding remorse and cooperation and the way these factors are taken into account. For example, what place does consideration of "remorse" have where a defendant is arguably not guilty or has a legitimate claim that he has been mischarged and he thereafter goes to trial to vindicate these beliefs? Suppose there is a legitimate question concerning the proof of one of the elements of the offense? My experience has been that the federal judges in Colorado do not punish these people for going to trial, nor would they necessarily reward them for foregoing their right to trial. Of course, judges can and should consider "remorse" in the appropriate situation. To the extent that a guilty plea may be consistent with remorse the court can take that into account. But to formulate an incentive for pleading guilty, which of course acts as a disincentive or even punishment for going to trial, is simply repugnant to the way we like to think our judicial system operates. Likewise, cooperation in an <u>appropriate</u> case can and

should be considered by a sentencing judge. However, cooperation is not simply the flip side of obstructing justice. Many legitimate concerns go into a decision whether to cooperate with the government. A person should not necessarily be punished for exercising discretion and good judgment in these situations. This does not mean that a defendant is not remorseful for his crime or is thumbing his nose at the court and trying to interfere with bringing others to justice. Conversely, some very "bad" people use the judicial system and their cooperation to their benefit in obtaining reduced charges and sentences, and many of these people constitute part of the serious criminal element and deserve harsh treatment. I have tried more than one case in which a key government witness had been involved in the criminal conduct for which my client was on trial and had a greater degree of responsibility then my client, yet was offered a substantial benefit for "cooperation". Cooperation or lack of cooperation is not one of the primary considerations in determining sentence, and the government should not be allowed to have it built in to the sentencing process in such a significant way as to punish those who do not cooperate.

In addition to the general observations that I have made above, I would like to briefly address the section of the preliminary draft dealing with criminal history. In speaking with several other Federal Public Defenders they have felt that my time at the hearing might be well spent in addressing some concerns in this area. To begin with, I believe that the only enhancement should be for previous convictions. Section C322 permits the court to consider other conduct for which the defendant has not been convicted if established by a preponderance of evidence. Such conduct would aggravate the sentence beyond the guideline range. I'm sure the Commission has heard all of the defense arguments for considering only adjudicated conduct. In terms of due process, reliability, and simplication of the sentencing process, this would be my position. But if unadjudicated conduct of peripheral crimes is to be considered it should be deemed as being included within the specific guideline range. In other words, the court could use this type of conduct as justifying a sentence closer to the top of the guideline range.

Another area of concern regarding criminal history is the consideration of drug use or "abuse". Criminal history points would be scored for single incidents involving a positive urine test. This would be the equivalent of the points asssessed for most previous felony convictions, and could translate into substantial additional time being served by a defendant. This

seems unduly harsh and arbitrary. Also, the term drug "abuse" is not defined in the guidelines. Not only does this create obvious problems of interpretation, but finding that a person was previously an abuser by virtue of having been in a drug program results in him being penalized despite the fact that he may have overcome the drug dependence. It creates additional problems in terms of advising a client whether to cooperate with the pretrial service officer or even a probation officer in discovering facts that would lead to a conclusion of prior drug use or abuse. Furthermore, considering that the Senate Judicial Committee felt that drug abuse should not play a role in deciding whether to incarcerate, it should be noted that the enhancement based on prior drug abuse could make the difference between probation and incarceration.

With regard to Section C321, the enchancement to the statutory maximum in certain cases involving "violent" crimes, it should be kept in mind that Congress in passing the statutory maximum sentences did so based on a parole system. In other words, the statutory maximum sentence of ten years takes into account that a person sentenced to ten years would serve substantially less than ten years in prison. Under the new sentencing guidelines that maximum sentence would convert to actual time.

With regard to the "decay factor" for prior crimes it should first be noted that the guidelines are not clear, as to whether the ten year time period commences after an offenders release from custody, and whether the ten years is tolled by the date of the alleged commission of the new offense or the date of conviction. Furthermore, there appears to be no reason for excluding crimes of violence and drug offenses from the decay factor. An individual who committed a robbery or sold drugs at the age of 19, but who has remained "clean" for twenty years and then picks up a conviction for false statement, fraud, or some such other

offense not related to drugs or violence no more deserves to have the earlier conviction considered than someone whose prior offense involves a non-drug related or non-violent crime.

With regard to diversionary dispositions I have been advised that some state jurisdictions require an admission before a judicial body prior to entry of a diversion. Apparently most jurisdictions do not. Thus, there would be a disparity between individuals who receive diversions in certain jurisdictions as opposed to those from other jurisdictions. It is my feeling that diversionary dispositions should simply be omitted from consideration. I know from my experience that the practice in state court is to sometimes offer a diversion where the evidence is thin if not insufficient to convict. Sometimes a prosecutor will actually institute the filing of charges knowing that a diversion will be offered. I believe this supports omitting diversions from consideration in the guidelines.

I believe Tova Indritz, the Federal Defender from New Mexico, will be addressing tribal and possibly foreign convictions. Foreign convictions are suspect because of the absence of "due process" and are not reliable indicators of guilt. Ms. Indridz has substantial experience with tribal convictions and can make a good argument for why they should be omitted from consideration in criminal history.

Finally, perhaps it goes without saying that uncounseled convictions should not be considered under these guidelines. I would feel more comfortable if there were a general provision specifically stating that uncounseled adjudications should not be considered. This would avoid confusion and any disparity in practcice from one federal jurisdiction to another depending on the practices of the U.S. Probation Department.

I hope that some of these comments will be of assistance and I look forward to appearing before the Commission on November 5th.

Sincerely,

MICHAEL G. KATZ
Federal Public Defender

MGK:bdm

00042
Rec'd 11-10-86

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October 28, 1986

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Att: Guidelines Comments

Dear Sentencing Commission:

Enclosed is a copy of a brief to be filed soon in the Oklahoma County District Court. I have written this brief for another inmate and I argue the excessiveness of his sentence. Although I initially argue that the punishment is not proportionate to the severity of the offense, I also argue, beginning on page 9, that the sentence is not rationally related to a legitimate penalogical goal.

I have not had the opportunity to read the proposed federal sentencing guidelines but I feel that there is a need for a uniform sentencing procedure. This procedure, though, should not only abolish disparity in sentencing but should also have some rational relationship to a legitimate penalogical goal, and should be the least restrictive alternative available to accomplish that goal. Of the four recognized goals, deterrence and retribution will be accomplished by almost any sentence. The major concern, then, should be with rehabilitation and incapacitation. Rehabilitation for those who are non-violent and receptive to rehabilitation. Incapacitation for those violent offenders who pose a threat to society.

A statute designed to accomplish this could be based on the Federal Bail Reform Act, 18 U.S.C. 3146(a). A sentencing judge would be required to determine the appropriate sentencing goal based on information received from a presentence report and other sources. If the judge determined that incapacitation was required, then he would sentence the defendant to a period of imprisonment necessary to protect society. If, on the other hand, rehabilitation seemed an effective goal, the judge would be required to choose the least restrictive means, ranging from probation to incarceration, to accomplish the goal. The statute would enumerate sanctions as deferred sentencing, fine, suspended sentencing, community service, weekend incarceration, work release, and incarceration, with or without program participation requirements. Restitution should be required in all cases.

A statute of this type would have far reaching effects. First, it would free prisons to fulfill their true purpose, i.e., incapacitating those who pose a serious danger to society. It would also be less expensive to implement. Incarceration is the most expensive means of dealing with offenders. The judge's decision-making process "on the record" would aid the appellate courts in the review of sentences. Finally, it would serve as a model for the states. All-in-all, legislation of this type would be immensely beneficial.

I hope you find the brief and my comments worthy of consideration. I would appreciate a copy of the proposed sentencing guidelines.

Sincerely,

R. F. Groshon, Jr.

Robert F. Groshon, Jr.
DOC #128250

encl.

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY

STATE OF OKLAHOMA

WILLIAM RAYMOND SCHERER, JR., Petitioner,	)	
-vs-	)	CASE NOS. CRF-85-4555
	)	CRF-85-5246
THE STATE OF OKLAHOMA, et al., Respondents.	)	CRF-86-865

APPLICATION FOR POST-CONVICTION RELIEF

PETITIONER'S POST-CONVICTION BRIEF

Submitted by:

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September, 1986

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IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY

STATE OF OKLAHOMA

WILLIAM RAYMOND SCHERER, JR., Petitioner,	)	
-vs-	)	CASE NOS. CRF-85-4555
	)	CRF-85-5246
THE STATE OF OKLAHOMA, et al., Respondents.	)	CRF-86-865

BRIEF OF PETITIONER

The Petitioner, William Raymond Scherer, Jr., was the Defendant in the District Court and will be referred to by name or as the Petitioner. The Respondents will be referred to as the State. Statistical data and other documents are attached to aid in the determination of the single proposition.

STATEMENT OF THE CASE

The Petitioner, William Raymond Scherer, was thrice charged in Oklahoma County District Court with multiple counts of Attempting to Obtain and Obtaining a Controlled Dangerous Substance by a Forged Prescription. On March 14, 1986, Petitioner appeared before the Honorable James B. Blevins and entered a plea of guilty on all counts. Mr. Scherer was found guilty by the Court which set punishment at ten (10) years imprisonment. The Department of Corrections filed an Offender Accountability Plan recommending modification of the sentence. The Court denied the plan on June 26, 1986.

STATEMENT OF FACTS

The Petitioner, William Raymond Scherer, Jr., was employed as a Regional Director for Financial Institution Services, Inc. when he was admitted to the Baptist Medical Center for surgery on his leg. During his recovery he was prescribed morphine and, later, Oxycodone, a synthetic morphine, for pain and remained on this medication for a period of six weeks. From this he developed his addiction to opiates.

To support his addiction, Mr. Scherer developed a method of forging prescriptions until, on August 29, 1985, he was caught and arrested. The State filed the first of three Informations in the District Court of Oklahoma County on September 5, 1985, charging Mr. Scherer with eight (8) counts of Attempting to Obtain and Obtaining a Controlled Dangerous Substance by a Forged Prescription, 63 O.S. 2-407. The forged prescriptions were for the drugs demerol and dilaudid, written over a two month period from June 19th to August 29th.

Mr. Scherer was appointed public defender Ron Evans to represent him and released on bond. No demand was made on Mr. Scherer to receive treatment for his addiction and he continued to forge prescriptions until he was again arrested on October 3, 1985.

The second Information was filed on October 9, 1985, alleging four (4) more counts of attempting to obtain and obtaining the drug dilaudid by forged prescriptions. These offenses occurred from August 15th to October 3rd. Again, Mr. Scherer was released on bond without any requirements concerning drug treatment.

On his own initiative, Mr. Scherer contacted Dr. Earl Young, head of the drug treatment program of the Veteran's Hospital, about admittance

into the program. At that time there was no space available but Mr. Scherer was promised a place in the program as soon as an opening became available. In the meantime, Mr. Scherer continued to forge prescriptions to support his habit.

Mr. Scherer was again arrested and the third Information filed on February 14, 1986. He was charged with seven (7) more counts of attempting to obtain and obtaining the drug demerol by fraud.

On March 14, 1986, on the advice of his public defender, Mr. Scherer entered a plea of guilty to all counts and was sentenced to a term of ten (10) years imprisonment with the understanding that his sentence would be reviewed by the Court within 120 days, in accordance with 22 O.S. 982(a), for possible modification.

Mr. Scherer was received by the Department of Corrections on March 28, 1986. After extensive testing and evaluation, the Department of Corrections prepared an Offender Accountability Plan recommending modification of the sentence to a term of two (2) years imprisonment, including intensive drug therapy during the incarceration, and the remaining eight (8) years suspended. This plan was filed in the District Court but, on June 26, 1986, the Honorable James B. Blevins denied the recommendation without comment.

Mr. Scherer, therefore, submits his Application for Post-Conviction Relief alleging that the sentence of ten (10) years is unconstitutionally excessive and that the Court abused its discreation in failing to accept the recommendation of the Department of Corrections.

PROPOSITION

THE SENTENCE IN THE INSTANT CASE IS UNCONSTITUTIONAL AND EXCESSIVE

The Oklahoma Court of Criminal Appeals has held that criminal sentences will not be found excessive unless, under the facts and circumstances of the case, the sentence is such as to shock the conscienceness of the court. Baldwin v. State, 596 P.2d 1269 (Okl.Cr. 1979).

Sentences as great as 499 years have been upheld, Moore v. State, 672 P.2d 1175 (Okl.Cr. 1983), while a sentence of only 45 days was found to be excessive. Robertson v. State, M-83-151 (Okl.Cr. Sept. 13, 1985) (unpublished opinion). Despite this apparent ambiguity, there is a logic in the Court's reasoning consistent with the constitutional demands of the Eighth and Fourteenth Amendments. When the facts and circumstances do not support the severity of the sentence and the sentence appears to be caused by the prejudice and passion of the court or jury, then the sentence is modified. An unconstitutional sentence, therefore, will undeniably "shock the conscienceness of the court" so as to require modification.

In Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), Justice White noted that a punishment might be unconstitutionally excessive on either of two grounds: first, if it is disproportionate; or second, if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." Id., 433 U.S. at 592, 97 S.Ct. at 2866.

Justice White's remarks, along with numerous decisions of the Supreme Court, indicate the two theories for use in the analysis of excessive punishment: first, Proportionality Review, the Eighth Amendment's

requirement that the punishment be proportionate to the severity of the offense; and second, Rationality Review, the substantive due process right under the Fourteenth Amendment that the punishment be rationally related to some legitimate state purpose and that this punishment be the least restrictive alternative available to fulfill the state purpose.

The application of these two theories to the instant case will be discussed separately.

SUB-PROPOSITION A

THE SENTENCE OF TEN YEARS IS NOT PROPORTIONATE TO THE SEVERITY OF THE OFFENSE.

The United States Supreme Court has principally relied upon three factors in their Eighth Amendment proportionality judgments. These factors are: first, the proportionality between the severity of the crime and the severity of the sentence, Solem v. Helms, 463 U.S. 277, 103 S.Ct. 3001, 3010, 77 L.Ed.2d 637 (1983); Enmund v. Florida, 458 U.S. 782, 797-8, 102 S.Ct. 3368, 3377, 73 L.Ed.2d 1140 (1982); Coker v. Georgia, 433 U.S. 584, 597-8, 97 S.Ct. 2861, 2868-9, 53 L.Ed.2d 982 (1977); Weems v. United States, 217 U.S. 349, 381, 30 S.Ct. 544, 54 L.Ed. 793 (1910); second, the sentence imposed in other jurisdictions for similar crimes, Solem v. Helms, 463 U.S. at ___, 103 S.Ct. at 3010; Trop v. Dulles, 356 U.S 86, 102-3, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); Weems v. United States, 217 U.S. at 379-80, 30 S.Ct. at ___; and third, the sentence imposed on other criminals in the same jurisdiction. Solem v. Helms, 463 U.S. at ___, 103 S.Ct. at 3010; Weems v. United States, 217 U.S. at 380-1, 30 S.Ct. at ___.

Thus, there is little doubt that the cruel and unusual punishments clause of the Eighth Amendment prohibits sentences that are "grossly

disproportionate to the severity of the crime." Rhodes v. Chapman, 452 U.S 337, 346, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981).

This is true whether considering the severity of the death penalty, Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), or the severity of imprisonment. Solem v. Helms, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

It is obvious from the facts of this case that Mr. Scherer's crime was not "severe." There were no acts of violence and no victims other than himself. He did not obtain drugs to sell to others. Instead, he deceived pharmacies to support his own addiction, a sickness he could not handle on his own.

But there is also an objective measure of the severity of his offense. The National Survey of Crime Severity was conducted as a supplement to the National Crime Survey in July, 1977. A total of 60,000 persons participated in the survey, each rating the seriousness of 25 specific criminal events. Twelve different forms were utilized but all have a common event - "a person steals a bicycle parked on the street" - assigned a score of 10. All other events were to by judged and given a score in relation to the assigned event.

Using this survey as a guide, two criminal events, similar to the instant case, are assigned severity scores. The event, "a person has some heroin for his own use," is assigned a severity score of 5.4 and the event, "a person uses heroin," is assigned the score of 6.5. The Severity of Crime, Bureau of Justice Statistics Bulletin, January 1984. See Attachment 1.

Mr. Scherer obtained the drug Dilaudid, a substitute for heroin, by forged prescriptions. He did this solely for his own use, therefore, the severity of his offense would be comparable to that of a person using

heroin, a crime considered less severe than stealing a bicycle. Even so, Mr. Scherer received the maximum punishment of ten years imprisonment.

The Oklahoma Department of Corrections issued a special report on August 27, 1986, listing sentencing statistics for various crimes. See attachment 2. No non-violent crime in the report showed an average sentence coming close to ten years. In fact, most non-violent crimes reported average sentences of five years or less. Only sex offenses and miscellaneous violent crimes, considered much more severe, had comparable average sentences. It is, therefore, readily apparent that the sentence given Mr. Scherer is disproportionate to the severity of the offense.

Statistics from other jurisdictions also show a clear disproportionality of the sentencing. Eighteen jurisdictions reporting in a recent study showed only one, Lucas County, Ohio, had an average sentence for drug trafficking comparable with the instant sentence. All other jurisdictions ranged from 1.5 to 7.6 years with almost 60% reporting average sentences of less than five years. Felony Sentencing in 18 Local Jurisdictions, Bureau of Justice Statistics Special Report, May, 1985. See attachment 3.

It might be noted that the statistics included both drug possession and drug sales offenses. Since the sale of drugs is universally considered a more severe crime than the possession of drugs for personal use, the average sentences reported would seem to be greater than if reporting only possession offenses. Statistics based solely on the offense of obtaining drugs by forged prescriptions would, arguably, report a very low average sentence.

More relevant statistics are available on sentencing in Oklahoma. The breakdown of sentences of currently incarcerated offenders whose controlling offense is obtaining controlled dangerous substances by fraud

was released by the Department of Corrections on September 2, 1986. See attachment 4. These statistics showed that 57% of those incarcerated for this offense had four years or less. The most frequent sentence being only three years. Of the 49 offenders currently incarcerated for this offense, only eight others are punished as severely as Mr. Scherer. Five of these, sentenced to 15, 20 and 30 year sentences, are necessarily sentenced under the habitual offender statute; but of the remaining three who are also sentenced to ten years, it is unknown if they, too, are sentenced as habitual offenders since ten years is both the maximum for the offense without a prior conviction and the minimum with a prior conviction. Mr. Scherer could very well be the only first-time offender in Oklahoma with the maximum sentence.

It has been suggested that the proportionality of crime and punishment is measured in part by the moral gravity of the particular offense and in part by the actual harm caused to the victim and society. Coker v. Georgia, 433 U.S. 584, 598, 97 S.Ct. 2861, 2869, 53 L.Ed.2d 982 (1977).

It is undeniable that narcotic addiction and the obtaining of narcotics by forging prescriptions is a grave moral offense, but it is not so grave as to justify incarceration for ten years. The addiction is a sickness, not a criminal disregard of societal norms, and would be better treated as such.

In this case, there was no victim and the actual harm caused to society is slight. Mr. Scherer did not rob pharmacies at gun point or steal money and property to support his habit. He maintained a good job, supported his family, and paid taxes. In every other way he was a good citizen. Society is harmed more by his prolonged incarceration than by his defrauding pharmacies out of narcotics.

Similarly situated defendants should be punished similarly, and the punishment should vary with the severity of the crime. Under the facts and circumstances of the case, the punishment of ten years imprisonment is excessive and should be modified to the recommendation of the Department of Corrections.

SUB-PROPOSITION B

THE PUNISHMENT VIOLATES SUBSTANTIVE DUE PROCESS RIGHTS IN THAT IT IS NOT THE LEAST RESTRICTIVE ALTERNATIVE RATIONALLY RELATED TO SOME LEGITIMATE STATE PURPOSE.

The substantive due process guarantee of the Fourteenth Amendment is "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." Poe v. Ullman, 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961).

Some type of rationality review is currently used to test most of governmental restraint on individual freedoms. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)(search and seizure); Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1974)(right to vote); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) (equal protection); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed. 2d 231 (1960)(first amendment); Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955)(economic due process).

There is no question that the right to be free from arbitrary governmental restraint "survives criminal conviction and incarceration." Youngberg v. Romeo, 457 U.S. 307, 316, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982).

The Supreme Court has recognized this substantive right of those criminally incarcerated in a variety of contexts. Greenholtz v. Nebraska

Penal Inmates, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)(liberty interest in not being arbitrarily deprived of parole expectation); Wolfe v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)(liberty interest in prison disciplinary procedures); Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970)(liberty interest in not being incarcerated beyond statutory maximum period of time for inability to pay fine); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942)(liberty interest in not being sterilized for being an habitual felon).

This substantive due process guarantee is recognized in sentencing cases. In a series of cases, prison sentences imposed on indigents were all struck down on the grounds that the states had less restrictive alternatives available to fulfill their penological interests in deterrence, retribution, rehabilitation and incapacitation. Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971); Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970).

Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), involved the revocation of probation on the grounds that the petitioner could not pay his fine. The Court struck down the revocation holding that the permissibility of the challenged state practice should depend upon "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose (and) the existence of alternate means for affectuating the purpose." Id., 461 U.S. at ___, 103 S.Ct. at 2069.

Although the Court has not directly addressed this rationality concept in the initial sentencing process, there exists substantial dicta

indicating that incarceration must advance the goals of our criminal justice system in some legitimate way. Solem v. Helms, 463 U.S. 277, ___, 103 S.Ct. 3001, 3013, n. 22, 77 L.Ed.2d 637 (1983)(life without parole unlikely to advance goals of criminal justice system); Furman v. Georgia, 408 U.S. 238, 280, 92 S.Ct. 2726, 2747, 33 L.Ed.2d 346 (1972)(punishment is unconstitutional if it "serves no penal purpose more effectively than a less severe punishment"); Robinson v. California, 370 U.S. 660, 677, 82 S.Ct. 1417, 1426, 8 L.Ed.2d 758 (1962)(prosecution for drug addiction cannot be justified as protecting society); Trop v. Dulles, 356 U.S. 86, 111-2, 78 S.Ct. 590, ___, 2 L.Ed.2d 630 (1958)(concurring opinion of Justice Brennan).

Utilitarian considerations such as the offender's need for treatment, his likelihood of offending again, and the deterrent effect of his punishment on others appear not only sustainable by the mainstream of constitutional discourse but, more likely, required by the Fourteenth Amendment. In fact, the prevalence of rationality review suggests that one of the basic messages of the Bill of Rights is that whenever the government curtails one's freedom, it must have a legitimate reason to do so and the means must be rationally related to that legitimate purpose.

Four penological goals are recognized as legitimate justifications for punishing criminal defendants. These are (1) deterrence, the attempt to control crime by making the punishment severe enough to outweigh the benefits for a potential criminal; (2) retribution, the principle that justice demands that the individual suffer some deprivation for violating the law; (3) incapacitation, the confinement of those potentially dangerous to the community in an attempt to prevent further crimes; and (4) rehabilitation, the improvement of the individual and the improvement

of society through the elimination of criminal behavior.

While a state's interest in punishment may encompass any one, or combination, of these goals, this interest, particularly with respect to non-violent offenders, can often be met by sanctions less restrictive than imprisonment. Deterrence, for example, is evidently served as well by the threat of a fine as by the threat of incarceration. Welsh v. Wisconsin, 466 U.S. 740, ___, 104 S.Ct. 2091, 2104, 80 L.Ed.2d 732 (1984).

In fact, numerous studies have shown that the threat of a fine may serve as a greater deterrent than imprisonment. Note, Criminal Fines: A Sentencing Alternative to Short-Term Incarceration, 68 Iowa L. Rev. 1285, 1290-3 (1983). The growing prison population and recidivism rate attest to the inability of imprisonment to deter some people. Those susceptible to deterrence are just as susceptible when sentenced under the least restrictive alternative system.

Retribution is an elusive goal since there are no criteria for accomplishing retribution. When does a defendant receive "just deserts" for his crime? What may be commensurate punishment for one person may constitute cruelty to another. Besides, the goal of retribution is served by almost any sentencing alternative the courts may choose since the defendant will almost always face some restriction of his liberty and the public disgrace associated with the conviction cannot be avoided.

Of all the interests that a state may have in punishment, only incapacitation is served effectively by incarceration. This suggests that incarceration ought to be imposed only when incapacitation is the primary goal of punishment, that is, when the offender poses a serious danger to society.

In the instant case, deterrence, retribution and incapacitation are

not primary goals. Deterrence is served by a mandatory drug treatment program that would restrict Mr. Scherer's liberty until such time as he was able to overcome his drug dependency and craving. Retribution is served by his conviction alone. His reputation in the community has suffered to such an extent that he will never be permitted to reestablish his occupation as a marketing executive for financial institutions. Finally, incapacitation is of no use since Mr. Scherer poses a minimal threat to society as evident by his past and present behavior.

Rehabilitation, therefore, is the only logical goal in this case. It is a goal supported by state statutes and legislative intent.

Title 57, Section 510 of the Oklahoma Statutes requires the Director of the Department of Corrections "to provide for the rehabilitation of inmates." A later enactment, Title 22, Section 982(a) establishes a system of judicial review of a sentence within 120 days after evaluation and a recommendation by the Department of Corrections. Clearly, these two statutes demonstrate the legislative intent for rehabilitation as a primary goal of punishment and for the individualization of punishment consistent with penological goals. For a court to totally disregard the recommendations of correctional officials who possess greater expertise in these matters, is to ignore the legislative intent of the statutes and the constitutional mandates of substantive due process.

On June 25, 1986, the Department of Corrections filed an Offender Accountability Plan and Request for Sentence Modification recommending modification of the sentence and intensive drug therapy. This plan was rejected by the district court without comment. See attachments 5 & 6.

If rehabilitation is to be considered the primary goal in punishing Mr. Scherer, then the district court's refusal to accept the accountability

plan was an abuse of discretion.

A person convicted of a crime receives little rehabilitation in prison. Prisons have become "lawless places" and the horror, brutality and degradation within their walls is well documented. Stabbings and fights are common occurrences. Drug and alcohol abuse are out of control as evident by the many positive results obtained by the Department of Corrections' EMIT urinalysis testing.

Since Mr. Scherer's rehabilitation could be accomplished better in a drug treatment program and a community-based facility, the court has an obligation, in view of the state's rehabilitative goal, to sentence him in such a manner as to accomplish this purpose.

For this reason, Mr. Scherer submits that the sentence of ten years imprisonment is not the least restrictive alternative, rationally related to a legitimate state purpose so as to comply with substantive due process under the Fourteenth Amendment. The sentence should, therefore, be modified to the recommendation of the Department of Corrections.

CONCLUSION

In Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), the Supreme Court struck down a sentence of ninety days because the Court felt the petitioner should not be inflicted with imprisonment for the "crime" of drug addiction. Admittedly, the facts in Robinson are distinguishable from the instant case but the end result is the same; Mr. Scherer is incarcerated for his drug addiction.

Mr. Scherer had no criminal record prior to his addiction to the drug Dilaudid. He was gainfully employed, supporting a wife and three

children. He posed no threat of violence to society. In truth, society suffers more by his incarceration. The State must support his wife and children through welfare programs during his imprisonment. The State must forfeit tax revenue it would derive from his employment. Society, in general, must also forfeit the benefit of his training and experience in the field of marketing. Society and his family must suffer because of the State's prejudice against drug addicts.

Whether the Court utilizes the proportionality review or the rationality review in considering the excessiveness of the sentence, it is clear that the sentence "is nothing more than the purposeless and needless imposition of pain and suffering." It is an unconstitutional sentence contrary to public policy and the needs of society. It is certainly a sentence to "shock the conscienceness of the court."

Mr. Scherer asks the Court to set a date for an evidentiary hearing to allow him the opportunity to present testimony and evidence as to his receptiveness for rehabilitation. He further asks the Court to recognize the appropriateness of the recommendation of the Department of Corrections and modify his sentence to a term of two years with intensive drug therapy.

Respectfully submitted,

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U.S. Department of Justice
Bureau of Justice Statistics

ATTACHMENT 1

Bureau of Justice Statistics Bulletin

The Severity of Crime

January 1984

This bulletin presents, for the first time, the seriousness scores for the full set of offenses measured in the National Survey of Crime Severity (NSCS), conducted in 1977 as a supplement to the National Crime Survey. The NSCS was designed, developed, and conducted by the Center for Studies in Criminology and Criminal Law, Wharton School, University of Pennsylvania. It was directed by Dr. Marvin E. Wolfgang with Dr. Robert M. Figlio.

A detailed report on the NSCS and its methodological underpinnings is now in preparation. It will be in two volumes and will be more than 1,200 pages in length. In addition, the bureau will publish a series of special reports highlighting the severity scores of various population groups.

The severity index represents an innovative way of looking at crimes. It points toward priorities and reaffirms basic values. Two areas of crime about which the public is clearly concerned, drug trafficking and white-collar crime, are major program thrusts of the U.S. Department of Justice. More developmental work is needed before a crime rate weighted by the seriousness of the crimes is possible, but the prospects are exciting. One day, perhaps, seriousness scores may be used routinely to investigate whether criminal career patterns involve crimes of an increasingly serious nature.

Steven R. Schlesinger
Director

How serious is a murder? Or a rape? Or, for that matter, a petty theft? Do such questions have any meaning? Would their answers have any utility?

Implicit judgments about the severity of crime are imbedded in our social institutions. Requiring the death penalty for certain crimes designates them as the most serious that can occur in this society. Crimes labeled felonies are considered more serious than those labeled misdemeanors. Crimes that can incur life sentences are more serious than those that receive prison sentences of only a few years.

Still, the seriousness of a crime is by no means clear-cut or immutable. In 1976 the rape of an adult woman was changed from a capital to a noncapital offense. The penalty for an offense in one State may be substantially different from the penalty for the same offense in another State. Even within one jurisdiction, the disparity in the sentences meted out by different judges for the same offense has been repeatedly noted with concern by criminal justice scholars. Much of the impetus behind recent determinate and mandatory sentencing legislation has come from the wish to minimize sentencing disparity.

When we speak of crimes such as robbery or burglary, we are speaking of legal categories rather than specific crimes. Although all "robberies" possess the characteristics necessary to be legally classified as such, they can vary in their particulars to an extraordinary degree. These variations, in all their complexity, seldom find their way into the penal code. They may or may not be taken into consideration by the sentencing judge. This wide range of possibilities within each crime type further confounds the seriousness issue. Robbery, because it involves personal confrontation and force or threat of force, is generally considered more serious than burglary. Yet most people would probably see the loss of several masterpieces in a museum burglary as more serious than the loss of lunch money in a schoolyard robbery.

Criminologists and criminal justice researchers have been interested in methods of determining the seriousness of criminal events for many years. An accurate measure of the seriousness with which society views a broad range of criminal events would be helpful to lawmakers and policymakers. It could provide a measure of the appropriateness of sentencing practices and it could assist in the allocation of scarce criminal justice resources. It could even indicate more accurately than at present whether crime is increasing or decreasing and by how much.

The two basic sources of information on the national crime rate are the FBI's Uniform Crime Reports (UCR) and BJS' National Crime Survey (NCS).* In the Crime Index the UCR counts the total number of murders, rapes, robberies, aggravated assaults, burglaries, and thefts reported to the police during the year. Through a survey of households across the Nation, the National Crime Survey collects information on the total number of rapes, robberies, assaults, burglaries, and thefts committed during the year. In computing crime rates and victimization rates from one year to the next, both the UCR and the NCS treat each type of crime as equally important. An increase of 100 pocket pickings affects the crime rate just as much as an increase of 100 murders, and 100 rapes affect the violent victimization rate as much as 100 simple assaults, which can be no more than a verbal threat of physical harm.

Intuition says that this is not completely right; 100 pocket pickings are not equal to 100 murders or 100 simple assaults to 100 rapes in the amount of injury they do or in the amount of anguish and fear they create. Clearly murders and rapes should count more, but how much more? Even within a single crime category, shouldn't certain events count more than others? For example, isn't a robbery in which the victim is shot more serious than one in which the offender is unarmed? How much more serious?

*See Measuring Crime, BJS Bulletin, February 1981, NCJ-75710.

To pursue answers to questions such as these, a survey of the seriousness of crime was conducted in 1977 as a supplement to the NCS. The survey, which included 60,000 persons 18 years of age or older, was the largest ever made of how the general public ranks the seriousness of a wide range of crimes.

Developing, conducting, and compiling the results of the severity study was a complex process using highly sophisticated mathematical techniques. For the respondents, though, the process was relatively simple. They were each given a description of a crime, "A person steals a bicycle parked on the street," and told that the seriousness of this crime was "10." They were then given a list of other crimes and told to compare them in seriousness to the bicycle theft. If a crime seemed to be twice as serious, they were to rate it at 20. If it were four times as serious, they were to rate it 40, and so on. Each person rated 25 crimes, but not everyone had the same 25. Overall, 204 items, each of which was illegal in at least one State, were rated.

Combining the ratings given by each of the 60,000 respondents, a single severity score was developed for each of the 204 items. These are shown in the table of severity scores. The scores range from 72.1 for "planting a bomb in a public building. The bomb explodes and 20 people are killed" to 0.2 for "A person under 16 years old plays hooky from school." The scores represent the relationship of one crime to another in terms of seriousness. A crime with a rating of 20 is considered by the general public to be twice as serious as a crime rated 10, which in turn is twice as serious as a crime rated 5.

Each of the items in the survey is quite specific as to the details of the crime and its consequences. These consequences strongly affect the ratings, a fact that is repeatedly apparent when similar crimes with different outcomes are examined. For example, the items scored 72.8, 43.9, 33.0, and 24.5 are all the same, planting a bomb that goes off in a public building. The outcomes range from 20 people killed to no one injured, and the scores descend in seriousness reflecting the differing outcomes. The crime scored 30.5 is an apparent inconsistency. More injury occurred in this incident (20 people hurt) than in the one scored 33.0 (one person hurt). A few other such apparently inconsistent ratings appear in the table. These may simply be due to the fact that no one saw all 204 items. Persons scoring the item where 20 people were injured may not have had the item where only one was injured with which to compare it.

When the outcome is not physical violence, but property loss, the same attention to detail is reflected among the scores. For example, in both item 21.0 and item 17.9, the victim was shot and

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How do people rank the severity of crime?

Severity score and offense

72.1—A person plants a bomb in a public building. The bomb explodes and 20 people are killed.

52.8—A man forcibly rapes a woman. As a result of physical injuries, she dies.

47.8—A parent beats his young child with his fists. As a result, the child dies.

43.9—A person plants a bomb in a public building. The bomb explodes and one person is killed.

43.2—A person robs a victim at gunpoint. The victim struggles and is shot to death.

39.2—A man stabs his wife. As a result, she dies.

39.1—A factory knowingly gets rid of its waste in a way that pollutes the water supply of a city. As a result, 20 people die.

35.7—A person stabs a victim to death.

35.6—A person intentionally injures a victim. As a result, the victim dies.

33.8—A person runs a narcotics ring.

33.0—A person plants a bomb in a public building. The bomb explodes and one person is injured but no medical treatment is required.

32.7—An armed person skyjacks an airplane and holds the crew and passengers hostage until a ransom is paid.

30.5—A person plants a bomb in a public building. The bomb explodes and 20 people are injured but no medical treatment is required.

30.0—A man forcibly rapes a woman. Her physical injuries require hospitalization.

27.9—A woman stabs her husband. As a result, he dies.

26.3—An armed person skyjacks an airplane and demands to be flown to another country.

25.8—A man forcibly rapes a woman. No other physical injury occurs.

25.2—A man tries to entice a minor into his car for immoral purposes.

24.9—A person intentionally sets fire to a building causing $100,000 worth of damage.

24.8—A person intentionally shoots a victim with a gun. The victim requires hospitalization.

24.5—A person plants a bomb in a public building. The bomb explodes but no one is injured.

24.5—A person kidnaps a victim. A ransom of $1,000 is paid and the victim is returned unharmed.

22.9—A parent beats his young child with his fists. The child requires hospitalization.

22.3—A person intentionally sets fire to a building causing $500,000 worth of damage.

21.7—A person pays another person to commit a serious crime.

21.2—A person kidnaps a victim.

21.0—A person robs a victim of $1,000 at gunpoint. The victim is wounded and requires hospitalization.

20.6—A person sells heroin to others for resale.

20.1—A man forcibly rapes a woman. Her physical injuries require treatment by a doctor but not hospitalization.

19.9—A factory knowingly gets rid of its waste in a way that pollutes the water supply of a city. As a result one person dies.

19.7—A factory knowingly gets rid of its waste in a way that pollutes the water supply of a city. As a result 20 people become ill but none require medical treatment.

19.5—A person smuggles heroin into the country.

19.5—A person kills a victim by recklessly driving an automobile.

19.5—A high school boy beats a middle-aged woman with his fists. She requires hospitalization.

19.0—A person intentionally shoots a victim with a gun. The victim requires treatment by a doctor but not hospitalization.

18.3—A man beats his wife with his fists. She requires hospitalization.

18.0—A person stabs a victim with a knife. The victim requires hospitalization.

17.9—A person robs a victim of $10 at gunpoint. The victim is wounded and requires hospitalization.

17.8—Knowing that a shipment of cooking oil is bad, a store owner decides to sell it anyway. Only one bottle is sold and the purchaser dies.

17.8—A person intentionally shoots a victim with a gun. The victim is wounded slightly and does not require medical treatment.

17.7—A person, armed with a gun, robs a bank of $100,000 during business hours. No one is physically hurt.

17.7—An employer orders one of his employees to commit a serious crime.

17.5—A high school boy beats an elderly woman with his fists. She requires hospitalization.

17.1—A person stabs a victim with a knife. The victim requires treatment by a doctor but not hospitalization.

16.9—A legislator takes a bribe of $10,000 from a company to vote for a law favoring the company.

16.9—A man drags a woman into an alley, tears her clothes, but flees before she is physically harmed or sexually attacked.

16.8—A person, using force, robs a victim of $1,000. The victim is hurt and requires hospitalization.

16.6—A person, using force, robs a victim of $1,000. The victim is hurt and requires treatment by a doctor but not hospitalization.

16.5—A person robs a victim of $1,000 at gunpoint. The victim is wounded and requires treatment by a doctor but not hospitalization.

16.4—A person attempts to kill a victim with a gun. The gun misfires and the victim escapes unharmed.

15.9—A teenage boy beats his mother with his fists. The mother requires hospitalization.

15.7—A county judge takes a bribe to give a light sentence in a criminal case.

15.7—A person robs a victim of $10 at gunpoint. The victim is wounded and requires treatment by a doctor but not hospitalization.

15.6—A person, armed with a lead pipe, robs a victim of $1,000. The victim is injured and requires hospitalization.

15.5—A person breaks into a bank at night and steals $100,000.

14.6—A person, using force, robs a victim of $10. The victim is hurt and requires hospitalization.

14.5—A company pays a bribe of $100,000 to a legislator to vote for a law favoring the company.

14.1—A doctor cheats on claims he makes to a Federal health insurance plan for patient services.

13.9—A legislator takes a bribe from a company to vote for a law favoring the company.

13.7—A person, armed with a lead pipe, robs a victim of $1,000. The victim is injured and requires treatment by a doctor but not hospitalization.

13.5—A doctor cheats on claims he makes to a Federal health insurance plan for patient services. He gains $10,000.

13.4—An employer orders his employees to make false entries on documents that the court has requested for a criminal trial.

13.3—A person, armed with a lead pipe, robs a victim of $10. The victim is injured and requires hospitalization.

13.0—A factory knowingly gets rid of its waste in a way that pollutes the water supply of a city.

12.7—A person intentionally sets fire to a building causing $10,000 worth of damage.

12.2—A person pays a witness to give false testimony in a criminal trial.

12.0—A person gives the floor plans of a bank to a bank robber.

12.0—A police officer takes a bribe not to interfere with an illegal gambling operation.

11.9—A person intentionally injures a victim. The victim is treated by a doctor and hospitalized.

11.8—A person stabs a victim with a knife. No medical treatment is required.

11.8—A man beats a stranger with his fists. He requires hospitalization.

11.7—Ten high school boys beat a male classmate with their fists. He requires hospitalization.

11.4—A person knowingly lies under oath during a trial.

11.3—Three high school boys beat a male classmate with their fists. He requires hospitalization.

11.2—A company pays a bribe to a legislator to vote for a law favoring the company.

10.9—A person steals property worth $10,000 from outside a building.

10.8—A person steals a locked car and sells it.

10.5—A person smuggles marijuana into the country for resale.

10.4—A person intentionally hits a victim with a lead pipe. The victim requires hospitalization.

10.3—A person illegally sells barbiturates, such as prescription sleeping pills, to others for resale.

10.3—A person operates a store where he knowingly sells stolen property.

10.3—A person threatens to harm a victim unless the victim gives him money. The victim gives him $1,000 and is not harmed.

10.0—A government official intentionally hinders the investigation of a criminal offense.

9.7—A person breaks into a department store, forces open a safe, and steals $1,000.

9.7—A person breaks into a school and steals equipment worth $1,000.

9.7—A person robs a victim of $1,000 at gunpoint. No physical harm occurs.

9.7—A person walks into a public museum and steals a painting worth $1,000.

9.7—A person breaks into a display case in a store and steals $1,000 worth of merchandise.

9.6—A person breaks into a home and steals $1,000.

9.6—A police officer knowingly makes a false arrest.

9.4—A public official takes $1,000 of public money for his own use.

9.4—A person robs a victim of $10 at gunpoint. No physical harm occurs.

9.3—A person threatens to seriously injure a victim.

9.2—Several large companies illegally fix the retail prices of their products.

9.2—A person knowingly makes false entries on a document that the court has requested for a criminal trial.

9.0—A city official takes a bribe from a company for his help in getting a city building contract for the company.

9.0—A person, armed with a lead pipe, robs a victim of $1,000. No physical harm occurs.

8.9—A person intentionally hits a victim with a lead pipe. The victim requires treatment by a doctor but not hospitalization.

8.6—A person performs an illegal abortion.

8.5—A person sells marijuana to others for resale.

8.5—A person intentionally injures a victim. The victim is treated by a doctor but is not hospitalized.

8.3—A person illegally gets monthly welfare checks of $200.

8.2—Knowing that a shipment of cooking oil is bad, a store owner decides to sell it anyway. Only one bottle is sold and the purchaser is treated by a doctor but not hospitalized.

8.0—A person steals an unlocked car and sells it.

8.0—A person, using force, robs a victim of $1,000. No physical harm occurs.

7.9—A person trespasses in a railroad and steals tools worth $1,000.

7.9—A teenage boy beats his father with his fists. The father requires hospitalization.

7.9—A person intentionally hits a victim with a lead pipe. No medical treatment is required.

7.7—Knowing that a shipment of cooking oil is bad, a store owner decides to sell it anyway.

7.7—A person conceals the identity of someone that he knows has committed a serious crime.

7.6—A person steals $1,000 worth of merchandise from the counter of a department store.

7.5—A person, armed with a lead pipe, robs a victim of $10. No physical harm occurs.

7.4—A person illegally gets monthly welfare checks.

7.3—A person threatens a victim with a weapon unless the victim gives him money. The victim gives him $10 and is not harmed.

7.3—A person beats a victim with his fists. The victim is hurt but does not require medical treatment.

7.3—A person breaks into a department store and steals merchandise worth $1,000.

7.2—A person willingly hides out a bank robber.

7.2—A person signs someone else's name to a check and cashes it.

7.1—A person, armed with a lead pipe, robs a victim of $10. The victim is injured and requires treatment by a doctor but not hospitalization.

6.9—A person beats a victim with his fists. The victim requires hospitalization.

6.9—A person breaks into a public recreation center, forces open a cash box, and steals $1,000.

6.9—A factory knowingly gets rid of its waste in a way that pollutes the water supply of a city. As a result, one person becomes ill but does not require medical treatment.

6.9—A person steals property worth $1,000 from outside a building.

6.8—Because of a victim's race, a person injures a victim to prevent him from enrolling in a public school. No medical treatment is required.

6.7—A person, using force, robs a victim of $10. The victim is hurt and requires treatment by a doctor but not hospitalization.

6.6—A person does not have a weapon. He threatens to harm a victim unless the victim gives him money. The victim gives him $10 and is not harmed.

6.6—A person steals $1,000 worth of merchandise from an unlocked car.

6.5—A person uses heroin.

6.4—An employer refuses to hire a qualified person because of that person's race.

6.4—A person gets customers for a prostitute.

6.3—A person, free on bail for committing a serious crime, purposefully fails to appear in court on the day of his trial.

6.2—An employee embezzles $1,000 from his employer.

6.2—A person beats a victim with his fists. The victim requires treatment by a doctor but not hospitalization.

6.1—A person runs a prostitution racket.

6.1—A person cheats on his Federal income tax return and avoids paying $10,000 in taxes.

5.7—A theater owner knowingly shows pornographic movies to a minor.

5.5—A person runs a place where liquor is sold without a license.

5.4—A person has some heroin for his own use.

5.4—A real estate agent refuses to sell a house to a person because of that person's race.

5.4—A person threatens to harm a victim unless the victim gives him money. The victim gives him $10 and is not harmed.

5.3—A person loans money at an illegally high interest rate.

5.1—A man runs his hands over the body of a female victim, then runs away.

5.1—A person, using force, robs a victim of $10. No physical harm occurs.

5.0—A person knowingly buys stolen property from the person who stole it.

4.9—A person snatches a handbag containing $10 from a victim on the street.

4.7—A man exposes himself in public.

4.6—A person carries a gun illegally.

4.5—A person cheats on his Federal income tax return.

4.4—A person steals an unlocked car and later abandons it undamaged.

4.4—A person picks a victim's pocket of $100.

4.4—A person robs a victim. The victim is injured but not hospitalized.

4.3—A person breaks into a public recreation center, forces open a cash box, and steals $10.

4.2—A person attempts to break into a home but runs away when a police car approaches.

3.8—A person turns in a false fire alarm.

3.7—A labor union official illegally threatens to organize a strike if an employer hires nonunion workers.

3.6—A person attempts to break into a parked car, but runs away when a police car approaches.

3.6—A person knowingly passes a bad check.

3.6—A person steals property worth $100 from outside a building.

3.5—A person runs a place where he permits gambling to occur illegally.

3.3—A person breaks into a department store, forces open a cash register, and steals $10.

3.3—A person picks a victim's pocket of $10.

3.3—A person attempts to rob a victim but runs away when a police car approaches.

3.2—A person breaks into a building and steals property worth $10.

3.2—An employer illegally threatens to fire employees if they join a labor union.

3.1—A person breaks into a home and steals $100.

3.1—A person forces open a cash register in a department store and steals $10.

3.1—A person breaks into a school and steals $10 worth of supplies.

2.9—A person steals property worth $50 from outside a building.

2.8—A person breaks into a department store and steals merchandise worth $10.

2.4—A person knowingly carries an illegal knife.

2.2—A person trespasses in a city-owned storage lot and steals equipment worth $10.

2.2—A person steals $10 worth of merchandise from the counter of a department store.

2.1—A person is found firing a rifle for which he knows he has no permit.

2.1—A woman engages in prostitution.

1.9—A person makes an obscene phone call.

1.9—An employee embezzles $10 from his employer.

1.9—A store owner knowingly puts "large" eggs into containers marked "extra-large."

1.7—A person under 16 years old is drunk in public.

1.7—A person is a customer in a place where he knows gambling occurs illegally.

1.7—A person steals property worth $10 from outside a building.

1.6—A person is a customer in a house of prostitution.

1.6—A male, over 16 years of age, has sexual relations with a willing female under 16.

1.6—A person is a customer in a place where he knows liquor is sold without a license.

1.6—A person breaks into a parking meter and steals $10 worth of nickels.

1.5—A person takes barbiturates, such as sleeping pills, without a legal prescription.

1.5—A person intentionally shoves or pushes a victim. No medical treatment is required.

1.4—A person has some barbiturates, such as sleeping pills, for his own use without a legal prescription.

1.4—A person smokes marijuana.

1.4—A person trespasses in a railroad yard and steals a lantern worth $10.

1.3—A person has some marijuana for his own use.

1.3—Two persons willingly engage in a homosexual act.

1.1—A person disturbs the neighborhood with loud, noisy behavior.

1.1—A person takes bets on the numbers.

1.1—A group continues to hang around a corner after being told to break up by a police officer.

1.1—A person under 16 years old illegally has a bottle of wine.

0.9—A person under 16 years old is reported to police by his parents as an offender because they are unable to control him.

0.8—A person under 16 years old runs away from home.

0.8—A person knowingly trespasses in a railroad yard.

0.8—A person is drunk in public.

0.7—A person under 16 years old breaks a curfew law by being out on the street after the hour permitted by law.

0.6—A person trespasses in the backyard of a private home.

0.5—A person takes part in a dice game in an alley.

0.3—A person is a vagrant. That is, he has no home and no visible means of support.

0.2—A person under 16 years old plays hooky from school.

required hospitalization. The different scores reflect the amount of money the robber took, $1,000 in the first case and $10 in the second.

The relationship of the victim to the offender and the ability of the victims to defend themselves both seem to be taken into consideration in assigning scores. The death of a child at the hands of its parent (47.8) is more serious than a husband's fatally stabbing his wife (39.2), which in turn is more serious than a wife's killing her husband (27.9).

The overall pattern of severity scores indicates that people clearly regard violent crimes as more serious than property offenses. They also take white-collar crime and drug dealing quite seriously, rating two offenses of this type higher than some forms of homicide. One of the highest scores (39.1) is awarded to a factory that causes the death of 20 people by knowingly polluting the city water supply. Running a narcotics ring (33.8) is regarded more seriously than skyjacking (32.7) and selling heroin for resale (20.6) more serious than rape if the woman's injuries do not require hospitalization (20.1).

In general, people tend to agree about the severity of specific crimes. A few differences appear, however, when the scores of different groups are examined. For example, blacks and members of other racial groups in general assign lower scores than whites. Older people found thefts of large amounts to be more serious than people in younger age brackets. Men and women, however, did not differ in any significant way in their overall scoring pattern. As might be expected, victims assign higher scores than nonvictims.

Methodology

The National Survey of Crime Severity was conducted as a supplement to the National Crime Survey over a 6-month period beginning in July 1977. A total of 60,000 persons participated in the survey, each rating the seriousness of 25 specific criminal events. Twelve different forms were used, each with a different set of items, so that the total of items scored was 204. Some items appeared on more than one form, and five items appeared on all of the forms:

—"A person steals a bicycle parked on the street."
(assigned a score of 10 as a starting point)

—"A person robs a victim. The victim is injured but not hospitalized."

—"A person under 16 years old plays hooky from school."
(received the lowest score)

—"A person stabs a victim to death."

—"A person plants a bomb in a public building. The bomb explodes and 20 people are killed."
(received the highest severity score).

The persons interviewed were all 18 years of age or older and were members of households that composed half of the National Crime Survey (NCS) sample. The NCS conducts interviews in 60,000 households forming a stratified random sample representative of the entire Nation.

Detailed explanation of all procedures, techniques, and methodologies used in the National Survey of Crime Severity will be presented in a forthcoming publication.

Bureau of Justice Statistics Bulletins are prepared by the staff of the bureau. Carol B. Kalish, chief of data analysis, edits the bulletins. Marilyn Marbrook, head of the bureau publications unit, administers their publication, assisted by Joyce M. Stanford. This bulletin was written by Patsy Klaus and Ms. Kalish.

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STATISTICS AS OF: 08 27 86

LOCATION: ALL INCARCERATED

TOTAL NUMBER	MALE TOTAL	MALE PERCENT	FEMALE TOTAL	FEMALE PERCENT	WHITE TOTAL	WHITE PERCENT	BLACK TOTAL	BLACK PERCENT	HISPANIC TOTAL	HISPANIC PERCENT	INDIAN TOTAL	INDIAN PERCENT	ASIAN TOTAL	ASIAN PERCENT	UNKNOWN/OTHER TOTAL	UNKNOWN/OTHER PERCENT
9640	8993	93.3	645	6.7	6050	62.8	2698	28.1	143	1.5	580	6.0	5	0.0	54	0.6

WHITE M	WHITE F	BLACK M	BLACK F	HISPANIC M	HISPANIC F	INDIAN M	INDIAN F	ASIAN M	ASIAN F	UNKNOWN/OTHER M	UNKNOWN/OTHER F
5663	386	2594	208	139	4	539	41	5	0	48	6

CURRENT YEAR

RECEPTIONS BY TYPE A	RECEPTIONS BY TYPE M	RECEPTIONS BY TYPE TOTAL	SHORTEST SENTENCE	AVERAGE SENTENCE	LONGEST SENTENCE	NUMBER WITH INVALID RACE CODES	NUMBER WITH INVALID SEX CODES	NUMBER WITH INVALID SENTENCE DATA	NUMBER WITH NO SENTENCE DATA	TOTA INVALI
2302	421	2730	000/03	010/08	900/00	6	2	814	10	832

NUMBER OF VIOLENT	NUMBER OF NON-VIOLENT	NUMBER OF LIFE	NUMBER OF DEATH	BREAKDOWN BY CASE TYPES: UNKNOWN	DEFERRED	SUSPENDED	INCARCERATIONS	SPLIT-SENTENCE	PAROLE-SUPERVISION	WARRANTS
4128	5819	547	71	0	6	0	8003	1344	0	0

BREAKDOWN BY LAST MOVEMENT TYPE

A	B	E	F	H	J	K	M	N	O	P	Q	R	S	T	U	V	W	Y	Z
226	6372	79	850	62	0	0	5	31	192	51	0	104	0	162	0	1401	0	76	0

BREAKDOWN BY SENTENCE CODES

CC	CS	ET	ID	MD	NI	NR	NS	SI	SP	US	WW
121	613	9	14	103	462	7402	1	371	0	0	0

CRIME CATEGORY	TOTAL NUMBER FOR LOCATION	PERCENT OF OF LOCATION	SHORTEST SENTENCE	LONGEST SENTENCE	AVERAGE SENTENCE	NUMBER OF LIFE	NUMBER OF DEATH	PERCENT OF ENTIRE POPULATION IN REPO
BURGLARY I	199	2.1	001/00	500/00	010/10	1	0	2.1
BURGLARY II	1304	13.5	000/03	700/00	007/10	0	0	13.5
LARCENY	1132	11.7	000/03	050/00	005/10	0	0	11.7
BOGUS CHECK, CARD	220	2.3	000/06	050/00	005/11	0	0	2.3
FORGERY	348	3.6	000/03	050/00	006/00	1	0	3.6
FRAUD	40	0.4	001/00	020/00	004/08	0	0	0.4
EMBEZZLEMENT	75	0.8	001/00	021/00	004/06	0	0	0.8
UUMV	213	2.2	000/09	040/00	004/00	0	0	2.2
DUI - 2ND	620	6.4	000/06	005/00	002/05	0	0	6.4
POSS., OBT., DRUG	318	3.3	001/00	099/00	005/04	1	0	3.3
DIST. DRUG	458	4.8	000/09	099/00	005/10	1	0	4.8
ESCAPE	117	1.2	000/03	030/00	003/02	0	0	1.2
MISC. NON VIOLENT	175	1.8	000/06	099/00	006/02	0	0	1.8
MURDER I	485	5.0	005/00	045/00	027/07	408	68	5.0
MURDER II	269	2.8	000/08	555/00	031/02	118	1	2.8
MANSLAUGHTER	340	3.5	001/00	200/00	019/11	14	0	3.5
KIDNAPPING	81	0.8	002/00	300/00	028/06	7	0	0.8
RAPE	487	5.1	001/00	900/00	028/08	13	1	5.1
ROBBERY	1428	14.8	000/06	175/00	018/11	19	1	14.8
ASSAULT	404	4.2	000/06	750/00	014/10	13	0	4.2
ARSON	58	0.6	001/00	350/00	015/05	1	0	0.6
SEX	303	3.1	001/00	180/00	011/09	0	0	3.1
WEAPONS	174	1.8	001/00	050/00	005/05	0	0	1.8
MISC. VIOLENT	86	0.9	001/00	099/00	011/00	0	0	0.9
UNKNOWN	306	3.2	000/03	030/00	000/04	0	0	3.2

ATTACHMENT 2

U.S. Department of Justice
Bureau of Justice Statistics

ATTACHMENT 3

Bureau of Justice Statistics Special Report

Felony Sentencing in 18 Local Jurisdictions

May 1985

This report presents sentencing outcomes in the felony courts of 18 predominantly urban jurisdictions for the offenses of homicide, rape, robbery, aggravated assault, burglary, larceny, and drug trafficking.[1]

An earlier Bureau of Justice Statistics report described aggregate statewide data on sentencing practices.[2] To examine sentencing outcomes in more detail, this study collected and analyzed case-specific data on the sentences imposed in 1983 on more than 15,000 felony offenders.

The 18 jurisdictions range in size from Lancaster County (Lincoln, Neb.) with a population of 192,884 to Los Angeles, Calif., with a population of 2,966,850. The average population is nearly 900,000, and the median population is about 660,000. The jurisdictions are located in 15 different States and are distributed across the major geographical regions of the country: three are in the northeast, seven in the south, five in the midwest, and three in the west. The study includes such major cities as Baltimore, Miami, Denver, Minneapolis, Los Angeles, Phoenix, Milwaukee, and New Orleans. No claim is made here, however, that the findings presented statistically represent sentencing patterns in all felony courts in the Nation or in all urban jurisdictions.

One of the most serious gaps in our knowledge of the criminal justice system in the United States is reliable multijurisdictional data on the sentencing of convicted felons. The Bureau of Justice Statistics began to fill this informational need in 1984 with Sentencing Practices in 13 States, a report on aggregate statewide data on felony sentencing. The current special report presents a wealth of additional data on felony sentencing in 18 mostly urban jurisdictions, including such major cities as Baltimore, Denver, Los Angeles, Miami, Milwaukee, Minneapolis, New Orleans, and Phoenix.

By collecting case-specific data on the sentences imposed on more than 15,000 felony offenders in 1983, this study was able to measure the use of different kinds and degrees of sanctions for seven major felonies in a variety of large jurisdictions throughout the country. It was also able to analyze the impact on sentencing patterns of such factors as crime severity, different types of sentencing systems, the number of conviction offenses, and the use of pleas vs. trials.

Special thanks are due to the National Association of Criminal Justice Planners, which conducted the research under a cooperative agreement with the Bureau of Justice Statistics, and to the many individuals in the 18 jurisdictions who assisted in the collection of the data.

Steven R. Schlesinger
Director

(See appendix table 1 for a list of the participating jurisdictions.)

Highlights

Principal findings from these 18 counties include the following:

- Forty-five percent of the sentences for the felonies studied were to State prison; 26% were to local jail (with or without an additional probation sentence); and 28% were to probation only.

- Those convicted of homicide were most likely to be sentenced to prison (85%) and those convicted of drug trafficking were least likely (23%).

- Average prison sentences for each crime varied greatly among the jurisdictions, but within each jurisdiction sentence lengths were ordered with great consistency.

- The use of jail in felony sentencing varied substantially among the participating jurisdictions, ranging from less than 1% of the sentences in Baltimore City to half of the sentences in Hennepin County (Minneapolis).

- The average prison term imposed in determinate sentencing jurisdictions

[1] This study is drawn from a longer report, Sentencing Outcomes in 18 Felony Courts, NCJ-97690 (forthcoming).

[2] Bureau of Justice Statistics Special Report, Sentencing Practices in 13 States, NCJ-95399, October 1984.

was 40% to 50% shorter than in jurisdictions using indeterminate sentencing.

- Nearly three-fourths (74%) of the sentences to life imprisonment or death were for those convicted of homicide; 26% of all homicide sentences were to life in prison or death.

- For robbery and burglary, those convicted of an attempted offense were less likely to be sentenced to prison and received shorter average prison terms than those convicted of the completed offense.

- The number of charges on which a person was convicted affected sentencing outcomes. Forty percent of those convicted on a single charge received prison sentences, averaging 5.3 years; in contrast, 69% of those convicted on four or more charges received prison terms averaging 13.5 years.

- About 1 in 9 of those convicted of multiple charges and sentenced to prison received consecutive rather than concurrent sentences. The average prison term imposed on those with consecutive sentences was 18.9 years; for those with concurrent sentences it was 8.9 years.

- Nearly six times as many offenders were convicted on the highest original charge as on a lesser charge (85% vs. 15%).

- There were about five times as many convictions through guilty pleas as by trial. About five-sixths (83%) of all guilty pleas were to the highest original charge. Those pleading guilty were slightly less likely to be sentenced to prison (44%) than those found guilty at trial (51%). Those pleading guilty also received shorter average prison terms than those found guilty at trial for each of the crimes studied.

Overview of sentencing outcomes

While a felony sentence is sometimes thought of as a term of incarceration in a State prison imposed by a judge on the convicted felon, sentencing actually involves a broader range of outcomes. If a defendant is convicted of a felony, the judge must make up to three major sentencing decisions. The first decision is whether to incarcerate. If the decision is to incarcerate, the judge must decide whether the offender should be sent to a State facility (prison) or to a local facility (jail). Finally, the judge must determine the sentence length. Although judges have considerable flexibility in these decisions, State law may 1) mandate incarceration for certain crimes, 2) require that longer sentences (e.g., 1 year or more) be served in State prisons rather than local jails, and 3) set a minimum sentence length in certain cases.

Incarceration was the sentence in 71% of all of the felony convictions studied (26% to jail and 45% to prison, figure 1). Nearly all of the remaining sentences (28%) were to probation only. Approximately 1% of convicted persons received a sentence other than that of incarceration or probation, normally a fine or restitution to the victim.

Persons convicted of a felony are usually viewed as a State responsibility. With 1 out of 4 felony offenders sentenced to jail, however, local correctional institutions play a prominent role in the incarceration of convicted felons. (Persons sentenced to the jail should not be confused with others who are sentenced to a State facility and are held in a local jail until space becomes available at the State prison.)

Jail sentences can be imposed by the courts in several different ways. In some cases the offender receives a straight jail term, while in others part of the sentence is a jail term and part is probation: Straight jail terms constituted 30% of jail sentences imposed; 68% of the felons sentenced to jail also received a probation sentence. In another 2% of the cases, the jail sentence was to time served; i.e., the sentence of incarceration was made to equal the amount of time the offender had already spent in pretrial detention.

Those sentenced to a straight jail term received a longer average jail sentence, 12 months, than those sentenced to jail as part of a split sentence, in which cases the jail term averaged 7 months. The shorter term for felons serving a split sentence is offset by the period of probation that also must be served. The average probation term for those serving a split sentence was 3 years and 2 months, 1 month longer than the average for those sentenced to straight probation.

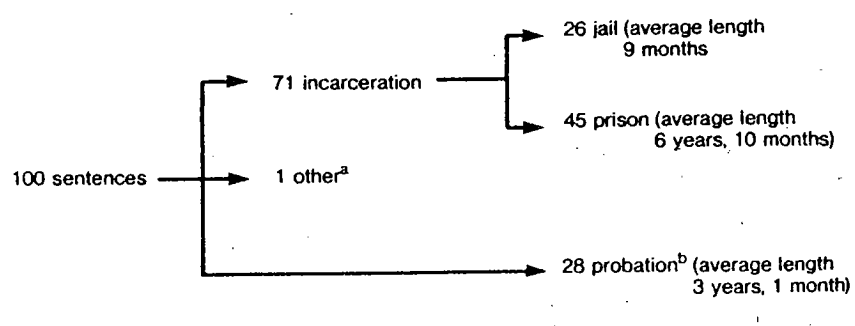
Offense differences

Overall, 45% of the felony offenders received prison sentences. (Because nearly half of the cases—48%—involved the property crimes of burglary and larceny, the overall sentencing outcomes are heavily influenced by the patterns found for these crimes.) The likelihood of a prison sentence was highest for those convicted of homicide (85%), rape (69%), and robbery (65%); it was lowest for those convicted of drug trafficking (23%) and larceny (29%) (table 1). For the purposes of this study, drug trafficking includes "possession with intent" to sell, manufacture or distribute. The relatively low percentage of drug offenders sentenced to prison may be explained by the fact that the threshold weight for "possession with intent" generally involves ounces, not pounds. Consequently, many of the drug trafficking cases involve small-time dealers.

The use of jail varied across the different crime categories. Jail was not a common sanction for murder, rape, or robbery. It was a much more prevalent sanction for aggravated assault, burglary, larceny, and especially for drug trafficking, with 41% of drug dealers sentenced to jail. With larceny the use of jail is equally striking: for each convicted felon sent to prison, another is sent to jail (29% and 32% respectively).

Straight probation was rarely used for the crimes of homicide, rape, or robbery. It was a more frequently used sanction for aggravated assault, burglary, larceny, and drug trafficking. Indeed, for larceny, where straight probation was imposed in 38% of the

A typical 100 sentences in felony court



[a] Other includes such sentences as restitution to the victim or a fine.
[b] Probation refers to probation only and does not include sentences to a split term of incarceration and probation.

Figure 1

Table 1. Distribution of sentences, by type of sentence and conviction offense

Conviction offense	Prison	Jail only	Jail and probation	Probation only	Other	Total
Total	**45%**	**8%**	**18%**	**28%**	**1%**	**100%**
Violent						
Homicide	85	1	5	9	—	100
Rape	69	2	10	18	1	100
Robbery	65	4	12	17	1	100
Aggravated assault	39	11	19	31	2	100
Property						
Burglary	46	8	17	28	1	100
Larceny	29	15	17	38	2	100
Other						
Drug trafficking	23	6	35	35	2	100

Note: May not add to 100% because of rounding.
— Less than 0.5%.

cases, it was the most frequently used sanction.

Sentence lengths

The average sentences imposed were longest for prison sentences and shortest for jail sentences (table 2). Prison sentence length, like the proportion of offenders sentenced to prison, was longest for the crimes of homicide, rape, and robbery and shortest for larceny and drug trafficking.

Average jail terms for the different crime categories varied less than prison terms. Only those sentenced to jail for larceny and drug trafficking had average jail sentences shorter than the range of 0.8 years to 1 year.

Average terms of probation fell in the fairly narrow range of 2.6 to 3.7 years for all crime categories other than homicide and rape. The length of the probation term, however, is only one consideration in viewing what is to be accomplished with probation. Judges often impose conditions with probation such as restitution, drug and alcohol counseling, and community service. The convicted felon's progress in meeting those conditions and keeping out of trouble are indicators of whether or not probation is succeeding. These considerations do not necessarily correlate directly with time. This may explain why there is no strong pattern between the average duration of probation and the nature of the offense.

Table 2. Average sentence length, by conviction offense

Conviction offense	Average sentence length: Prison	Jail	Probation only
Violent			
Homicide	14.9 yrs.	.9 yrs.	5.6 yrs.
Rape	12.6	.8	5.4
Robbery	8.7	1.0	3.7
Aggravated assault	6.7	.8	3.4
Property			
Burglary	4.6	.8	2.9
Larceny	3.3	.6	2.6
Other			
Drug trafficking	4.2	.4	3.1

Note: Persons receiving life or death sentences (less than 2% of all cases but 26% of all homicide cases) were excluded in the computation of the average prison terms. Information on persons receiving life or death sentences is provided elsewhere in this report. Jail column includes those sentenced to jail and probation.

Prison sentences

Among the 18 jurisdictions studied, there was substantial variation in the average prison sentences imposed for the seven felony crime categories (table 3). Robbery, for example, varied from 3.8 years to 20.6; aggravated assault from 3.7 years to 14.4; and burglary from 2.2 years to 10.2. Nonetheless, there was great consistency in how sentence lengths were ordered across crimes within each jurisdiction. In 15 of the 18 jurisdictions rape sentences were longer than robbery sentences; in 13, robbery sentences were longer than those for aggravated assault; in 14, aggravated assault sentences exceeded the average length of burglary sentences; and in 17, the average sentence for burglary was greater than that for larceny.

The homicide data cannot reasonably be compared to that for other crimes since the sentence length calculations exclude sentences to life in prison or to death, which constitute 26% of all homicide sentences but no more than 2% of the sentences for any of the other crime categories. In a few other cases sentence lengths for a particular crime that seem out of step with others in the same jurisdiction—e.g., 3.5 years for rape in Jefferson County—may be attributable to a very small number of cases or to a disproportionate number of attempts rather than completed crimes.

Table 3. Average prison sentence length in years for each conviction offense, by jurisdiction

Jurisdiction	Average prison sentence length in years for: Homicide	Rape	Robbery	Aggravated assault	Burglary	Larceny	Drug trafficking
Average for all jurisdictions	**14.9**	**12.6**	**8.7**	**6.7**	**4.6**	**3.3**	**4.2**
Determinate sentencing jurisdictions							
Hennepin County, MINNESOTA	10.0	5.8	4.1	3.7	2.2	2.1	1.5
Los Angeles, CALIFORNIA	6.5	11.5	3.8	5.2	2.5	2.1	2.6
Riverside County, CALIFORNIA	5.2	9.7	4.6	3.8	3.0	2.6	3.1
Kane County, ILLINOIS	9.3	8.6	5.8	4.0	4.2	2.2	5.4
Denver, COLORADO	7.6	11.8	7.1	5.7	4.8	4.7	4.5
Median	7.6	9.7	4.6	4.0	3.0	2.2	3.1
Indeterminate sentencing jurisdictions							
Maricopa County, ARIZONA	11.2	7.6	7.4	5.3	3.9	3.1	5.4
Milwaukee County, WISCONSIN	12.7	8.3	7.6	9.1	4.0	3.3	3.6
Lancaster County, NEBRASKA	7.5	11.0	4.6	6.8	2.7	2.0	2.4
Davidson County, TENNESSEE	15.4	12.1	13.2	7.9	5.8	5.0	5.8
Philadelphia, PENNSYLVANIA	14.7	11.9	8.4	5.3	5.8	3.9	5.7
Jefferson Parish, [illegible]	11.6	3.5	16.8	11.3	4.7	2.9	7.6
New Orleans LOUISIANA	15.4	18.4	9.8	9.3	4.7	2.6	5.0
Oklahoma County, OKLAHOMA	13.7	21.3	13.5	10.0	6.2	4.1	4.9
Lucas County, OHIO	22.5	18.2	20.6	11.4	10.2	4.2	9.2
Baltimore City, MARYLAND	17.4	11.2	6.7	14.4	3.3	*	*
Baltimore County	25.3	20.3	10.4	10.5	6.3	2.0	3.5
Dade County, FLORIDA	28.7	26.2	15.6	4.3	5.9	3.3	6.4
Jefferson County, KENTUCKY	13.9	15.7	13.7	7.1	7.4	4.1	4.9
Median	14.7	12.1	10.4	9.1	5.8	3.3	5.0/5.4

Note: Persons receiving life or death sentences (less than 2% of all cases but 26% of all homicide cases) were excluded in computing the average prison terms.
*Sentencing data were not collected for these crimes in Baltimore City.

The differential use of jail

Another substantial difference in sentencing patterns among the 18 jurisdictions was the use of jail as a sanction for convicted felons.

At one extreme were Baltimore City and Denver, where only about 1% of felons received a jail sentence; at the other extreme were Hennepin County (Minneapolis) and Los Angeles,[3] where about half the sentenced felons received some type of jail term (table 4).

Generally, the more frequent the use of jail, the higher the incarceration rate for a jurisdiction. Hennepin County and Los Angeles, for example, were among the top three jurisdictions with the highest overall incarceration rates (table 5). Denver, on the other hand, one of the jurisdictions that imposed jail sentences least often, had the lowest overall incarceration rate.

Other jurisdictions where jail was rarely used for felons, such as Baltimore City and Jefferson County (Louisville), imposed prison sentences on relatively high percentages of offenders (66% and 64%, respectively).

The differential use of jail among these jurisdictions reflects differences in how State and local authorities have elected to deal with convicted felons. Denver, for example, has a fairly extensive community-based residential corrections program, which tends to take the place of jail in the sentencing of convicted felons. In Minnesota, on the other hand, jail is used extensively to divert convicted felons from prison, especially by using short or part-time stays such as weekends in jail. In other States the criminal codes have been revised to permit judges to sentence felons to local jails for more than a year. A judge in Louisiana, for example, may sentence a person up to 12 years in the parish (county) jail.

But even where no State program exists and no code revisions have taken place, judges often retain wide discretion in deciding the type of sentence to be imposed. A judge, believing that a sentence to prison might be inappropriate but that the offender should do some time in an institution, can combine a jail term with a period of probation.

In addition to variation among the jurisdictions in how frequently jail is used, there is also considerable variation in the length of jail sentences.

[3] Los Angeles refers to the Central District Court of Los Angeles County, which generally conforms to the boundaries of the City of Los Angeles.

Table 4. Proportion of jail sentences and average jail sentence length, by jurisdiction

Jurisdiction	Percent of all sentences to: Straight jail	Jail and probation	Average jail sentence length for: Straight jail	Jail and probation
Baltimore City	—	—	23 weeks	9 weeks
Baltimore County	13%	14%	37	44
Dade County	13	10	32	32
Davidson County	13	7	55	23
Denver	—	1	31	19
Hennepin County	1	50	22	15
Jefferson County	1	2	57	12
Jefferson Parish	17	—	61	52
Kane County	1	32	5	12
Lancaster County	19	12	22	6
Los Angeles	4	40	36	29
Lucas County	—	26	13	14
Maricopa County	4	19	14	16
Milwaukee County	3	24	45	22
New Orleans	13	5	40	25
Oklahoma County	4	9	29	24
Philadelphia	23	11	84[a]	86[a]
Riverside County[b]	1	1	36	30

Note: This table includes those who received "time serve" sentences.
— Less than 0.5%.
[a] Philadelphia judges impose maximum and minimum jail terms, unlike any of the other 17 jurisdictions. Average minimum jail sentences are shown here.
[b] Because the record source used in Riverside County did not always indicate when a jail term was imposed along with a probation sentence, the number of jail sentences in Riverside County is most probably understated.

Table 5. The use of incarceration, by jurisdiction

Jurisdiction	Percent of all sentences to: Incarceration (jail and prison)	Jail[a]	Prison
Los Angeles County	88%	44%	44%
Kane County	85	33	52
Hennepin County	82	50	32
Dade County	80	23	57
Davidson County	77	19	58
Lancaster County	76	31	45
Lucas County	74	27	47
Milwaukee County	68	27	41
Jefferson County	67	3	64
Philadelphia	67	34	33
Baltimore City	66	—	66
New Orleans	64	18	46
Oklahoma County	61	13	48
Riverside County[b]	57	3	54
Baltimore County	57	26	31
Maricopa County	55	22	33
Jefferson Parish	43	17	26
Denver	42	1	41
Average for all cases	71%	26%	45%

— Less than 0.5%.
[a] Includes those sentenced to "time served."
[b] See table 4, footnote b.

With the exception of Philadelphia (discussed below), average terms ranged from 5 weeks in Kane County (suburban Chicago) to 61 weeks in Jefferson Parish (suburban New Orleans) for straight jail terms and from 6 weeks in Lancaster County (Lincoln, Neb.) to 52 weeks in Jefferson Parish for jail terms coupled with probation (table 4).

Interestingly, three of the four jurisdictions—Kane, Lucas (Toledo, Ohio), and Hennepin—that most often used split sentences (to both jail and probation), had very similar average jail sentence lengths: between 12 and 15 weeks. The fourth, Los Angeles, had a substantially higher average jail sentence of 29 weeks.

The average jail terms for Philadelphia—84 weeks for straight jail terms and 86 weeks for those receiving jail and probation—were by far the longest imposed among the participating jurisdictions. Unlike any other jurisdiction encompassed by this study, however, judges in Philadelphia impose a minimum as well as a maximum term on those sentenced to jail. Table 4 shows the average maximum jail sentences. Because most offenders sentenced to jail in Philadelphia are released shortly after serving their minimum sentence

(about a third of the maximum), the average jail sentences in table 4 for Philadelphia overstate the time that the sentenced felon actually serves in jail.

Probation

Straight probation constituted more than a fourth (28%) of sentences imposed for the felonies examined in this study. Probation sentences imposed with jail constituted another 18% of felony sentences (table 1). Thus, probation was a factor in 46% of the felony sentences covered by this study.

Total use of probation varied considerably among the 18 jurisdictions, from fewer than 1 out of 4 sentences in Dade County (Miami) to more than 2 out of 3 sentences in Hennepin County. The length of the average probation term ranged from 2.0 years in Kane County to 4.8 years in Jefferson County.

Within jurisdictions the average terms of probation did not differ substantially between offenders receiving straight probation and those receiving probation with jail: for no jurisdiction was the difference greater than 0.8 years.

Sentencing systems

While sentencing practices may vary, the concepts of incarceration and probation do not change their meaning from one jurisdiction to another. Even the time periods associated with jail and probation are a relatively stable concept from one jurisdiction to another. This is not true, however, with prison terms. Prison sentences have different meanings in different jurisdictions based on what State law permits with regard to correctional and parole board discretion, minimum terms, earned time, and time off for good behavior (good time).

There are two general legislative schemes that guide sentencing in the United States. One is determinate sentencing, under which a judge imposes a specified sentence not later reviewable by another body. The other type of sentencing scheme—indeterminate sentencing—does permit review of the judicially imposed sentence; this review function is usually performed by a parole board. Although parole boards have discretionary release authority under indeterminate sentencing systems, the scope of that discretionary power can vary substantially from State to State.

The primary mechanism for the control of parole board discretion is the use of minimum terms. Either the judge or the law specifies a minimum term of incarceration that must be served before the prisoner can be considered for parole. The shorter the minimum (including no minimum at all in some States), the greater is the discretion afforded the parole board. Conversely, the longer the minimum the more constrained the paroling authority's discretion.

Another distinguishing characteristic of the two sentencing systems is in the sentence lengths set by legislation. The legislatively prescribed penalties in determinate sentencing States generally have shorter time spans than those in indeterminate sentencing States. For example, in California, a determinate sentencing State, the prescribed penalties for robbery range from 2 to 6 years. On the other hand, in Kentucky, an indeterminate sentencing State, the prescribed penalties for robbery range from 5 to 20 years. This difference between the two States likely reflects the desire of State legislatures in determinate sentencing States to have greater certainty in the time served in prison for criminal violations.

Another factor that affects the time that actually will be served is the practice known as "good time." In all but five of the jurisdictions involved in this study (New Orleans, Jefferson Parish, Davidson County, Oklahoma County, and Philadelphia are the exceptions), State law specifies the rate at which prison terms can be reduced by the convict's good behavior in the correctional institution.[4] The rate at which good time can be accumulated varies among the jurisdictions; the average sentence reductions range between 25% and 33%. Generally, good-time reductions affect only the maximum term to be served. Two States, however, Ohio (Lucas County) and Nebraska (Lancaster County), permit good-time reductions of the minimum term.

Finally, sentences can be reduced in some jurisdictions through the discretion of correctional officials for time spent in prison industries or educational programs.

Sentence length and actual time served

Average sentence lengths were considerably lower in the 5 determinate sentencing jurisdictions than in the 13 indeterminate sentencing jurisdictions (table 3). This was true for each of the crime categories, with the biggest difference for the violent crimes. Because the two kinds of jurisdictions operate under different kinds of prison release mechanisms, the longer sentences in indeterminate sentencing jurisdictions do not necessarily translate into stiffer criminal penalties (i.e., more time actually served in prison).

Figure 2 shows how the average prison sentence for burglary can be affected by minimum terms, parole board discretion, correctional official discretion (earned time for time spent in prison industry and educational programs) and the behavior of the inmate (good time). The jurisdictions are grouped by the type of sentencing system under which they operate: determinate or indeterminate. Within each group jurisdictions are listed in descending order of the percentage of the maximum term that must be served before the convicted felon can be considered for release from prison.

The two determinate sentencing jurisdictions with the longest average terms (Denver and Kane County) also have the most generous good time rate (50%, or one day off the sentence for every day of good behavior). Denver is also in a State that awards earned time based on the inmate's work or educational advancement at the rate of 8% or 1 day off the sentence for every 12.5 days of involvement in correctional programs. Earned time is also a factor in California (Los Angeles and Riverside County), where it can be awarded at the rate of 17%. In Minnesota (Hennepin County) the State awards good time at a rate of 33%.

In these jurisdictions, therefore, the minimum amount of time that must be served by the sentenced burglar has a much narrower range than the range of the average maximum sentence imposed. Thus, it is likely that the differences in the average amount of time actually served in prison for burglary among these five jurisdictions will be a matter of months rather than years.

Among the indeterminate sentencing jurisdictions there is no consistent relationship between sentence length and minumum terms. Nonetheless, as figure 2 shows, the eight indeterminate jurisdictions that require more than 20% of the maximum sentence to be served have much less variation in mimumum sentence lengths than in the maximum sentence imposed. Indeed, these minumums are quite similar to those found in the five determinate

[4] The State of Louisiana does allow good time for those convicted of some felonies, but the crimes encompassed by this study do not fall into any of the eligible crime categories. Consequently, for the purposes of this study, Louisiana law does not provide for good-time credits.

sentencing jurisdictions. Altogether, 14 of the 18 jurisdictions had minimum terms between 1.25 and 2.32 years; average maximum sentences imposed in these same jurisdictions fell in the much wider range of 2.2 to 10.2 years.

This finding suggests that judges may adjust their sentences to compensate for the sentence reduction policies and practices operating in their State: by giving relatively shorter sentences in jurisdictions where the proportion of sentence that must be served is greater and giving relatively longer sentences in jurisdictions where the proportion of sentence that must be served is less. (In the two jurisdictions, for example, where the minimum is zero, average sentence lengths were among the top 5 of the 18 jurisdictions.)

It follows, then, that focusing on average prison sentence length can be misleading for assessing the variation in the criminal penalties imposed for similar crimes in different jurisdictions. A more useful indicator may be the actual minimum term that must be served before possible release from prison. At least for the crime of burglary, there was much less variation among most of the jurisdictions studied in the minimum time that must be served on an average sentence than in the sentence lengths themselves. Consequently, the average time served by imprisoned felons in different jurisdictions may vary less than the impression given by differences in average maximum sentences.[5]

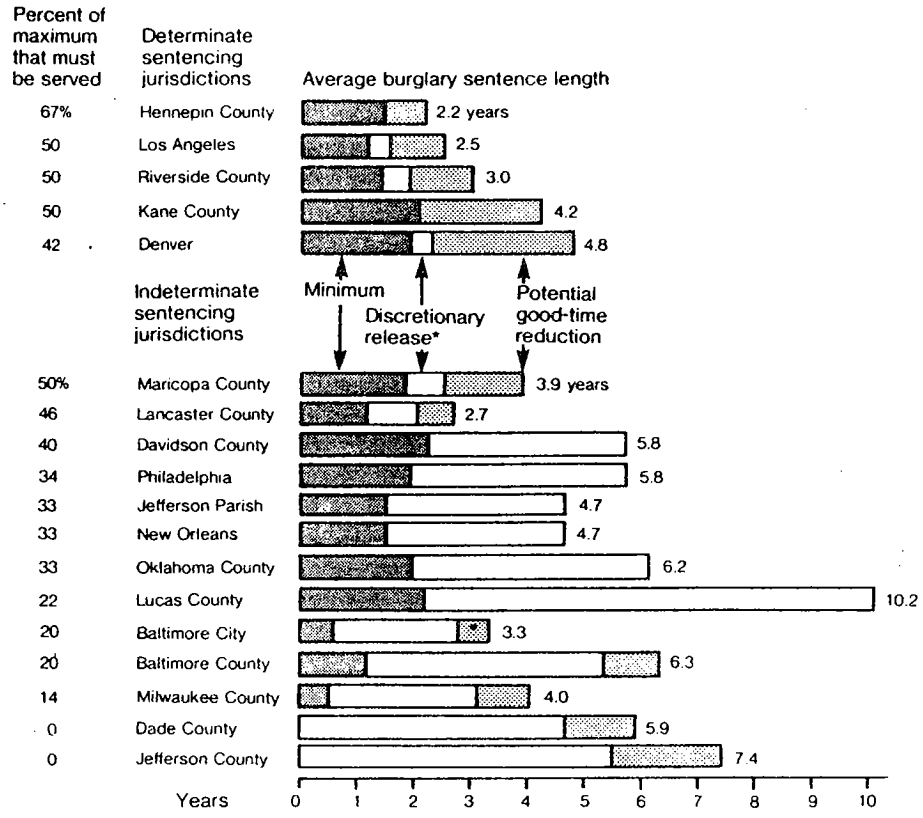
Table 6 presents additional data on the differences in sentencing patterns for burglary in determinate and indeterminate jurisdictions. In the determinate jurisdictions 89% of the burglary sentences were in the range of 1 to 4 years. Less than 2% of the sentences were to terms of 10 years or more. In the indeterminate jurisdictions, on the other hand, only 55% of the maximum sentences imposed were in the range of 1 to 4 years, and 13% were to 10 years or more (including 8 life sentences).

Sentences to life imprisonment and to death

For the purposes of this study, a life sentence is defined as any prison sentence with a maximum term of life in prison, regardless of the possibility of parole. (Only about 5% of the life sentences imposed did not allow for parole.)

[5]For data on actual time served in prison by convicted felons, see Bureau of Justice Statistics Special Reports, Time Served in Prison, NCJ-93924, June 1984, and Prison Admissions and Releases, NCJ-95043, September 1984.

Average burglary sentence lengths and potential reductions in 18 jurisdictions



* Discretionary release includes earned-time credits as well as the parole board's authority to release.

Figure 2

Table 6. Distribution of sentences for burglary, by type of sentencing system

Maximum sentence length	Number of sentences to a specified maximum length: Determinate sentencing jurisdictions	Indeterminate sentencing jurisdictions
Less than 1 year	0	33
1 year	201	363
2	357 median	321
3	90	435
4	203	278 median
5	22	522
6	40	117
7	4	115
8	17	41
9	2	63
10	10	105
11	1	0
12	2	16
13	2	3
14	1	8
15	1	135
16	0	3
17	0	1
18	0	2
19	0	0
20	0	23
21 or more	0	28
Life	0	8
Average burglary sentence	2.9 years	5.2 years

Note: Sentence lengths include fractions of a year. For example, a sentence to 1 year and 9 months would be classified as 1 year.

For the crimes and jurisdictions studied here, there were 445 life sentences and 12 sentences to death, or about 2% of all sentences imposed. Though a very small proportion of all sentences, these constituted 26% of homicide sentences. After homicide, the proportion of sentences to life imprisonment or death for a particular crime category falls to 2% of rape sentences, less than 2% of robbery sentences, and well under 1% for the other crimes.

The following table examines the distribution of the total 457 sentences to life imprisonment and death across the various crime categories:

	Percent	Number
Total sentences to life in prison or death	100%	457
Homicide	74	336
Rape	5	23
Robbery	18	84
Aggravated assault	1	5
Burglary	2	8
Larceny	0	0
Drug trafficking	—	1

— Less than 0.5%.

Nearly three-fourths of all the sentences to life in prison or death were for homicides; and nearly 1 in 5 were for robbery. Although the proportion of all such sentences imposed for rape (about 1 in 20) was much lower than for robbery, as shown above a slightly higher percentage of all rape sentences were to life in prison than of all robbery sentences.

While some States allow a judge to impose a life sentence on a first-time rapist or robber, most of the life sentences for crimes other than homicide were imposed under authority of habitual offender laws.

Degrees of severity within crime categories

Most State penal codes recognize degrees of severity or aggravating circumstances within general crime categories. Many penal codes, for example, authorize (or mandate) a more severe penalty for armed robbery than for robbery without a weapon. Similarly, some States penalize burglars who break into residences or who carry weapons more severly than those who burglarize commercial establishments or who operate unarmed. Finally, all States prescribe different degrees of punishment for different kinds of homicides, usually distinguishing murder, where there is intent to kill, from manslaughter, where there is no premeditation, and from negligent manslaughter, where death is attributable to the negligence or recklessness of the offender.

In the 18 jurisdictions studied here there was a direct relationship between the likely sentence and the kind of homicide, robbery, or burglary for which the offender was convicted (table 7). The proportion of sentences to prison and the average prison sentence length were higher for the more serious crime within each crime category. Of those convicted of homicide, for example, 93% were sentenced to prison for an average term of 17.3 years if the offense was murder, while 41% were sentenced to prison for an average term of 3.9 years if the conviction offense was negligent manslaughter. (Note that sentence length data exclude life sentences. Moreover, because the definition of murder varies considerably among the 15 States in the study, some of the murder convictions included in table 7 would be classified as manslaughter in other States.)

Similar patterns exist for robbery and burglary. Those convicted of armed robbery were much more likely to be imprisoned (81%) than those convicted of the less serious offense of unarmed robbery (57%); and those convicted of either armed or residential burglary were substantially more likely to receive a prison sentence (67% and 65%) than those convicted of nonresidential burglary (38%).

Penal codes are written to reflect differences in the severity of different kinds of crimes (e.g., rape vs. burglary) as well as the elements that can aggravate or mitigate the severity of a particular kind of crime (e.g., armed vs. unarmed robbery). These findings on how punishments vary both across and within the major crime categories (especially tables 1, 2, 3, and 7) illustrate how the sentencing practices of judges reflect these legal distinctions.

Completed vs. attempted offenses

Nearly all the State penal codes for the jurisdictions participating in this study have provisions that lower the penalty if the offender is convicted of an attempted rather than completed crime. Most States have gradations of felonies (e.g., 1 to 5 or A to E) and assign a different penalty range to each gradation. Moreover, most penal codes specify that the criminal penalty be lowered by one gradation for an attempted crime. For example, in Arizona (Maricopa County), armed robbery is a class 2 felony with a presumed sentence of 7 years for a first offender. If the charge is attempted armed robbery, however, Arizona reclassifies the offense as a class 3 felony, which carries a presumed sentence of 5 years, or 2 years less than that for the completed crime. Some State codes, Wisconsin for example, go as far as cutting the potential maximum sentence in half if the conviction is for an attempted rather than completed crime.

To examine the impact of this distinction on sentencing, the study compared sentences for attempted robberies and burglaries with those for the completed crimes (table 8). For both crimes the likelihood of going to prison and prison sentence length were less for those convicted of attempts. Those convicted of attempted burglary, for example, were only about half as likely to be sentenced to prison as those convicted of the completed crime (26% vs. 49%).

Table 7. For homicide, robbery and burglary, distribution of sentences, by type of sentence and average prison sentence length

Conviction offense	Percent of sentences to: Probation only	Jail	Prison	Total	Average prison sentence length
Homicide					
Murder	4%	3%	93%	100%	17.3 years
Manslaughter	17	8	75	100	9.2
Negligent	30	29	41	100	3.9
Robbery[a]					
Armed	11	8	81	100	11.2
Unarmed	28	15	57	100	7.9
Burglary[b]					
Armed	22	11	67	100	9.5
Residential	17	18	65	100	4.4
Nonresidential	39	23	38	100	3.3

[a] Table presents data only for those 63% of the cases where the distinction between armed and unarmed robbery could be made.

[b] Table presents data for those 50% of the cases where the distinction between the three classes of burglary could be made.

Table 8. Sentences to prison for attempted and completed robberies and burglaries

	Robbery	Burglary
Percent of sentences to prison terms for:		
Attempted crime	58%	26%
Completed crime	69	49
Average prison term for:		
Attempted crime	3.6 yrs.	2.8 yrs.
Completed crime	5.6	4.3

Note: Table shows only those cases where information on whether the crime was completed or attempted was available: 62% of the robbery cases and 65% of the burglary cases.

Multiple conviction offenses

In two-thirds of the felony convictions studied the offender was found guilty of a single offense (figure 3). In 28% of the cases the offender was convicted on more than one charge: 17% of the cases involved convictions on two crimes and 11% involved convictions on three or more crimes. In the remaining cases (5%) the study was not able to ascertain the number of crimes on which the offender was convicted. Multiple-charge convictions occurred most frequently when the highest conviction offense was homicide (39%) or rape (37%) and least frequently when it was larceny (22%) or drug trafficking (19%).

The number of conviction offenses had a significant impact on the like-

Table 9. Sentences to prison, by the number of conviction charges

Number of conviction charges	Percent of all sentences to prison	Average prison terms
One	40%	5.3 years
Two	56	8.3
Three	60	10.3
Four or more	69	13.5

Note: Table does not show those cases where number of charges were not ascertained.

lihood of receiving a prison sentence, ranging from 40% of those convicted of one offense to 69% of those convicted of four or more (table 9). Similarly, average prison sentence length was directly related to number of convictions, from 5.3 years for one offense to 13.5 years for four or more.

For homicide, rape, and robbery average prison sentence length consistently increased with the number of conviction offenses (table 10). For each of these three crimes, average prison sentences were about three times higher for those convicted of four or more charges than for those convicted on a single charge.

Aggravated assault and drug trafficking evidence a similar pattern, differing only in degree; the average prison sentence for those convicted on four or more charges was about twice as long as for those convicted of only one charge. For burglary and larceny the biggest jumps in sentence length occurred between those convicted on a single charge and on two charges.

Consecutive sentences

When a person is convicted of two or more crimes, the judge must decide whether to sentence the offender to concurrent or consecutive terms. A concurrent sentence means that the convicted felon is able to satisfy the time requirements on each charge at the same time; a consecutive sentence means that the sentences on each charge must be served sequentially. For example, if a person is convicted on two counts of burglary and sentenced to 2 years on each count, the sentence will be satisfied in 2 years if the sentences are concurrent, but will take 4 years if the judge made the terms consecutive.

Consecutive sentences were analyzed only when a single case led to a conviction on multiple charges. Excluded were instances where the judge made the sentence consecutive with another sentence previously passed on the same convicted felon. (For example, a person convicted of a new crime while on parole might have the new sentence added to the unexpired previous sentence.)

Table 10. Average prison sentence length, by the number of conviction charges and conviction offense

Conviction offense	Number of conviction charges: One	Two	Three	Four or more
Violent				
Homicide	11.2 years	18.1 years	23.0 years	34.5 years
Rape	8.8	14.7	18.8	23.2
Robbery	6.4	10.5	11.4	17.6
Aggravated assault	5.9	7.3	8.6	9.3
Property				
Burglary	3.8	5.8	7.3	6.1
Larceny	2.8	4.4	4.4	4.0
Other				
Drug trafficking	3.4	5.3	6.0	7.5

Note: Sentences were classified according to the most serious conviction offense. Offenses are listed in order of seriousness. In addition to the most serious conviction charge, multiple convictions charges may include lesser offenses not covered in the study, including misdemeanors.

Consecutive sentences constituted a very small proportion (2%) of all sentences imposed (figure 3). Indeed, consecutive terms were rarely imposed even when the prerequisite condition (a multiple-charge conviction) was met. About 1 out of every 9 offenders convicted of multiple charges and sentenced to prison (513 out of 4,604) was required to serve consecutive sentences.

Consecutive sentences may be rare, but when invoked they carry significantly longer prison terms. The average prison term for offenders receiving consecutive sentences (18.9 years) was more than twice as long as those with concurrent sentences (8.9 years) and nearly three times as long as the average prison sentence for all cases studied (6.8 years).

Conviction on original charge

Conviction on the highest original charge occurred nearly six times as often as convictions on a lesser charge (85% versus 15%). The data reveal a fairly narrow range (83% to 89%) in the frequency of convictions on the highest original charge for all of the crime categories except larceny (78%). The following are the proportions for each crime category of offenders convicted of the highest original charge:

Total convicted on highest original charge	85%
Homicide	83
Rape	87
Robbery	89
Aggravated assault	84
Burglary	86
Larceny	78
Drug trafficking	89

The overall difference in imprisonment between those convicted on the highest original charge compared to

The number of concurrent and consecutive sentences to prison resulting from 100 typical sentences

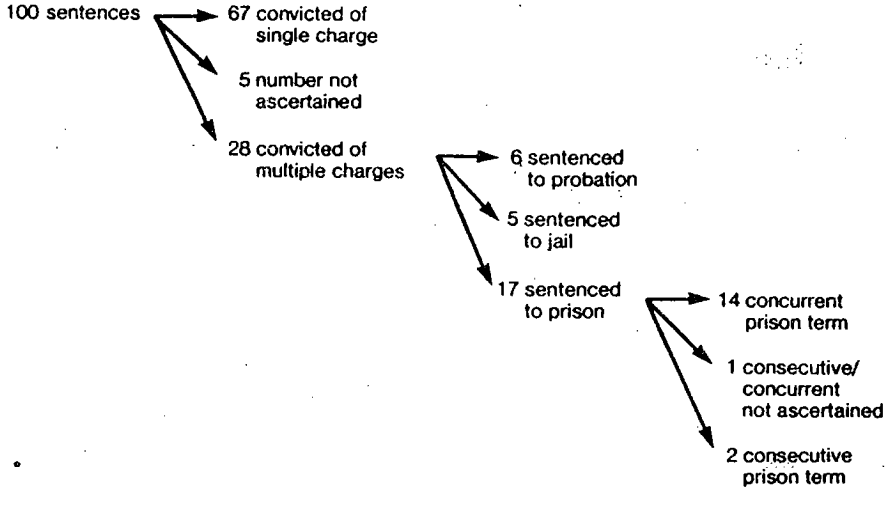


Figure 3

Table 11. Sentences to prison for those convicted on the highest original charge or a lower charge

Conviction offense	Percent of sentences to prison for those convicted on: Highest original charge	Lower charge	Average prison sentence length for those convicted on: Highest original charge	Lower charge
Total	**48%**	**35%**	**7.1 years**	**5.9 years**
Violent				
Homicide	87	80	16.3	10.8
Rape	70	59	13.9	7.9
Robbery	66	59	9.0	6.5
Aggravated assault	40	32	6.7	6.3
Property				
Burglary	50	30	4.7	4.4
Larceny	32	23	3.3	3.3
Other				
Drug trafficking	24	15	4.2	4.4

Note: Table excludes those cases (9%) where the study could not ascertain whether or not the felon was convicted on the highest original charge. Lower charge may be for a lower grade of the same general offense class: for example, a 2nd-degree murder conviction on an original 1st-degree murder charge.

those convicted on some lower charge was substantial (48% vs. 35%, table 11). This difference in imprisonment was also present for each of the crimes separately. Overall, prison sentences were longer for those convicted on the original charge. This difference was considerable for the violent crimes of homicide, rape, and robbery but disappeared for the property crimes.

Pleas vs. trials

A person may be found guilty of a crime either through admitting guilt—a guilty plea—or as a result of a trial before a judge or a jury. Information on pleas versus trials was available in 91% of the cases. An analysis of these cases reveals that conviction by trial in the felony courts studied was the exception rather than the rule. Only one out of every six felony convictions (16%) was the result of a finding by a judge or jury.[6]

The rate at which trials took place varied substantially among the crime categories studied. Generally, the more serious the crime, the greater the proportion of trials. For the less serious offenses of burglary, larceny, and drug trafficking, about 1 out of 10 convictions was the result of a trial. For aggravated assault and robbery this ratio was 1 out of 5. For rape it rose to 1 out of 4. Finally, for homicide about 3 out of 8 convictions resulted from trials.

Overall, defendants who pled guilty were somewhat less likely to be sentenced to prison than those found guilty at trial (44% vs 51%, table 12). This was not true, however, for all seven crime categories in the study. The reverse relationship held for burglary and larceny, and there was virtually no difference for robbery.

For all the crimes studied the average prison sentence lengths were shorter for those who pled guilty. Overall, those who pled guilty and were sentenced to prison received an average sentence of 6.0 years; those found guilty at trial and sentenced to prison averaged 10.7 years.

Although average homicide prison sentences were only slightly longer for those found guilty by trial (16.6 years) than for those who pled guilty (14.2 years), the former were much more likely to receive a sentence to life in prison or death (46%) than the latter (22%).

Pleas and conviction offense

In 7 out of 8 cases (88%), information on the manner in which the person was convicted (trial vs. plea) and the charge on which the person was convicted (highest original charge vs. a lower charge) was available. For the overwhelming share of these cases (70%) the offender pled guilty to the highest original charge. Much smaller proportions were offenders found guilty of the highest charge at trial (15%), offenders who pled guilty to a lesser charge (14%), and offenders found guilty at trial of a lower charge (1%). Considering only those who pled guilty, about five-sixths (83%) pled to the highest original charge.[7]

Those who pled guilty to a lower charge were less likely to be sentenced to prison (33%) than those who pled guilty to the highest original charge (47%) (table 13). The difference, however, in average prison sentence lengths for these two groups was only half a year.

[6]Other data on plea-to-trial ratios are presented in the Bureau of Justice Statistics Special Report, The Prevalence of Guilty Pleas, NCJ-96018, December 1984. For the 14 jurisdictions examined in that report, the median ratio of pleas to trials was 11 to 1, varying from a high of 37 pleas for every trial to a low of 4 pleas per trial.

[7]Data from The Prevalence of Guilty Pleas, op. cit., for eight jurisdictions showed a mean percentage of guilty pleas to the top charge of 60%.

Table 12. Sentences to prison, by method of conviction

Conviction offense	Percent of sentences to prison for those convicted by: Trial	Guilty plea	Average prison sentence length for those convicted by: Trial	Guilty plea
Total	**51%**	**44%**	**10.7 years**	**6.0 years**
Violent				
Homicide	92	82	16.6	14.2
Rape	81	65	16.2	10.9
Robbery	66	65	12.7	7.3
Aggravated assault	47	36	9.8	5.6
Property				
Burglary	42	48	6.4	4.3
Larceny	24	30	4.2	3.1
Other				
Drug trafficking	27	21	5.7	3.8

Note: Table excludes those cases (9%) where the study could not ascertain how the person was convicted.

Table 13. Sentences to prison for those convicted on the highest original charge or a lower charge, by method of conviction

Method of conviction	Percent of sentences to prison terms for those convicted on: Highest original charge	Lower charge	Average prison sentence length for those convicted on: Highest original charge	Lower charge
Trial	52%	55%	10.8 years	8.7 years
Guilty plea	47	33	6.0	5.5

Methodology

Geographical coverage. For all the jurisdictions participating in the study (appendix table 1) the sentencing data come from the entire county or independent city except in Los Angeles County. In Los Angeles multiple prosecutorial offices and courts are scattered throughout the county. Because the data had to be verified against the original court record as well as supplemented from the original court record, the decision was made to simplify this task by limiting the scope of the study in Los Angeles to the Central District Court, which serves the City of Los Angeles.

Frame of reference. Exception for Baltimore County, Dade County, and New Orleans, the data in this report represent all of the sentences imposed during calendar year 1983 for the crimes under study. Baltimore County provided sentencing data for the period 4/1/83 through 3/31/84. On October 1, 1983, the State of Florida implemented new sentencing procedures. In the interest of obtaining a full year's worth of data under a single sentencing approach, Dade County information was collected on sentences from 10/1/82 through 9/30/83. In New Orleans the nature of the record system necessitated studying cases initiated in 1983, resulting in the inclusion of some sentences imposed in 1984.

Crime definitions. The penal codes from each of the participating jurisdictions provided the basis for defining the seven crimes analyzed in this study; i.e. homicide, rape, robbery, aggravated assault, burglary, larceny, and drug trafficking. Project staff specified which penal code citations applied to these various crime types and in some instances specified what citations did not. These exclusions took place where the participating jurisdiction's penal code could lead to potential confusion with the general parameters that were laid down for the study. For example, a number of States have statutes dealing with criminal trespass, a crime that could easily be confused with burglary. Project staff made explicit that criminal trespass should be excluded from the data collection effort.

Project staff compiled a listing of all statutes falling into the study in a separate publication titled, "Penal Code Citations: Guidelines for BJS Sentencing Project Participants," which shows the differences in how the crimes are defined from jurisdiction to jurisdiction. Such differences are to be expected with each State legislating its own code. For the seven crimes in this study, the differences do not seriously impair the ability to obtain comparable definitions.

Sampling. Whether sampling was used and its extent varied by jurisdiction and crime category (appendix table 2). In 11 of the 18 jurisdictions there was no sampling at all. In the other seven jurisdictions sampling was used when the volume of sentences was large. This applied to fewer than half of the crimes in these seven jurisdictions and in no case included homicide or rape. A total of 15,018 cases were examined in the study. These were adjusted by their sampling ratio to represent 27,641 weighted cases. The analysis throughout this report is based on weighted cases.

Appendix table 1. Jurisdictions that participated in the study

Jurisdiction	Population	Major city
Baltimore City, Maryland	786,775	Baltimore
Baltimore County, Maryland	655,615	Towson (suburban Baltimore)
Dade County, Florida	1,625,781	Miami
Davidson County, Tennessee	455,651	Nashville
Denver, Colorado	492,365	Denver
Hennepin County, Minnesota	941,411	Minneapolis
Jefferson County, Kentucky	685,004	Louisville
Jefferson Parish, Louisiana	454,592	Kenner (suburban New Orleans)
Kane County, Illinois	278,405	Geneva (suburban Chicago)
Lancaster County, Nebraska	192,884	Lincoln
Los Angeles County, California	2,966,850	Los Angeles
Lucas County, Ohio	471,741	Toledo
Maricopa County, Arizona	1,509,052	Phoenix
Milwaukee County, Wisconsin	964,988	Milwaukee
New Orleans, Louisiana	557,515	New Orleans
Philadelphia, Pennsylvania	1,688,210	Philadelphia
Oklahoma County, Oklahoma	568,933	Oklahoma City
Riverside County, California	663,166	Riverside

Note: Los Angeles population is for the Central Court District only.

Appendix table 2. Distribution of the number of sentences, by jurisdiction

Jurisdiction	Total	Homicide	Rape	Robbery	Aggravated assault	Burglary	Larceny	Drug trafficking
Total	**27,641**[a]	**1,268**	**1,144**	**5,460**	**2,698**	**7,740**	**5,401**	**3,930**
Baltimore City	1,713	118	102	792[b]	119	582[b]	[c]	[c]
Baltimore County	633	11	16	133	12	102[b]	276[b]	83
Dade County	3,715	231	97	711[b]	226	1,148	1,020[b]	282[b]
Davidson County	964	53	65	216	98	269	156	107
Denver	697	33	14	106	61	254	60	169
Hennepin County	834	18	69	117	78	280	216	56
Jefferson County	945	53	69	177	89	224	175	158
Jefferson Parish	610	25	10	68	54	167	245	41
Kane County	330	8	12	29	21	122	85	53
Lancaster County	146	3	13	15	12	39	25	39
Los Angeles County[d]	5,772	303	172	1,155[b]	680[b]	1,068[b]	604[b]	1,790[b]
Lucas County	471	15	13	54	50	125	154	60
Maricopa County	3,000	73	105	224	432[b]	970[b]	975[b]	221
Milwaukee County	1,324	33	107	238	52	496[b]	191	207
New Orleans	800	20	9	120	37	249	251	114
Oklahoma County	1,204	64	45	133	103	341	264	254
Philadelphia	3,549	169	119	999[b]	450[b]	1,040[b]	651[b]	121[b]
Riverside County	934	38	107	173	124	264	53	175

[a] The study used 15,018 cases that were adjusted by their sampling ratios so as to produce 27,641 weighted cases.
[b] For these crimes and jurisdictions, a sample of all cases was drawn for this study.
[c] Sentencing data not collected for these crimes in Baltimore City.
[d] Data from Central Court District only.

Bureau of Justice Statistics Special Reports are prepared principally by BJS staff under the direction of Joseph M. Bessette, deputy director for data analysis, assisted by Marianne W. Zawitz. This report was written by Mark A. Cunniff of the National Association of Criminal Justice Planners under the direction of Carla K. Gaskins, program manager, BJS adjudication unit, and was edited by Benjamin H. Renshaw, deputy director for management. Marilyn Marbrook, publications unit chief, administered report production, assisted by Millie Baldea and Joyce M. Stanford.

June 1985, NCJ-97681

OKLAHOMA DEPARTMENT OF CORRECTIONS
DISTRIBUTION OF SENTENCES OF CURRENTLY INCARCERATED OFFENDERS
WHOSE CONTROLLING OFFENSE IS OBTAINING CONTROLLED DANGEROUS
SUBSTANCE BY FRAUD (63-0002-0407)
(PGM=SPRPT2, LIB=39)

9:06 TUESDAY, SEPTEMBER 2, 1986

SENT	FREQUENCY	CUM FREQ	PERCENT	CUM PERCENT
1	3	3	6.122	6.122
2	8	11	16.327	22.449
3	10	21	20.408	42.857
4	7	28	14.286	57.143
5	6	34	12.245	69.388
6	2	36	4.082	73.469
7	3	39	6.122	79.592
8	1	40	2.041	81.633
10	4	44	8.163	89.796
15	2	46	4.082	93.878
20	2	48	4.082	97.959
30	1	49	2.041	100.000

ATTACHMENT 5

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA)
)
Plaintiff,)
)
vs.)
)
William Edmond Scheer Jr.)
Defendant)

No. CRF- 85-4555 8cts
No. CRF- 85-5246 4cts
No. CRF- 86-865 7cts
No. CRF- _____

REQUEST OF DEFENDANT

FOR

SENTENCE MODIFICATION

I hereby request the District Court of Oklahoma County to review my sentence(s) in the above referenced case(s) for modification purposes.

This request is made in respect to Title 22, Section 982(a) and the provisions set forth therein.

X William R. Scheer, Jr.
Defendant

MEDIATION RESULTS

Victim: Representative Paul Woodward Offender: William Schaus

Representing: Drug Recovery Case Number or DOC Number: 151789

120 J.R. ✓ NIO Probationer ____ NIO Incarc. ____ Presentence ____

Offender Convicted of Obt. CDS by Forged Script

Parmeters/Issues to Initially be Discussed: Com Sec - Drug Counseling

Participants in this session: William Schaus/Tracey Schaus
Paul Woodward

Restitution:

Victim Compensation Fund:

Incarceration/Supervision:

Offender's Employment:

DOC Form No. 062052 (Rev.)

Counseling: One year (long-term) in-patient at available site followed by aftercare as directed by the inpatient site.

Community Service: 600 hours of community service to be completed within four years of release

Services to Victim:

Other:

Special Emphasis:

Mediation Acknowledgement

We the undersigned hereby acknowledge this form accurately describes our intentions and hopes for this Sentencing Plan. We understand this Plan is not effective unless approved by the Court or proper authorities.

We further state the results on this form are the product of our work in our Mediation Session and that no part of these results is being imposed on us by the Mediator assigned to our case.

William R. Roberts Jr.
(Offender's Signature)

5-27-86

Brian Woodward
(Victim's Signature)

DEVELOPED THROUGH MEDIATION

SPECIALIZED OFFENDER ACCOUNTABILITY PLAN

FILED IN THE DISTRICT COURT
[illegible] COUNTY, OKLA.
JUN 25 1986
TOM [illegible] Court Clerk
DEPUTY

120 DAY JUDICIAL REVIEW

NAME: Scherer Jr., William Raymond

COUNTY: Oklahoma

OFFENSE: Att. Obtain C.D.S. By Forged Pres.
Obt. C.D.S. By Forged Pres.
Att. Obt. C.D.S. By Forged Pres.
Obt. C.D.S. By Forged Pres.
Obt. C.D.S. By Forged Pres.
Att. Obt. C.D.S. By Forged Pres.

CASE #: CRF 85-4555 Ct 1
CRF 85-4555 Cts 2-8
CRF 85-5246 Ct 1
CRF 85-5246 Cts 2-4
CRF 86-865 Cts 1-6
CRF 86-865 Ct 7

SENTENCE: 10 years

DOC#: 151789

DOB: 6-25-48

DATE: 3-14-86

JUDGE: Blevins

PROSECUTING ATTORNEY: R.Wintory

DEFENSE ATTORNEY: R. Evans

Sentences run concurrently.

(120 J.R.) SENTENCE MODIFICATION

Period of Incarceration: Two (2) years

Period of Community Commitment: Eight (8) years

MEDIATION:

On May 27, 1986 a Mediation was conducted between this offender and Paul Woodward, Clinical Director of Drug Recovery Inc., who represented the interest of this plan that were agreed to by mediation parties include: 600 hours of community service to be completed within four years of release.. Long term (minimum 1 year) in-patient drug counseling followed by Aftercare as directed by the in-patient center.

CONDITIONS OF INCARCERATION/COMMUNITY SUPERVISION:

Security:

Mr. Scherer's current level of security is Minimum. This level of security will change in accord with the Department of Correction's objective classification system.

During the period of community commitment Mr. Scherer must serve a minimum of six (6) months under intensive supervision which will include the observation of a curfew, the submission of urine samples on demand, and frequent face-to-face contacts with a probation officer at home or at work.

Restitution/CSSP:

Restitution is not a factor in this case.

Please see the attached Rules and Conditions of Probation for court related costs.

While on community commitment Mr. Scherer will perform 600 hours of community service work to be completed within 4 years of release. Within 72 hours after release from prison the offender shall contact the District Resource Office at 236-2727 Ext 549 to initiate this sanction. A part or all of this sanction can be waived if the District Resource Officer determines that suitable community service will not be available.

Reporting Instructions:

Within 72 hours after release Mr. Scherer must report to the Probation and Parole Office at 4545 N. Lincoln Blvd., Suite 39 in Okla. City.

NAME: Scherer Jr., William Raymond DOC #: 151789 CASE #: CRF 85-4555
Cts 1-8
CRF 85-5246
Cts 1-4
CRF 86-865
Cts 1-7

ADDITIONAL SANCTIONS: (Continued)

1. I will report to my Probation and Parole Officer within seventy-two (72) hours of release from the penal institution.

2. I will refrain from violating any city, state, and federal laws.

3. I will not be in the possession of marijuana or any other narcotic drugs other than those legally prescribed by a physician. I will not consume alcoholic beverages, nor will I frequent or go on the premises of a place where alcoholic beverages are consumed, including taverns, beer parlors, clubs or group meetings, or parties where alcoholic beverages are served.

4. I will report in person to my Probation and Parole Officer according to the instructions provided by my Officer, and I will allow him or her to visit me at my home, work, or other convenient place.

5. I will immediately report in person, in writing, or by telephone any changes in my address or employment and I will also immediately report any new arrests.

6. I will not lie or misrepresent the truth to any Probation and Parole Officer or Department of Corrections Staff member.

7. I will not leave the State of Oklahoma without prior written approval of my Probation and Parole Officer. I will not move from the State of Oklahoma without the prior approval of the Court. I will not leave my county of residence for longer than a twenty-four (24) hour period without prior approval of my Probation and Parole Officer.

8. I will not associate with persons on parole or probation, or persons with criminal records, nor will I communicate with inmates of any penal institution, except members of my immediate family, unless my Probation and Parole Officer gives me permission because of my work or other good reasons.

9. I will not own, carry, be in the possession of, or travel in a vehicle containing a firearm belonging to me or anyone else.

10. I understand that I must be employed full-time or actively seeking employment, unless I am physically unable to do so. Full-time attendance in school or in-patient treatment will substitute for employment. I will not voluntarily terminate employment without seeking in advance advise from my supervising Probation and Parole Officer.

11. I will pay probation fees at the rate of $10.00 per month starting the 1st day of the second month from sentencing or release from the penitentiary.

12. If restitution is a factor in this case, I will abide by the schedule as outlined in the sanctions.

13. A. I will pay Court Costs in the approximate amount of $ 380.00 within 6 months after release, this includes VCA.

B. I will pay VCA in the amount of $

C. I will pay a fine of $

My signature hereon evidences that I have read and understood the above listed rules and conditions.

Witness Signature

Offender

CONDITIONS OF INCARCERATION/COMMUNITY SUPERVISION: (continued)

Programs:

While incarcerated, the offender must satisfactorily participate in:

Rational Behavior Training
Substance Abuse Education
Interpersonal Communication Skills Training

In addition he must complete a minimum of year in-patient drug counseling at Drug Recovery Inc. 1501 N.E. 11th, Okla. City or other long-term in-patient facility.

While on community commitment offender must satisfactorily participate in Aftercare Drug Counseling as directed by the in-patient center.

Employment:

While on community commitment the offender must maintain full-time employment or provide satisfactory evidence that offender is actively seeking employment. Educational or training programs which have been approved by the probation officer may partially or totally offset this requirement.

Residence:

While on community commitment, Mr. Scherer must initially reside at 1224 N. Utah Ave., Oklahoma City, Okla. This residence is suitable and available.

RATIONALE:

Recommendations for periods of incarceration and community supervision are based on the Iowa Risk Assessment, an instrument utilized to determine the offender's potential violence and general risk to the community.

Program recommendations are based on our assessment of the severity of the offender's needs, upon program availability, and upon the time available for program completion.

Intensive Supervision is an effort to help the offender to adjust to the community during the critical period immediately following his release from prison.

Community Service Work, and a contribution to the Victim's Compensation Fund are ways for the offender to be accountable for his actions.

ADDITIONAL INFORMATION:

The offender's failure to comply with the rules and regulations of the Department of Corrections and with the conditions of this plan will result in more severe security requirements. Failure to comply with the conditions of community supervision will result in a recommendation to the court that his probation be revoked. The sanctions of this plan are in addition to any otherwise imposed by the court.

Offender is currently incarcerated at the John Lilley Correctional Center. He is currently enrolled in Daily Living Skills Training. He has no misconduct records as of 6-19-86. No detainers on file.

Offender has received a copy of this plan.

Prepared By: Cathy Chapman DATE: 6/20/86
Reviewed By: Daniel E. Lee DATE: 6-20-86
Approved By: Daniel E. Lee for Les Crabtree DATE: 6-20-86
Hearing Date: mor

Disposition: Approved _____ Objection Filed: N/A _____
Rejected ✓ D.A. _____
Modified _____ (120 JR Only) Offender _____ (NIO)

Elaine Dingman 7-15-86
Court Representative Date

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
JUL 1 1986
Clerk
DEPUTY

ATTACHMENT 6

THE STATE OF OKLAHOMA,

Plaintiff

vs.

WILLIAM RAYMOND SCHERER, JR.

Defendant.

NO. CRF-85-4555 Ct. 1
CRF-85-4555 Ct. 2-8
CRF-85-5246 Ct. 1
CRF-85-5246 Ct. 2-4
CRF-86-865 Ct. 1-6
CRF-86-865 Ct. 7

ORDER DENYING APPLICATION FOR MODIFICATION OF SENTENCE, WITHOUT NECESSITY OF HEARING

This matter comes before the Court, pursuant to the provisions of 22 O.S. Sec. 982(a), on the application of the defendant named above for modification of specialized offender accountability plan

Upon a careful review of the court file and the facts relating to this case, the Court concludes that a hearing is not necessary and that the requested modification should be denied.

IT IS THEREFORE ORDERED BY THE COURT that the defendant's application for modification of sentence is denied.

Dated this 26th day of June, 1986.

JUDGE

Court Clerk
By July Deputy

00043
Rec'd 11-10-8

REMARKS TO THE U.S. SENTENCING COMMISSION
November 5, 1986
by
The Honorable John L. Kane, Jr.
United States District Judge
District of Colorado

I thank the distinguished members of this commission for permitting me to make these few brief comments. These comments are personal to me. I have not sought nor have I received authority to speak on behalf of my fellow judges. Before proceeding further, I think it might be helpful for you to know something about me so you can form a basis for evaluating my remarks.

I was appointed to the bench in December, 1977 and am now completing my eighth year as a district judge. I have not kept an accurate record of the sentencings I have imposed, but a rough estimation is that I have sentenced approximately five hundred people during the past eight years. My sentences have ranged from a suspended fine to 325 years imprisonment. I am sure that in any given sentence, someone has disagreed, but I am pleased to say that I have never been reversed for imposing an illegal sentence.

Before coming to the bench, I served first as a prosecutor in a state district attorney's office, then as the first public defender in the State of Colorado and then as a private practitioner. I appeared in countless cases ranging from petty offenses to death penalty cases. As a judge I believe I have the reputation of sentencing on the high side in violent crimes -- especially where weapons and injuries to the person are involved and average for this district and circuit on other offenses.

The pivotal role of judge under the present system, however, is in deciding whether to sentence or place on probation and

whether to revoke probation. I am unaware of any records kept on this basis and can only guess as to my performance. My guess is that I am low in granting probation because I frequently use the split sentence option presently available and that I am very high on revocations. I hope this information is helpful.

Now to get down to business, I want to express my complete and enthusiastic support for appellate review of sentences. As long as sentencing remains a judicial act -- and I will have more to say about that later -- there is no reason at all why such a critical judicial function should not be subject to review. The greatest danger, however, in the use of guidelines such as those contained in this commission's preliminary draft is that the entire process will become trivialized to the point that it advances cynicism and insults justice.

I think it would be a foolish waste of your valuable time for me to review the statute and guidelines with you. I am aware of practices which exist in some other jurisdictions which lend at least a little credence to some of the basic assumptions of your proposed guidelines. Nevertheless, I implore you to consider that national uniformity has never been a wise solution to any sectional problem.

I can tell you without fear of contradiction that the judges of this district do not engage in the practices which you seek to correct: We do not participate at all in so-called plea bargaining. We never will agree to a certain sentence or even a range of possible sentences in advance of a plea. We do not and never will permit probationers to work as informants, paid or otherwise. We do not sentence anyone without receiving a fully documented and prepared pre-sentence report from our outstanding probation department. We do not accept pre-sentence reports from other jurisdictions without review and verification by our own department. Our Local Rule of Practice 202 A provides that no plea agreement involving dismissal of charges will be accepted by

the court unless written notification of the agreement is received at least 10 days before the Monday of the week of trial. Further, the judges of this district have refused to accept plea agreements which they have deemed unconscionable or which have attempted to circumscribe the court's sentencing authority. Finally, cases are not bandied about. The judge who takes the plea or tries the case is the same judge who imposes the sentence.

The commission's assumption that "unwarranted disparity" is due to judges not being provided with adequate guidance has absolutely no support from this federal district. The judges of this district are fully advised of local, regional and national sentencing patterns and statistics. Further, our judges are fully advised concerning the entire factual background of charges which are dropped or admitted. In that regard, I have previously presented you with two opinions I have written on individual sentences. I now submit a third, United States v. Jones, 475 F.Supp. 1152 (D. Colo. 1979) which shows you the practice and level of expectation regarding sentencing in this district.

It is easy to substitute slogans and catch words for hard thinking. Frequently, the use of slogans is also fraught with peril. I think a perfect example of this sort of dangerous practice is found in your use of the term "Real Offense Sentencing System." In all candor, it is not a system at all. It is a shallow attempt to put qualitative and sometimes ineffable concepts into quantitative terms. The use of such pseudo-scientific numerology may look good on paper or fit nicely into some computer's data base, but it has no more validity to it than does astrology. In fact, astrology is less harmful because it has less pretense. By what sort of legerdemain does the offense of theft have a "base value" of 2 while trespass has 6 and advising tax fraud has 10?

I respectfully suggest that the proposed guidelines do not

seek uniformity of sentencing, but rather the elimination of the judicial function from the sentencing process. If that indeed is the intent, if relegation is the purpose, then why not say so and take judges out of the process entirely. On the other hand, any judge should be able to look a defendant straight in the eye when imposing sentence and tell that unfortunate soul exactly why the precise sentence is being imposed. I don't believe the defendant, the victim or society deserves anything less and I make it a point to do so in every case.

Sometimes it is necessary to include consideration of charges that have been dropped into the sentence computation. Other times, in fact more often, it is not. Should the sentence in any way be affected by the idiosyncratic judgment of an assistant United States Attorney? Your proposed guidelines do just that.

Has this commission seriously considered the ludicrous nature of sentencing under these proposed guidelines? Am I supposed to say, "You are sentenced to 22 months because that is the top of the guideline range. Actually you scored 28, but I am giving you the benefit of the doubt because there were no points for transactions outside the United States and I have made an adjustment by using the cooperation multiplier because you testified against your brother and sister-in-law." Isn't it better to say, "You were charged with fifteen counts in the indictment and plead guilty to one. The prosecutor in your case always files multiple counts and he always gives away the farm by accepting a plea to one count. The facts, not the counts in the indictment, show that you not only committed the crime charged in Count I of the indictment, but you conspired with others to do it and what is more serious, you inveigled a young person with no previous criminal record to join with you."? Quite frankly, I suggest the latter makes more sense and better justice.

.I will not burden you further. Suffice it to say that I would never follow any guidelines which give reductions for

guilty pleas or reward cooperation with the prosecution. I shall avoid comment on the obvious constitutional infirmities which envelope such provisions. I will simply say that it is not a judge's function to be a sub-station of the prosecutor's office any more than it would be to become a branch office of the public defender. I believe that to engage in such rationing of justice is blatantly unethical and only a fool or a scoundrel could do it.

Since at least the 17th Century, the law in this country has been regarded as an expression of the common consciousness of the people. As judges, we must strive to know and express, not our own sense of right and certainly not some supercilious formula for uniformity, but rather the felt convictions of our culture. That is what this country stands for. These guidelines simply do not help nor will they achieve that end. I suggest you abandon entirely the concept of numerical values and replace it with qualitative guidelines which will assist the judge in the search for justice, however lacking in the lock-step of uniformity such a search might be.

Sentencing should be both historical and systematic. A judge should be required to articulate the inner coherence of the sentence handed down. To relegate this judicial function to a clerical application of arbitrarily determined arithmetic points is neither historical nor systematic.

00044
rec'd 11-12

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PROBATION OFFICE

DORIS HALLIDAY-CANNATA
CHIEF PROBATION OFFICER

U.S. COURT HOUSE
450 GOLDEN GATE AVENUE
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SAN FRANCISCO 94102
415-556-0200
FTS: 556-0200

777 SONOMA AVENUE
ROOM 3-24
P.O. BOX 3469
SANTA ROSA 95402
707-525-4288
FTS: 450-4288

PLEASE REPLY TO:

Santa Rosa, CA

October 7, 1986

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

Dear Sir:

I recently went through several presentence reports I had authored and completed many coding instruments at the request of the Sentencing Commission. If my memory serves me correctly, there were no specific questions with regard to alcohol abuse or alcohol related offenses. There may have been some general questions with regard to drug abuse. However, I feel strongly that alcohol abuse is one of the major causes of crime in the United States and respectfully suggest that more attention should be given to that area of offenders' backgrounds.

I appreciate very much the obvious excellent efforts the commission is making with regard to developing sentencing guidelines.

Yours sincerely,

Oliver J. Deegan

OLIVER J. DEEGAN
U. S. Probation Officer

OJD:la

rec'd 11-12-8

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
UNITED STATES COURTHOUSE
CLEVELAND, OHIO 44114
216-522-4992

DAVID S. PERELMAN
UNITED STATES MAGISTRATE

October 30, 1986

United States Sentencing Commission
1331 Pennsylvania Ave., NW
Suite 440
Washington D.C. 20004

ATTENTION: Guidelines Comments

Gentlemen:

As a Magistrate I have no involvement, other than on a preliminary basis, in felony cases. Consequently, I think it appropriate that I restrict my comments to those aspects of the proposed sentencing guidelines as to which both my past and anticipated future experience would be pertinent.

I am concerned with §B321(1) which designates as a factor demonstrating "acceptance of responsibility" that the defendant "voluntarily surrender[ed] to authorities before charges are filed or an arrest warrant issued".

Rule 9(a) of the Criminal Rules provides that "Upon request of the attorney for the government the court shall issue a warrant for each defendant named in" an indictment or information (emphasis added). In the course of taking grand jury returns I have had a number of instances in which warrants were requested by the government, and upon questioning as to the basis for such request the Assistant United States Attorney, while offering an explanation, took the position that under Rule 9 the court had no discretion to deny the request. I believe that in light of the Rule's mandatory language that position is correct.

If that is so, the prosecution would have the capability of unilaterally negating one of the criteria for acceptance of responsibility by requesting a warrant whenever it chose.

This contingency could be avoided if the language of the guideline was revised to speak to surrender before an arrest warrant was executed. Even that narrower proviso, however, could present a problem, in that often a defendant for whom a warrant is issued is unaware of the indictment prior to arrest and, therefore, does not have the opportunity for voluntary surrender.

There are two avenues open to meet this latter problem. First, the proviso regarding voluntary surrender could be deleted entirely. Alternatively, it could be amended to read "volunatarily surrendering to authorities before charges are filed or an arrest warrant is issued, or if arrested upon a warrant and released upon bond by compliance with all term and conditions of release prior to sentencing".

I would also note that the guideline does not specifically reflect that it is intended to apply to a warrant of arrest issued upon an indictment or information, and not upon a preliminary complaint. This could be clarified very simply.

The next area covered by the proposed guidelines upon which I would like to comment is one which most of my criminal practice has involved---failure to file income tax returns. With regard to that offense, proposed guideline C212 provides that "The base offense value is eighty percent (80%) of the offense value for Tax Evasion specified in §C211". Section C211, in turn, calls for a range of base offense values based upon the tax deficiency involved.

In my experience, in most cases the charging document in a failure to file case does not allege a claimed deficiency. Rather, it asserts a figure alleged to have been the defendant's gross income, demonstrative of the obligation to file.

In some instances the trial proofs and/or presentence report will contain a deficiency projection. If the defendant is primarily a wage earner the accurancy of that projection is usually fairly reliable. However, if the defendant is self-employed or has substantial investment income, or if there are significant potential deductions, the reliability of such projection diminishes. I have had two or three cases in which the defendant pled to failure to file, acknowledging income beyond the statutory minimum while vigorously contesting the government's estimate of income and tax liability, with no deficiency having been formally assessed by I.R.S.

Under such circumstances I perceive potential difficulty in determining an appropriate base offense value in certain cases, short of trying a civil tax proceeding in the context of sentencing.

Considering that the maximum sentence which may be imposed for violation of the statutes within the ambit of §C212 is one year, any deficiency in excess of Five Thousand Dollars ($5,000.00) would, applying the eighty percent (80%) ratio, result in a base offense value beyond the one year maximum. That being so, the majority of the deficiency ranges specified, and based upon my experience the majority of cases as a practical matter, would fall outside that maximum.

Under these circumstances, I believe that in order to avoid the potential uncertainty which could arise by keying the base offense value for failure to file to the deficiency element it would be better to specify a fixed base offense value of either ten or twelve for the substantive offenses.

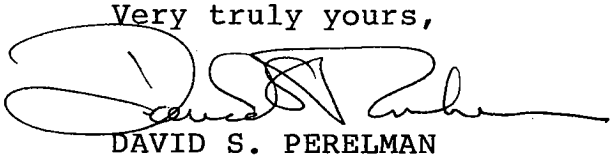
Another consideration often presented in failure to file cases is that there is a pattern of conduct extending over many years, and the indictment or information contains multiple counts. Query, whether the same values should be applied to each count or whether there should be deminishing values representing a recognition of the related nature of the continuing offenses. I would favor a reducing table, perhaps .8 for a second year .6 for a third and .5 for four or more.

The final subject I would like to comment upon is that of fines, but in the limited context of tax-related proceedings.

Generally, the defendant in a tax case, evasion or failure to file, faces the prospect of a substantial future liability, and in many instances that debt cannot be liquidated during a reasonable probationary period. Imposition of a substantial fine on top of such obligation would represent an exercise in futility if subordinated to collection of the taxes, or would conflict with the collection of the taxes by I.R.S. if given priority.

Consequently, if a guideline is to be formulated on fines, I believe it should incorporate as an element for consideration the defendant's probable future financial liability to other arms of government, such as for collection of taxes or imposition of monetary penalties in correlative civil proceedings.

Very truly yours,



DAVID S. PERELMAN
United States Magistrate

DSP/sg

0006
Rec'd 11-12-8

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF GEORGIA
PROBATION OFFICE

October 30, 1986

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DANIEL C. LANFORD, JR.
CHIEF U.S. PROBATION OFFICER

ROBERT C. HUGHES, JR.
SUPERVISING PROBATION OFFICER

U.S. Post Office & Court House
P.O. Box 13, MACON 31202
912-752-8106

REPLY TO Macon

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

Dear Judge Wilkins:

This is in response to your memorandum of September 29, 1986, which included a copy of the Preliminary Draft of Sentencing Guidelines. I have reviewed the Sentencing Commission's Preliminary Draft, and the following comments are provided. The essence of these written comments will be provided in oral testimony at the regional hearing scheduled for October 29, 1986, in Atlanta, Georgia.

Initially, I express my appreciation for the opportunity to testify at the regional hearing in Atlanta and to be a part of what I consider a most historical event. I must commend the Sentencing Commission for its efforts thus far as I note that you have continuously demonstrated a "spirit of cooperation" and a desire to make the guidelines practical and workable tools by soliciting input from all concerned persons on a continuing basis. I feel that you have accurately quantified many practical factors within the guidelines that United States probation officers consider in crafting sentence recommendations for District Courts. As developed thus far, I feel that all United States probation officers are capable of understanding and applying the guidelines, and I appreciate the fact that the Commission has not engineered an unworkable, complex tool.

My comments are of a general and specific nature. There has been no intention to "fly-speck" these guidelines, however, I will endeavor to raise points for reevaluation and reconsideration by the Commission. Hopefully, I have focused on practical aspects of the guidelines from the United States probation officer's perspective.

Generally, I concur with the three features as outlined in the guidelines, Modified Real Offense Sentencing, Generic Offense Descriptions, and Use of Numerical Offense Values. I feel, however, that we face a problem concerning Real Offense Sentencing in its pure form, and I argue that the Court should be able to consider all aggravating factors although they may not be related

to the specific offense or conviction. The Courts have, in my opinion, historically done so and should be allowed to do so in the future. A specific example of this problem exists in Example No. 3 on Page 16 of the guidelines. The Commission will note that this example concerns an offender who was indicted for two separate bank robberies in a two-count Indictment. The bank robberies were unrelated and were not in furtherance of a conspiracy. As part of a plea agreement, Count 2 was dismissed on the Government's motion, and the offender plead Guilty to Count 1. The offense value for the bank robbery in Count 2 is not added to the offense value for the bank robbery in Count 1 because the second bank robbery is not related to, resulting from, or done in furtherance of the first, therefore it is not considered in sentencing the offender.

It is my argument that if we want to assure that sentences reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public, the Court must consider the nature and circumstances of the total offense behavior as found by a preponderance of the evidence. This would, in my opinion, include dismissed cases. It is recommended that possibly a "general type adjustment" for additional criminal behavior be added to the base offense value or the Court be allowed to use the additional criminal behavior as justification to go above/outside the guidelines.

I concur with the Offense Conduct Sections of the preliminary guidelines as outlined in Chapter 2. The structure and narrative of this chapter combined with the Statutory Index to Guidelines as provided in the appendix, in my opinion, enables the probation officer to compute the base offense value easily. The Specific Offense Characteristics and Cross References are simply and clearly stated and are easily applied to yield proper adjustment. There is one area in this chapter, however, which is of concern.

Your attention is directed to Part D, Chapter 2, concerning offenses involving drugs. It is here that I request that the Commission reconsider several factors. First, however, I must state that I agree with the Commission's decision thus far to deal with the total weight of the controlled substance versus the purity question. In my opinion in recent years, we have become so concerned with the purity of an illegal substance that we forget the fact that we are dealing with a controlled substance. I disagree, however, with the base offense values with regard to both cocaine and marijuana.

As noted in the guidelines, an offender who imports two kilograms of cocaine is labeled with a 180 base offense value. The offender who imports 20,000 pounds of marijuana is assigned a base offense value of 108. It is my argument that importation of 20,000 pounds of marijuana is a much more sophisticated and demanding process in many instances than the importation of two kilograms of cocaine. This amount of marijuana suggests to me the use of extensive contacts, a potential criminal organization, equipment to include boats and/or airplanes, etc. I feel that the base offense value should be higher for this offense.

It should also be recognized that as the table now stands, an offender who imports 100 kilograms of cocaine receives the same base offense value as

the offender who imports two kilograms of cocaine. I agree that cocaine represents a serious harm to society and request that the Commission allow the base offense value to remain very high for cocaine offenses. However, I feel more graduation is needed on a scale concerning cocaine. I quite frankly don't think it would be beyond an offender to recognize that if he is going to bring two kilograms of cocaine into the United States illegally, he might as well bring as much as possible as he would not be subjected to any greater base offense value.

Chapter 3 of the guidelines captures many offender characteristics Courts and United States probation officers have considered in the past. At this point, I draw the Commission's attention to post-offense conduct as outlined in Chapter 3. It is noted that the guidelines focus heavily on an offender's criminal history specifically his prior record as well as the offender's financial situation. It is critical that the United States probation officer conducting the presentence investigation glean accurate, verifiable information. To assist the United States probation officer in obtaining information of this nature, it is recommended that an aggravating adjustment (as described on Page 123 in the guidelines) be attached to an offender who, as proven by a preponderance of the evidence, furnishes false information to a United States probation officer for presentence investigation purposes.

I concur with granting a positive adjustment for an offender's accepting responsibility as well as cooperating with authorities. I feel there is a problem, however, with granting an offender credit for each of these positive adjustments as, in my opinion, it seems to in effect penalize an offender who has no further knowledge of other criminal activity as he is unable to cooperate. For example, consider an offense involving several local bank officers to include the bank president and a bank teller. The teller occupying a position at the "bottom rung of the culpability ladder", when apprehended receives the positive adjustment for acceptance of responsibility. As a result of her position in the criminal organization, however, she knows of no further involvement by any other bank officers. On the other hand, however, the bank president when apprehended receives a positive adjustment for acceptance of responsibility and as a result of his outlining for authorities the entire offense and everyone's role and his agreement to testify against all codefendants, receives an additional positive adjustment for cooperation. I feel this creates some disparity and unfairness.

It is recognized that investigative authorities must obtain cooperation of offenders to enable the system to operate. As a result of this cooperation, offenders must be rewarded to some degree. It is recommended that an offender should be given credit for only one of the two positive adjustments, i.e. acceptance of responsibility or cooperation, however, not both.

Concerning the criminal history score as outlined on Page 127 in the guidelines, it is my understanding that a probation officer, when computing a criminal history score for the guidelines, is to assume that an offender served one-third of the maximum term imposed. The offender, however, shall be allowed to rebut this assumption and establish the fact that he served

less time. It is my opinion that this method creates fertile grounds for controversy, and I anticipate that the probation officer will be given the responsibility to establish the actual facts concerning this matter. Prison records are the only documents available to accurately portray this information. Unfortunately, these records are not maintained locally, and within this district, to obtain these records collateral requests would have to be forwarded to the Northern District of Georgia on a continuing basis. It is noted that the Commission's rationale in this method is stated within the guidelines as "time served results from a judicial assessment combined with assessments made by prison and parole officials". This is not the case in the State of Georgia as at the present time, time served is related to many factors including prison population within the state system.

It is recommended that the Commission consider using number of prior felony convictions or actual length of sentence imposed in computing the criminal history score. In any case, however, it is recommended that the score be computed on some document or record which can be obtained through local courts quickly and easily.

It is also noted in regard to the criminal history score that points are to be afforded a defendant if the offender produces a positive urine test during "pretrial release period, presentence period; or if the defendant is determined to have been a drug abuser of certain drugs within ten years of the current conviction". This statement suggests that to be uniform, all offenders must be tested during the pretrial release period or presentence period as this is the only way to eliminate disparity from being created by probation officers. Personally, I don't think this is what the Commission actually means as certainly there is no need to test every offender. It is recommended that clarification be provided at this point and wording be considered requiring urine tests if probable or reasonable cause exists, for example, prior drug use as documented by criminal record, information from family members concerning prior drug use, physical signs, etc. I also recommend that this adjustment be considered for past alcohol abuse as I feel we should admit that alcohol is in fact a drug.

It is somewhat difficult to address the exact nature and impact of "other offender characteristics" upon appropriate sentences. It is suggested, however, that these characteristics, for example age, employment history, education, etc., may be considered as aggravators or mitigators to sentences imposed by courts. They may also serve as reasons for the court to go to the upper or lower limits of the established guidelines. Certainly, these characteristics must be considered in crafting appropriate special conditions of probation pursuant to Title 18, United States Code, Section 3563(b).

The guideline table as depicted on Page 140 of the draft guidelines appears, in my opinion, to be a workable method of converting sanction units into imprisonment. It is suggested that courts impose a sentence that satisfies all sanction units, and in effect, I agree with Option 2: Permissive Satisfaction of All Sanction Units as outlined in the guidelines. It is suggested that the Commission consider assigning sanction unit weight to other alternatives, for example supervised release, community service, fines, etc., and let the court formulate a plan using its discretion to satisfy total sanction unit count.

The conditions of probation and supervised release as outlined in the guidelines appear to be workable, sensible, and enforceable. There has been controversy within the United States Probation System within recent years concerning goals and philosophy of probation supervision as well as the role of the United States probation officer. I think it is at this point that the Commission is defining the goal of probation as the protection of society and the probation officer's role as to insure compliance with the conditions ordered by the court. It is suggested that goal and role of the probation officer be portrayed as such in the guidelines.

I appreciate the fact that the Commission has established "minimum standards of compliance" for the conditions of supervision. Personally I feel this will eliminate past disparity in the area of supervision and feel that it provides direction to probation officers in a historically "gray area". I concur and endorse the three categories of violations as outlined in the preliminary guidelines: lesser violations, serious technical violations, and serious violations. I recommend that the probation officer exercise complete discretion until the situation reaches the serious technical stage at which time the court should be made aware of the offender's behavior.

I also concur with the sentences for revocation as outlined on Page 155 of the guidelines. Further, I recommend that an offender not receive sentence credit for time spent under probation or supervised release supervision upon revocation.

Chapter 6 of the guidelines raises some interesting issues. In examining the material as presented concerning criminal fines, we find two sensible approaches to this sentencing alternative. The Proportionate Approach which is punitive in proportion to the offender's financial resources would tend, in my opinion, to eliminate disparity. The Harm-based Deterrent and Compensation Approach follows the theory that fines should compensate society for any wrongdoing and deter further criminal activity. I feel that both approaches may be appropriate to individuals and organizations and should be used according to particular situations. Each approach offers the court valid methods of imposing fines, and I recommend that both approaches be retained for courts to exercise. I encourage the Commission to assist United States probation officers to avoid becoming collection agents. Certainly, the responsibility exists to monitor fine payments, etc.; however, we feel that the present system of collection of fines is appropriate.

Concerning the area of plea agreements, we share Congressional concern that plea agreements not be used to circumvent the sentencing guidelines. Unfortunately, it is suggested that much of the public harbors a negative image of plea bargainning, and certainly this image will continue to erode if plea agreements are used to circumvent prison sentences. Judicial scrutiny must be a part of any negotiated plea, however, the court must avoid any action which would tend to be viewed as a usurption of the prosecutor or defense attorney's role. Hopefully, the court would retain an impartial objective role insuring that veracity and candor concerning the offense behavior are standards applied in evaluating whether an agreement was acceptable according to the letter and spirit of the sentencing guidelines. Of grave concern is the issue that plea agreements may be used to present

to the court for application of sentencing guidelines a "sanitized version" of the offense. This, in effect, would provide the defendant an avenue of manipulation to escape accountability for his actions. It is therefore recommended that the court should not be bound by any stipulation of fact especially if the court becomes aware of additional facts. The court should also have the power to require the United States Attorney's Office through the United States Probation Office to disclose all facts concerning the case. The rule should also require that if there has been any stipulation of fact between the prosecutor and the defense, then the court, the United States probation officer and others should be put on notice.

It is also noted that the sentencing guidelines do not make a distinction between application to felony or misdemeanor cases. It should be noted that in many districts to include the Middle District of Georgia, presentences are prepared for United States Magistrate Court/Misdemeanor Cases occurring at several military reservations. It is anticipated that these reports may have to be expanded somewhat and procedures modified to apply the guidelines to these misdemeanor cases. It is also my opinion that United States Magistrates possibly are not aware of the impact of these guidelines on misdemeanor cases.

These guidelines pose significant changes to the United States Probation System. Hopefully, the Sentencing Commission through the Judicial Conference, Federal Judicial Center and Administrative Office will recognize these changes, and our system may begin planning for the implementation of these guidelines immediately. To assist us in the application of the guidelines at a local level, it is suggested that a "hotline" be established when the guidelines become effective to enable us to quickly clarify any dispute concerning the guidelines.

As noted in the draft, the Commission views the guidelines as quite dynamic, continuously changing to reflect changing philosophy, criminal behavior, etc. It is recommended that any change be made as simple as possible. As mentioned earlier, the simplicity in the application of the guidelines is greatly appreciated. Probation officers at the local levels will be required to explain these guidelines to sentencing judges, defense attorneys, United States attorneys, defendants and other significant persons.

I appreciate the opportunity to respond to the preliminary draft of the guidelines and look forward to seeing you in the near future.

Sincerely,

Robert C. Hughes Jr.

Robert C. Hughes, Jr.
Supervising U. S. Probation Officer

RCHjr/tla

00047
rec'd 11-12-8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CHAMBERS OF
HAROLD D. VIETOR
CHIEF JUDGE
UNITED STATES COURTHOUSE
EAST FIRST AND WALNUT
DES MOINES, IOWA 50309

October 31, 1986

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 440
Washington, D.C. 20004

Attention: Guidelines Comments

Re: Preliminary Draft of Sentencing Guidelines

Dear Commission Members:

Many more prisons will have to be built if these guidelines are adopted in their preliminary form. Hardly anybody will qualify for bench probation and in most cases sentences will be significantly longer than those presently imposed. In my opinion the guidelines are too harsh.

I think the sentencing ranges are too narrow. From sanction units 30 on up, the low end of the range is only about 20% to 25% below the top end of the range. That is not much discretion. The U.S. Attorney has far more discretionary power by using or not using a cooperation certification.

I believe the guidelines should in some fashion (other than allowing the judge in his discretion to sentence at the low end of the range or high end of the range) take into account the defendant's motive for committing the crime. I think there is a whale of a difference between a bank president who embezzles $30,000 to wager on the football games or play the commodities market and an underpaid bank teller or assistant loan officer who embezzles $30,000 to provide her daughter with needed but uninsured surgery and medical treatment. I think the sentences imposed on such people should reflect that difference.

I believe that the purity of drugs should be a factor in drug cases. Under the guidelines, the sentencing range is the same whether the purity of cocaine, for instance, is 90% or 20%. Purity is a pretty good indicator of how high up the distribution ladder the defendant is.

I do not think it is appropriate to add to the base offense value of a drug offense if it took place within 1000 feet of an

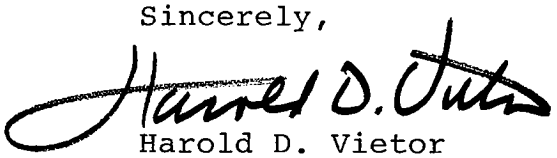
elementary or secondary school. Most drug transactions take place at night and would have absolutely no connection whatsoever with any nearby school or its students.

I do not understand why the property table for fraud offenses is far more lenient than the property table for theft offenses. I think the same table should be used for both types of offenses.

I do not think units should be added for psychological injury for offenses not involving the person, and I do not think units should be added for psychological injury other than "extreme psychological injury." If not so limited, we are going to have a lot of disputed hearings about whether the victim was temporarily emotionally upset.

In respect to criminal history and definitions, I think a distinction should be made between a prior sentence for a crime committed before commission of the subject offense and a prior sentence for a crime that was committed after commission of the subject offense. Several times I have sentenced defendants for a crime committed four or five years ago where they had, in the interim and before prosecution of the subject offense, been sentenced for a crime committed after commission of the subject offense.

Sincerely,



Harold D. Vietor

Janet
00048
rec'd 11-12-86

SENTENCING GUIDELINES

COMMENTS OF WILLIAM A. BROCKETT*

Baseball is not batting averages as much as it is Pete Rose rounding third. The Sentencing Commissions' effort to quantify sentences is laudable; unfortunately, it draws too much on science, and ignores art.

The present system is unsatisfactory -- sentences can be and are too disparate for identical offenses. But, the proposed revision has been fine-tuned too much. There is no "platonic ideal", matching an exact offense with an exact sentence. Below, I list my major comments on the Draft, followed by comments and questions on some of the specific proposals.

MAJOR COMMENTS

1. Many of the offenses result in jury determination, (beyond a reasonable doubt) of a base offense of modest "score", followed by the judge determination (by a "prepondefance") of facts

* Former Federal Defender (1971-1974), San Diego and San Franscisco. A current Curriculum Vitae is attached.

which create a sentence far longer than that mandated for the base offense. This is probably unconstitutional, and certainly a mistake. For instance, the drug provision, §D211, permits a judge to determine the quantity of a controlled substance by a preponderance of the evidence. §D211 shows sentences varying between four and fifteen years, depending upon the quantity of schedule I-II substance..

2. The tail should not wag the dog. A jury should determine the base offense, which should represent the largest part of any sentence. A judge ought to be able to aggravate or mitigate that, but not by so much that the jury trial becomes meaningless. The Commission should study the current determinate sentencing system in effect in California. It is complicated, but, generally provides for three levels of sentence for each offense. In addition, specific factors may bar probation, or require extraordinary circumstances before probation can be granted. It is too intricate, but better than the Preliminary Draft.

3. The Draft will eliminate the "split sentence." Many judges find this to be one of their most effective sentencing tools. The split sentence, of course, allows the judge to impose (for example) a five-year sentence, and suspend all but six months. This imposes a sure short punishment on an offender, while holding over the offender the prospect of a much longer sentence of he or she violates probation.

4. The Commission should provide with the Preliminary Draft a table of comparative sentences, showing the present sentence range and median sentence for each of the offenses covered in the Draft. This data is readily available. It has value:

a. The existing median sentences reflect the accumulated wisdom of federal judges.

b. Comparing the present sentence range to the proposed sentence range will assist the Commission and the public to determine the impact of the Proposed Draft. If, for example, the new proposed sentences tend to be twice as long as current sentences, new prisons will be badly needed.

SPECIFIC COMMENTS

Some of the comments below may flow from a misunderstanding of the Draft. The Sentencing Commission has understaken a wide-ranging and ambitious overhaul of the existing system. I have prefered to cover as much territory as possible, rather than worry about errors.

1. How will judges create a record for appeal on findings made by a "preponderance of the evidence?" Does the defendant have the right to put on live witnesses and cross-examine?

2. If the Commission adheres to its plan of imposing long enhancements for factors related to the base offense, it should consider requring the jury to determine those factors by special interrogatory. This is done all the time in civil cases.

3. §A212. If additional points are to be added to a base offense because a victim is a government official employee, it should be necessary for the offender to have been aware of the official status of the victim. Otherwise, the additional three years, which makes sense only as a deterrent, does not deter.

4. §A213. Ten years (120 points) is a very long sentence for voluntary manslaughter. Generally, the homicide sections are fuzzy about the distinction between first degree murder, second degree murder, and manslaughter.

5. §A214. Is an automobile "a dangerous device", for adding points to the base offense value?

6. §A221, assault and battery, with a base offense value of six, has a "preponderance of evidence" add-on of 60 for

use of a deadly or dangerous weapon during and in relation to any crime of violence of drug trafficking crime. A jury should make this determination, not the judge at sentencing. See, for instance, current 18 U.S.C. §2113(d).

7. §A231, provides the same base offense value for criminal sexual conduct by aggravated force or coercion. They should be distinguished.

8. §A234. A defender who has only attempted criminal sexual conduct should not have the identical base offense as someone who has completed the act. In my experience a "mere attempt" often occurs because the offender did not have sufficient criminal intent to carry out the offense.

9. How does the Draft treat Aiding and Abetting? Is the person who drives the getaway car responsible for a murder carried out inside the bank being robbed?

10. §A242. Does "abduction or unlawful restraint" include child stealing by a parent? If so, although serious, the crime should not be treated the same as other kidnappings.

11. §A251 (psychological injury). Should a high point value be added to the base offense value for high psychological harm to victim, if the victim is particularly unstable (a variation

on the "egg-shell" victim of law school tort classes).

12. §B251. The property table, and accompanying commentary, do not spell out whether wholesale or retail value is determinate.

13. §C212. Why have a base offense value of 6 for failure to pay taxes in a situation when no tax was due?

14. §D211. A base offense value of 12 is too high for less than one pound of marijuana, particularly when the quantity gets down to four onces or less. This should not be a federal concern. From my experience in the early 70's, federal authorities have prosecuted "importation" of one ounce quantities of marijuana. A high base value for this minor offense encourages overcharging, and pleas of guilty by innocent persons. This would include passengers of vehicles containing controlled substances put there by the driver.

15. §E243. I had not known the broadcasting of obscene language was a criminal offense. The potential for abuse is apparent.

16. §E252. Are the base offense values for transporting prostitutes multiplied by the number of prostitutes? This is existing law.

17. Section F211. (Fraud and Deception). 18 U.S.C. §1001 (False Statements) and 18 U.S.C. §§1341-1343 (Mail and Wire Fraud) are among the most commonly charged federal offenses. The behavior implicated in these statutes is so varied that the idea of providing specific base offense values is bankrupt. How does the Commission intend to treat multiple mailings? At present, a single offense which results in four or five separate mailings can result in four or five separate counts of "mail fraud."

18. The Draft ought to take into account some sort of "entrapment factor." In my experience, about 5% of all non-violent crimes are initiated or encouraged by law enforcement officers. Neither jurors nor judges are fond of these cases. Some recognition should be made of the different character of offenses which are initiated or encouraged by law enforcement agents.

19. §K223. The Commission should not lump together those who have <u>used</u> and those <u>carry</u> a firearm. The first is far more serious. And, the offender who carries a loaded weapon should be treated differently than one who carries an unloaded weapon. Bank robbery is one of the most common federal crimes. Anyone with experience in this area knows the phenomenon of the "pathetic bank robber." Many bank robbers are carried out by marginal street persons, who are captured in or near the bank. Such individuals should be treated differently than the hardened professional.

20. §A311. The court should not determine multipliers for a person in a position of control over criminal enterprise. This should be a jury issue. The same is true with other offender characteristics spelled out in Chapter 3.

21. §B321. This permits a judge to reduce a sentence by 20% for an offender who "recognizes and sincerely accepts responsibility for the offense." This will encourage crocodile tears, and Moscow Show Trial confessions. No man is a villain to himself. Defendants should not be required to overstate their repentance in order to wring some sentence reduction from a judge who will evaluate their performance. And, the reduction available for assistance to prosecutors is best dealt with by conventional methods in place now, including immunity, reduced charges, and prosecutorial recommendations at sentencing.

22. §§C322-C323. Agravated sentences for priors should not be decided by a "preponderance of other evidence."

23. §A415 (Home Detention). This sounds susceptible to abuse, but is worth trying.

24. §A416. The standard for restitution is too vague to mean much.

25. §A422. This section deals with imposing concurrent or consecutive sentences. The Commission should focus on some problem areas. They include multiple charges of transportation, importation, and possession with intent to distribute narcotics, three separate offenses often brought against those who bring drugs across the border.

26. Chapter 6, Part A, discusses fines. In my experience, fines are of little importance to anyone except in "business crime" areas. In those areas, which include defense contract, anti-trust, and government fraud, the court should ought to be able to impose fines of more than $1 million, when appropriate. The Commission should focus on the efforts ~~to~~ convicted organizations have made before prosecution to prevent the offense which occurred. Present law permits a corporation to be convicted of a crime, even though it specifically instructed its employees in writing not to commit the acts resulting in the crime. The sentencing process should mitigate punishment substantially if a company has, in good faith, tried to prevent wrongdoing.

The Sentencing Guidelines, represent hard work by intelligent and dedicated individuals. In an ideal world, criminal offenses would be tried, with no plea bargaining at all. This will never happen.

We need something better than the present system. I applaud the efforts of the Sentencing Commission, but believe that the proposed solution is a step backward. Presently, facially wide variance in sentences is limited by the use of "salient factor scores" by the Parole Commission. This system should be left in place, but improved by grafting onto it the better ideas generated by the Sentencing Commission.

Bill Bright
11/11/86

MISC-GUIDE

00049
rec'd 11-12-

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November 3, 1986.

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004
Attention: Giudelines Comments

Sir/ms:

I plan to submit written comments of several aspects of the Sentencing Guidelines. Prior to doing so, I will like to receive additional information as to the following:

1. How were the specific base offense values in chapter 2 of the guidelines draft developed?

   a. Was it through a formula, specific criteria, empirically after considering sentencing practices, or arbitrarilly?

   b. How was the offense scale, used in assigning specific values to offenses developed? Why was a range of 0-360 utiliezed?

   c. How were the criteria of actual harm and deterrence used in developing the base offense values measured and scaled?

2. In chapter 3 of the Guidelines, please indicate how were the specific numerical factors to be used in adjusting the base offense value in accordance to mitigating and aggravating factors developed?.

3. What criteria were used in developing the sentencing guideline range in Chapter 4?

a. How was the imprisonment scale developed?

b. How were the specific sanction units converted into terms of imprisonment?

Please rush the information requested. Thanking you in advance, I remain.

Cordially,

Dora Nevares-Muñiz
Professor of Law
and Criminology

00050
Rec'd 11-12-86

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November 3, 1986

David I. Tevelin, Esq.
Deputy General Counsel
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Dear Mr. Tevelin:

In connection with the public hearing in New York City on October 21, I enclose ten copies of my written testimony.

Needless to say, I, along with many others, look forward to learning what happens as a result of all your public hearings.

With many thanks for your patience.

Yours sincerely,

Harold R. Tyler, Jr.

Enclosures

STATEMENT OF HAROLD R. TYLER, JR.
BEFORE THE UNITED STATES SENTENCING COMMISSION
October 21, 1986
New York, New York

My name is Harold R. Tyler, Jr. and I am a member of the firm of Patterson, Belknap, Webb & Tyler in New York City. From 1962 to early 1975, I was a United States District Judge in the Southern District of New York. From 1975 to early 1977, I was the Deputy Attorney General of the United States.

The Commission has my gratitude, not only for inviting me to participate in the hearing today, but, as well, for the opportunity for informal discussions with certain of the Commission staff and members here in New York on August 8, 1986.

In essence, my statement or testimony breaks into several parts. First, I wish to focus on broad concerns dealing with the approach of the current draft of sentencing guidelines for the federal courts. Second, with a clear relationship to the broader points, I want to address, as the Commission has invited, certain probation issues suggested by the current draft. Third, I wish to respond to the Commission's suggestion that there be public comment on the proposed fine considerations as outlined in Chapter Six of the current guidelines draft.

I.

Despite recognition of the obvious thought and work, not to mention the innovation, demonstrated in the current draft, I continue to have serious reservations about its basic approach for the reasons and along the lines to be set forth briefly hereinafter.

As I read the current draft, it appears to be built on the basic assumption that every element of harm that can be possibly measured should constitute not only a "base offense value" leading usually to a prison commitment but also in many cases to an increased term by use of a multiplier. I doubt that there is practical and moral validity to this approach. An easy illustration of this doubt can be stated by presenting the question of whether or not an individual who evades certain amounts of taxes is necessarily deserving of more imprisonment than a person who evades lesser amounts. The same point can be made with respect to securities laws violations where the securities issue in question is of greater or lesser dollar amounts.

As an important corollary to this point, I am uneasy about the frequent use of multipliers to enhance and mitigate punishments. Whether one assumes a factor deemed by the Commission to merit either enhancement or mitigation of punishment, there is a serious likelihood of unfairness in multiplying the base offense score by the value assigned to that factor.

Because the proposed scheme set forth in great detail in the current draft mandates specific and precise determination of every factual aspect of the criminal conduct of the offender, my principal concern is that ascertainment of relevant facts will lead to significant and unfortunately unintended results. Obviously, one result will be that sentencing courts will be obliged to hold many hearings to find the facts. This is so if only because there will be factual disputes which must be resolved. If one assumes that the great bulk of criminal cases will end up by means of guilty pleas, those pleas will become litigated matters at sentencing hearings. If it is anticipated that such hearings can be avoided by stipulated versions of the facts worked out by prosecutors and defense counsel, I fear that another problem will arise in that prosecutors in particular will be given excessive authority to structure sentencing in the federal courts. For this and other reasons, discretion of the judges will be severely limited in any event, but more so because of the possibility that sentencing responsibility in the last analysis will go to the lawyers, particularly the prosecutors, under this proposal.

In general, there is the clear likelihood that judicial discretion will be so severely curbed because the end result will be more inflexible than Congress may have contemplated. Hence, I would argue that the Commission should consider ameliorating the present specific assignment of specific values to a multitude of factors, which amelioration, of course, would mean the prospect of modest increases in disparity. Accepting this as so, I have always understood that Congress contemplated that disparity cannot and should not be totally eliminated; rather, I believe that Congress intends the Commission to come up with a system which eradicates gross disparities which exist in present federal sentencing.

Finally, I continue to think that the proposed complexity of the system at the very outset as embodied in the current draft will create too many loopholes for error in application of the guidelines with resultant challenges to sentences, not only in the district courts but also in the courts of appeal.

II.

Perhaps understandably, the most glaringly sparse section of the current draft on Sentencing Guidelines is that dealing with probation. See pages 143-144. That section does no more than cite the present statutory provisions in the United States Code dealing with that traditional sentencing alternative. If one considers the "guideline table" for translating "sanction units" into sentences, three pages earlier at page 140, it seems clear that in many if not most cases, probation will not be a realistic or viable alternative for sentencing under current federal statutes and the proposed guidelines -- even of first defenders. In short, the very precision of the current draft approach leads to inflexibility -- i.e., a rigid requirement of some imprisonment in almost every case.

Without extended discussion, a possible step to ameliorate the rigidity of the proposed system with a concomitant structured use of probation as a sentence alternative is that recommended heretofore by Judge Jon O. Newman in his letter to the Commission dated September 3, 1986 at page 3, paragraph 2. There, Judge Newman suggested that the Commission consider altering its approach to aggravating and mitigating factors by letting the sentencing judges assign values to such factors from within a range to be prescribed. Recognizing the problem that the statutorily permissible guidelines range of 25% under the statute could be considered to be exceeded, the judge has suggested, sensibly in my view, that a reasonable construction of the statute by the Commission would be to announce that it construes the 25% latitude to apply to the relationship between the top and bottom of a range appropriate for a crime and thus accord the judges discretion to assign values above and below the 25% range for stipulated aggrevating and mitigating factors. Following that approach in respect particularly to the probation alternative could allow more leeway in the system and thus provide structured criteria for probation in appropriate cases, which, as I view the calculation table at page 140 of the current draft, is not presently feasible.

III.

In Chapter Six, the Commission in the current draft invites comments on proper approaches to fines, particularly in light of the 1984 legislation of Congress. See e.g. 18 U.S.C. 1, 3571 and 3572. The Commission seems to reason that Congress by its 1984 enactment intends fines to be a more effective sanction or sentencing alternative. The Commission argues that under previous federal law, judges eschewed fines because of their view that the statutory maxima for fines were too low to punish or deter.

As a former sentencing judge under pre-1984 law, I seriously doubt that this was the major reason why judges eschewed fines in most cases. Even under the old statutory maxima, it was my experience, and I believe that of most sentencing judges, that the majority of federal offenders were and are unable to pay fines of any significance if only because their economic or financial status is such that fines would do more to penalize their dependents and families than achieve any objective of punishment. Thus, I strongly suspect and urge the Commission to consider the probability that increased fines under the 1984 legislation really may not help much, except with respect to a relatively limited group of comparatively wealthy white-collar offenders and major organized crime figures.

I recognize that both Congress and the Commission understand that there is a problem with the ability to pay fines. See 18 U.S.C. 3572 (a). Indeed, the Commission states and discusses two alternative approaches to fines, the first of which is styled the ability to a pay approach. On the other hand, the second proposition discussed by the Commission is denominated the "harm based deterrent and compensation approach". Although both approaches are worthy of consideration and discussion, they do not in my opinion get to the real point. In considering these approaches, the Commission should not ignore the prospect of guidelines which permit significant fines of certain classes of offenders in lieu of commitment, in whole or in part, where (1) the offender can afford to pay without serious penalties being imposed upon his dependents, (2) the offender is of the type who likely will be deterred by the prospect of paying serious fines and (3) where imprisonment does little to protect the public or punish more effectively than the imposition of a heavy fine. In my judgment, this approach can be achieved without violation of the specific criteria for fines set forth by Congress in Section 3572 (a) of Title 18 of the United States Code.

In conclusion, I boldly suggest to the Commission that it recommend to Congress that the initial guidelines proposal to and accepted by Congress be considered as discretionary as opposed to mandatory for a reasonable "trial period" of at least one year. With the experience gleaned from such a period of time, the Commission will be permitted to reconsider its guidelines for final approval by it and the Congress. In making the suggestion, I recognize the possibility that offenders sentenced during the "trial period" may attack their sentences once new guidelines are made mandatory; such attacks in our courts in all probability may be lesser in number and difficulty than sentence hearings and related litigated proceedings under the present proposals of the Commission.

00057
rec'd 11-12-

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHAMBERS OF
HUGH H. BOWNES
JUDGE

FEDERAL BUILDING
55 PLEASANT STREET
CONCORD, N. H. 03301

November 4, 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:

I want at the outset to compliment you and the Commission for bringing an imaginative and innovative approach to one of the most difficult problems with which judges have to grapple, sentencing. During my nine and one-half years as a district judge, I attended at least three seminars devoted exclusively to sentencing. There is no question that determining fair and just sentences for convicted felons has and will always be a difficult task for conscientious judges. Because the philosophy of sentencing changes to reflect shifts in public attitudes, I believe that the approach of judges to sentencing should be reviewed and reexamined periodically. The Commission's guidelines are important not only as a sentencing tool but because they have forced the Federal Judiciary to rethink and reexamine the basis for and approach to sentencing.

I am one of the few federal judges who always believed that there should be appellate review of sentencing. Determining how long a person should be incarcerated is the most important decision a district judge makes. To deny review of such a decision denigrates and belittles the error-correction function of the appellate court. The statute and guidelines have imposed appellate review of sentencing, some would say with a vengeance. That, however, is a burden that, in my opinion, appellate judges must shoulder if there is to be true justice in sentencing.

I now turn to specific comments. First, as I think you have learned from the hearings you conducted, the sentences used in the guidelines are too high. Subject to statutory restraints, I think your maximums should be

based on the average sentences given, not served, over the past five years. If these figures are not available, then I suggest taking the statutory maximum and reducing it by one-half.

Second, I suggest that the guidelines explicitly state that if a person pleads guilty, the sentence will be reduced. I am referring to a naked plea of guilty. I realize that this raises a constitutional problem. It also reflects what a great number of judges are actually doing. I think that a guilty plea deserves some reduction. We will certainly never know if this is constitutional if judges continue to utter reasons that mask the basic reduction factor.

Third, a Rule 11 plea should prevail over the guidelines. I realize that this will mean that in many instances the prosecutor can eliminate a "real" sentence by reducing the charges to which the defendant pleads. I do not see how this can be avoided without changing Rule 11 or ruling that the goal of the guidelines--modified real sentencing--preempts Rule 11. I think this would be a mistake. Since the prosecutor has the sole authority to initiate a criminal prosecution, he/she should be given full authority to negotiate a plea bargain. The only exception would be if the plea was bought or the prosecutor was incompetent.

Fourth, I do not think offender characteristics should be assigned values and factored into the sentence. I refer specifically to "Acceptance of Responsibility," "Cooperation," and "Criminal History Score." I think the sentencing judge should take all of the statutorily enumerated characteristics into consideration, 28 U.S.C. § 994(d), but should be given complete discretion as to how they are applied. Under the modified real sentencing approach of the Commission, the sentencing judge's discretion is already limited. I think it a mistake to further curtail his/her discretion.

I except from this the assignment of values to "Role In The Offense" and "Post-Offense Conduct." These are not really "Offender Characteristics," but conduct directly bearing on the crime. These two categories should properly be assigned values as factors in the sentencing determination. I think they should be included in Chapter 2, not Chapter 3, of the guidelines.

Let me close by saying that, regardless of what the fate of the guidelines is, the Commission is to be commended for the effort it has expended and the thought it has given to one of the most important problems facing our society.

Yours truly,

Hugh H. Bownes

HUGH H. BOWNES
United States Circuit Judge

00052
rec'd 11-12-86

Thomas R. Brett
Judge

United States District Court
Northern District of Oklahoma
333 West Fourth, Room 4-508
United States Courthouse
Tulsa, Oklahoma 74103

November 4, 1986

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

Dear Judge Wilkins:

The first sentence of the U. S. Sentencing Commission guidelines preliminary draft states:

> "Presently, judges in our federal criminal justice system are provided little guidance when confronted with the complex issue of sentencing a convicted offender."

If that sentence is meant to say that federal courts have little in the way of mandatory sentencing guidelines, it is a correct statement.

The undersigned believes considerable helpful information and guidance is provided the court to assist in sentencing by the Department of Probation. The Department of Probation furnishes the court with a fairly comprehensive report concerning the prosecution's version, defendant's version, prior criminal record, defendant family data, marital, education, employment, health, and financial condition. From such information the Probation Officer provides an assessment, a plan of supervision, parole guidelines, and a recommended sentence.

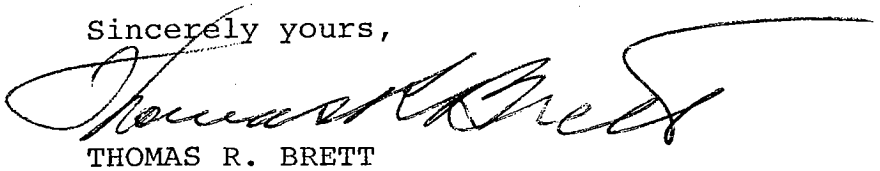
The Probation Officer's recommended sentence (confinement and/or probation) correlates with national norms within the Department of Probation relative to the particular offenses. This guidance is of invaluable assistance to the court, and followed in most instances.

Because of the excellent guidance of the Department of Probation to assist the court in sentencing, to say federal judges "... are provided little guidance when confronted with the complex issue of sentencing...", is a misleading statement.

The political dichotomy is between the assurance of mandatory terms of confinement versus the broad range of sentencing discretion now given the court followed by the Parole Commission's inflexible guidelines and release after serving one-third of the sentence. The virtues of each are debatable.

Significant disparity in confinement sentences does cause credibility problems within the justice system. However, it is important that criminal defendants be viewed by the sentencing judge in the context of their particular factual situation and background. Seldom are two cases precisely alike. There is virtue in consistent penalties only where the relevant facts and considerations are similar.

Sincerely yours,



THOMAS R. BRETT

0003 3
Rec'd 11-13-86

WRITTEN SUBMISSION

OF

ROBERT C. BONNER
UNITED STATES ATTORNEY
CENTRAL DISTRICT OF CALIFORNIA

BEFORE THE

UNITED STATES SENTENCING COMMISSION

ON

NOVEMBER 18, 1986
AT SAN FRANCISCO, CALIFORNIA

Mr. Chairman and Members of the Commission:

I am pleased to have this opportunity to make some observations and perhaps some contributions to the critically important work of the Commission. The Preliminary Draft of the sentencing guidelines obviously represents the results of an extraordinary effort. I will attempt to address several aspects of the draft which are of particular concern to me.

MODIFIED REAL OFFENSE; EXPLICIT CROSS REFERENCES

While I concur in the modified real offense approach, I believe the Commission might consider a basic change. On page 17 of the draft the Commission notes that an explicit cross reference system has been adopted to determine conduct the judge shall take into account. I recognize the difficulty of developing a broader approach, which would allow the sentencing judge to consider all conduct and harms, and I believe the Commission has shown imagination and judgment in determining the recommended cross references. This approach as presently constituted would, however, foreclose adequate consideration of at least some highly significant factors in individual cases.

An example which would support my point is illustrated by the following situation. Two individuals are each indicted for bank robbery. The circumstances of the offenses are identical under

the guidelines and each has no prior criminal record. One of the robbers, however, committed the bank robbery as part of a crime spree in which all of the other offenses, including local armed robberies, were not federal offenses. In view of the federal prosecution, local authorities have decided to defer to the federal case and do not plan to prosecute on the local violations. The other robber is not known to have been responsible for any other criminal acts. The fact of the local crime spree should undoubtedly be relevant to the sentencing judge. Under the proposed guidelines, since it is not a cross referenced aggravating factor, the judge would seem to be foreclosed from considering it.

The Commission might wish to consider either of two possible remedial steps. The first would be to supplement the explicit cross references with a general list of aggravating factors which could be considered in regard to all defendants. The second would be to abandon the cross reference system entirely for a general list of universal application. I tend to favor the first alternative, inasmuch as the existing cross references appear to cover most situations.

SENTENCING TIED TO STATUTORY REFERENCE RATHER THAN UNDERLYING FACTS

The proposed guidelines appear to tie the sentencing ranges

to the type of statute under which an individual is prosecuted. The potential problem with such an approach is that limited charging possibilities frequently require a federal prosecutor to select a statute which provides a basis for federal jurisdiction, but not necessarily one which precisely describes the underlying wrong. Such charging limitations will bring about some uneven and inappropriate sentences under the proposed system which could be eliminated by a system requiring the sentencing judge to look to the type of violation presented by the facts and not the label on the federal charge.

An example of this would be the following:

An officer of a major corporation by means of a mail or wire fraud, embezzles $1,500,000 from his company. Under the guidelines, this would be considered a "fraud" offense because the prosecutor had to utilize the wire or mail fraud provisions to provide the basis for federal prosecution. The conduct underlying the offense (i.e., embezzlement) is more accurately characterized as a property offense.

If viewed as falling under the fraud category, the sanction units would appear to total 42 with a range of from 30 to 36 months. (24 for value, 10 for breach of fiduciary duty, 8 for more than one transaction, but only one victim).

If, as would be more appropriate, the crime was considered an embezzlement offense, the sanction units would appear to total 56 with a sentencing range of 44 to 54 months (2 for base offense, 6 for embezzlement and 48 for value).

READJUSTMENT OF BASE VALUES

Based upon a relatively limited review of the preliminary offense values, sanction units and guideline ranges, I believe that, by and large, reasonable and appropriate sentences result. This sentencing pattern will obviously be subjected to close scrutiny in the coming months, and my principal concern is that there will be a tendency to "waterdown" the values and resulting within guideline sentences. This occurred when the California legislature went to determinant sentencing, and I urge the Commission to resist this process. The Commission itself will have a continuing role and experience teaches that it is far easier to adjust downward if that becomes necessary.

There are at least some sentencing ranges which should be adjusted in the interest of fairness and appropriateness.

One example is presented by the assault and battery provisions. While the base value for assault and battery is only 6, if a dangerous or deadly weapon was used in relation to a crime of violence or drug trafficking 60 points are added to the base

value, and if the weapon was used to threaten an additional 12 units are added, totalling 78 sanction units and a guideline range of 66 to 82 months. This seems a reasonably fair sentence. On the other hand if a dangerous weapon is used to threaten in a crime scheme not involving narcotics or violence, such as a stolen property ring or fraud case, the total sanction units would appear to total only 18, with a guideline range of only 6 to 12 months. While there may well be a logical basis for treating drug trafficking and violence offenses with greater severity, this disparity is too great to be supported by any line of reasoning. The sanction units for the second situation should be readjusted upward. Assaults with dangerous weapons are far too serious to be treated as lightly as the preliminary draft recommends.

COOPERATION AND PLEA AGREEMENTS

Perhaps the two most difficult areas for formulating standards involve the highly intertwined problems posed by allowable credit for cooperation and the scope of plea agreements.

The three levels of cooperation consideration stated at page 125 of the draft are far too limited. They would prove to be too inflexible and inadequate from the point of view of sentencing judges, prosecutors, and defense counsel. More importantly, they would lead to unjust situations, at least in the context of the real world. Moreover, U.S. Attorneys sometimes need to be able to

provide greater incentives, short of non-prosecution, to induce cooperation. For example, an individual who was an active and even fairly important participant in a terrorist organization is convinced to cooperate with the government. His cooperation is vital since all efforts to penetrate the organization have been unsuccessful. Only his cooperation and undercover work will allow prosecution of the chief leaders of the terrorist group and prevent planned acts of terrorism. By cooperating, including working undercover, and testifying, the cooperative defendant subjects himself to not only immediate but permanent danger of retaliation, including death. Under the guidelines, this immensely vital cooperation could not reduce his sentence by more than 40%. The only feasible alternatives under the draft provisions might well be to either not prosecute the cooperating defendant or perhaps to allow him to plead to an inappropriate lesser charge, not representative of his conduct, which had a low maximum sentence. Neither of these alternatives is very attractive. Moreover, a maximum 40% reduction may well not be sufficient incentive for this type of cooperation.

If the essential format for crediting cooperation is retained it must be modified. B 331 might be altered to show a multiplication factor ranging from .7 to .8; B 332, might be changed to set a multiplication factor of .5 to .7; B333, relating to the most exceptional assistance, should be set in a range of from .3 to .5. This suggested pattern would show some crossovers

for the three levels, but would allow a tailoring which would take into consideration the seriousness of the violation and the length of the sentence without cooperation (e.g., a longer base sentence arguing for a higher percentage of reduction).

There are two alternatives which could be considered in regard to certification under this system: (1) the prosecutor would certify the category and the exact multiplier; (2) the prosecutor would certify the category and make a recommendation to the court concerning the multiplier.

The situation in regard to plea agreements, including those where cooperation is not a factor, poses even more difficult problems. A number of questions are set out at page 166 of the draft. I have a few comments on this issue:

(1) Broad discretion must be granted to the sentencing judge in determining whether a plea agreement is in accord with the letter and spirit of the guidelines. For example, the prosecution might concur in a recommendation of a sentence which might not be appropriate in regard to the gravity of the offense or the level of cooperation. It could be that the case in question, a long, complex fraud trial, has already been tried once and ended in a 9-3 jury, hung for conviction. The possibility for another hung jury and ultimate dismissal without a third trial would make it in the interests of justice to have a plea of guilty on the basis of a lesser sentence than if the case had ended in a jury verdict of guilty.

Another example would be the need to avoid a trial where a necessary witness, namely an informant, would be revealed which would jeopardize the successful investigation and prosecution of more significant cases and defendants involving the informant.

Both the foregoing situations might impel a U.S. Attorney to enter into a plea agreement specifying a below guidelines sentence. If there are appropriate reasons supporting the plea agreement, the sentencing court should not reject the agreement solely because it is not within guidelines.

(2) Charge bargaining would not appear to be substantially changed by the Sentencing Reform Act, except to the extent than overly inflexible sentencing standards might force prosecutors to turn to charge bargaining for various reasons, such as providing sufficient consideration to cooperating defendants.

(3) Prosecutors and defense attorneys should be able to stipulate to underlying facts and offender's characteristics, with the sentencing court free to accept or reject the stipulations. Prosecutors would be bound to avoid any stipulations which would clearly not be in accord with the facts or offender characteristics.

PRIOR CRIMINAL HISTORY

Prior criminal history is a highly relevant factor in sentence determination, particularly since criminal record is a predictor of recidivism. I am troubled by both of the proposed systems set forth in the preliminary draft, since their primary element is the length of prior sentences. These proposals would perpetuate the disparity of sentences which have existed both between and even within federal districts. Thought should be given to some proposal which would decrease this over reliance on sentence length and the complexity of determining the sentencing effect flowing from a prior criminal record.

One system which would correct these arguable flaws would be the following:

(1) Rate criminal record into four categories, namely: (a) minor criminal record; (b) moderate criminal record; (c) serious criminal record; (d) very serious criminal record.

(2) Ranges of multipliers would be considered by the sentencing court for each category: (a) minor, 1.0 to 1.2 multiplier; (b) moderate 1.2 to 1.3; (c) serious 1.4 to 1.5; (d) very serious 1.6 to 2.0. Note: A significant, 2.0 multiplier, should be available because a long period of incapacitation may be warranted for a defendant with a "very serious" criminal record.

(3) While the category and multiplier would largely be left to the sentencing judge, subject to review for abuse of discretion, some general guidelines could be provided, e.g., one felony conviction for a crime of violence or narcotics, placing the defendant in the serious category. In determining the category of a prior record, the sentencing judge should consider all clearly relevant factors, including the number of convictions, the nature of convictions, the sentences imposed, the age of the convictions, and work history.

One factor in the proposed system for rating a defendant's criminal history which seems to be misplaced is prior drug usage. While serious drug users are more prone to commit certain offenses, particularly bank robberies in this district, it is difficult to support an argument that the drug user deserves more severe treatment than the individual who robs a bank for sheer greed or to support an uncontrollable predilection for gambling. However, if the present offense and one or more prior offenses appear to be related to drug usage, this should lead the sentencing court to classify a prior record as serious or very serious. Again, commission of a crime to support a drug habit requires the court to consider a lengthier sentence because it may demonstrate the need for incapacitation. Even without a prior criminal record, if an offense is related to drug usage, the court should be able to consider this as an aggravating factor permitting an above guideline sentence.

DECAY FACTOR

I do not believe there should be an automatic decay factor. The sentencing judge should be permitted to consider the entire criminal record of a defendant. The system proposed in the preliminary draft could lead to uneven results, as may be seen from the following examples:

(1) Defendant #1 stole two cars in his early twenties. He received a sentence of two years. After his release, he maintained a good job history for seven years, until his employer went out of business. At this point he committed a theft from interstate shipment. His prior convictions would be counted under the present system.

(2) Defendant #2 perpetrated a major mail fraud at age thirty, defrauding his victims of $500,000 and received a sentence of two years. After his release he had a terrible, if nonexistent work history at legitimate jobs. Seven years after his release he commenced another ponzi-type fraud scheme, which proceeded successfully for four years, defrauding a large number of people of substantial money. At this point he is indicted and ultimately convicted.

If my interpretation of the "decay" policy is correct, defendant #2's prior record would not be considered, in contrast

to that of defendant 1. This result is completely illogical and should be avoided by any adopted system.

I believe that a defendant's entire criminal record should be subject to consideration and that a "decay" factor should be completely eliminated. It would be possible, however, to alleviate part of the problem created by the 10 year decay provision by considering when the criminal conduct which was the subject of the instant conviction commenced. In the example of the fraud defendant who operated for four years before apprehension, the period of the continuing violation should not be included in calculating decay, since he was not, in fact, crime free during that period.

Even this modification would not provide an adequate cure. If an individual was convicted of multiple burglaries, remained conviction free for the requisite 10 year period, and then was convicted of another burglary, there is a high probability that this professional burglar was continuing to commit burglaries in the intervening years. Certainly, the sentencing court should be permitted to consider the defendant's prior burglary convictions in categorizing his prior criminal record. The argument against a decay factor is strengthened by the fact that burglary, like many other crimes, is an offense with a very low solution rate. Likewise, there is a low solution rate for high level narcotics traffickers, professional con-men, receivers of stolen property

and other serious criminal violators. Accordingly, a lapse of more than 10 years between convictions should not preclude consideration of a defendant's prior record. In reality, the absence of a criminal conviction over 10 years simply does not reliably equate to a cessation of criminal activity.

OTHER OFFENDER CHARACTERISTICS

At page 137 of the Draft, the Commission mentions three possible methods for consideration of other offender characteristics, namely utilizing them in setting the sentence in the 25% range, considering them as aggravating or mitigating factors, and treating them as multipliers. If the basic structure proposed by the draft is retained, the simplest system would be to allow the judge to consider them in the setting within the 25% range. None of the factors listed, other than those already covered by the preliminary draft, appear to warrant consideration for sentences outside of guidelines. Further, the use of multipliers would needlessly complicate an already complicated system.

USE OF GUIDELINE TABLE

At page 141 of the Draft, an alternative to the use of the guideline table is proposed. Under this proposal the conversion rate from sanction units to imprisonment would depend on the

nature of the offense. I would strongly urge the retention of the guideline table. The nature and gravity of the offense is and can be given adequate consideration in determination of the sanction units and guideline ranges. The added complication of the alternative system would serve no useful purpose.

RULES OF EVIDENCE AND BURDEN OF PROOF IN SENTENCING PROCEEDINGS

While I concur in the goal of more uniform sentencing, it would impose an unworkable and intolerable burden on the federal criminal justice system if each sentencing evolves into a mini trial. Sentencing courts should not be restricted to the rules of evidence or to preponderance of the evidence standards in regard to the establishment of required facts underlying the sentence determination. As under the existing system, a court should be able to consider all relevant information, the defendant should be given the opportunity to rebut this information, findings should be required on disputed points, and the findings subject to review only for abuse of discretion.

Any system of sentencing must take into account all factors relating to the interests of justice, not only including fairness to the defendant, but the presently and predictably available judicial, investigative, and prosecutive resources. Every reasonable avenue of creating as simple a system as possible should be given careful consideration.

* * * *

In conclusion, I appreciate the opportunity to discuss some of the aspects of the draft. I am sure that the Department of Justice will provide the Commission with a far more detailed and complete analysis and commentary.

00053
addendum
11-13-86

U. S. Department of Justice

United States Attorney
Central District of California

RCB:ycg
(FTS) 798-2400

United States Courthouse
312 North Spring Street
Los Angeles, California 90012

November 13, 1986

Suzanne Conlon, Esq.
Executive Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Dear Suzanne:

This refers to my Written Statement forwarded to you on November 12. Unfortunately in my haste to get the statement back to you, I did not get a chance to review and correct pages 9-15. Enclosed please find revised pages 9-15. Please substitute these pages in the Written Statement I forwarded to you yesterday.

I look forward to seeing you in San Francisco next week.

Very truly yours,

ROBERT C. BONNER
United States Attorney

Enclosure

cc: William Landers, Esq. (w/encl.)

Substituted 11-24-86 gf

0005 P
rec'd 11-198

November 7, 1986

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004
Attention: Guidelines Comments

Sentencing Commission:

Please find enclosed my comments as to the Preliminary Draft that I received from the United States Sentencing Commission recently. I want to take this opportunity to thank the Commission for allowing me the opportunity to submit comments on the subject of sentencing throughout its hearings this year.

I also wish to commend the Commission for the on-going work it is accomplishing in this most difficult area of criminal justice. The Commission has gone a long way already in trying to ensure fairness in criminal justice sentencing. I was especially glad to see that the Commission will continue in this work, periodically reviewing the effectiveness of the final guidelines and revising them when necessary and in light of experience.

I welcome the opportunity in the future to submit comments or make suggestions in the area of sentencing and reformation of those convicted of offenses in this Country. Thank you again for allowing me to submit comments on the Preliminary Draft.

Continued success in your work.

Very truly yours,

Daniel Johnson, #274157
Ellis Unit 1
Huntsville, Texas 77343

DJ
cc: files
Enclosure

Comments On Chapter One: Introduction And Overview

1. Modified real offense sentencing. This writer does not disagree with the concept of modified real offense sentencing in principle. It is fair and should be expected that punishment should inher for all criminal conduct associated with any criminal transaction. There could be a legal problem however. The Supreme Court has always held that a defendant is to be imprisoned based on conviction beyond a reasonable doubt of the facts leading to that imprisonment and of the elements of the charged offense. Some of the cross-references, e.g. § B231 for example, appear to constitute substantive elements of an offense in reality. Allowing a finding in this regard by a preponderance of the evidence, assuming a general verdict by a jury at guilt or innocence, during sentencing, appears to lessen the burden of proof as to substantive elements of the offense. There could be a question of whether characterizing substantive elements as 'sentencing facts' would be permissible if such were challenged by review. If no such legal barrier exists then the concept of modified real offense sentencing would be practical, more efficient than the system currently in use, and would more fairly structure the sentencing process with the use of the crosss-referencing as proposed by the Commission. By looking at the proposed 'specific offense characteristics', again using § B231 as an example, it does appear that significant terms of imprisonment can be imposed wherein the base offense value offense is found beyond a reasonable doubt, by a general verdict of a jury, and specific offense characteristics scores or values substantially increasing punishment are found by a preponderance of the evidence.

2. The Commission's Commentary, at page 7 of the Preliminary Draft, states that rehabilitation is not to be accomplished through imprisonment but rather through educational and treatment programs that are conditions of probation or supervised release. The policy statement further limits rehabilitation as a sentencing consideration to minor offenses.

There are some practical problems involved when rehabilitation is not a significant sentencing factor and not began or carried on while the offender is imprisoned. We know, for example, that many crimes

are committed when the offender is a drug user, alcohol user in an addictive sense, or when the offender has a severe psychological or emotional problem that may not rise to the level of insanity. If not treated while in prison the drug addict, for example, may find ways to continue his or her habit while in prison. This is common knowledge in prison life. This activity not only affects the addict but it affects others around the addict, and in some cases may lead to other offenders using drugs that had no prior drug use history. The impact of this, in practical terms, is especially pronounced on first offenders, some of whom develop habits or other negative modes of behavior from other convicted persons in prison. Whether the problem be drug or alcohol related, psychologically based, etc., by merely incapicating the person for 'X' number of years, without any attempt to rehabilitate, can actually further reinforce negative bahavioral patterns and add new negative patterns of behavior with no countering, positive influences through rehabilitation programs. When this happens what sort of person do we have when the person is released after 'X' number of years, as most will be? Relying on post-imprisonment rehabilitative programs can have the effect, in practical terms, of trying to treat a condition that has progressed so far, or has been so aggravated by the onerous prison life and attendant influences, that the convicted person may not be amenable to such rehabilitation. In sentencing there must be the concern for incapacitation, deterrence, and just deserts, surely. But everyone concerned with criminal justice reform and progress must not act only to remedy present criminal activity in a way which could compound the problem in the future. If the matter of in-prison rehabilitation is ignored the problem is compounded, practically speaking, and society has a significant interest that this not occur. This is particularly true with first offenders, in all instances with the exception of the most henious crimes that take life or threaten the country's security for example. There should be a recognized concern for the offender's and society's interest in the on-going rehabilitation of the offender after conviction in the form of sentencing considerations.

Comments On Chapter Two - Offense Conduct.

1. This writer commends the Commission for the manner in which it has organized various offenses in appropriate groupings. Such organization will be effective in the actual administration of the modified real offense sentencing scheme.

In this chapter attention is directed to § A251, at page 34 of the Preliminary Draft, which addresses the subject of 'Psychological Injury' as a cross-reference to many base offense values. It is suggested that this element of harm be factored into the base values for the appropriate offense categories. It can be argued that every offense that is committed, practically, causes psychological harm to someone. There may be potential for abuse with this particular aggravating element in sentencing, particularly considering that a finding can be based on a preponderance of the evidence and lay testimony (for example victims, relatives) can be used to establish this element. Emotions and psychological considerations are difficult to measure in any case. It may be that most prosecutors will parade a number of witnesses before a sentencing judge (for example a victim and 3 or 4 family members) all of whom will give evidence of personal 'psychological injuries' to themselves, which may or may not be entirely objective. A prosecutor could come to use the same psychologist in each trial, for example, who the prosecutor knows is favorable to the prosecution in this regard and establish the required proof of such injuries. This has happened before and has been a concern to federal courts in the context of insanity defenses and testimonies used by state prosecutors from psychiatrists consistently used for this purpose. As this writer reads the commentary, at page 35 of the Preliminary Draft concerning psychological injury, we are talking about an additional term of imprisonment of from one to three years (see also guideline table, at page 140) for psychological injury per victim, times the number of victims as defined by the commentary, at page 35. So this is an issue of serious dimension in terms of additional imprisonment. Considering the difficulty of objective measurement of such injuries, and the potential for abuse, it is an injury which should be factored into the base offense rather than considered separately.

Comments On Chapter Three - Offender Characteristics.

1. Acceptance of Responsibility. The factors listed in the Preliminary Draft, at page 124, concerning acceptance of responsibility are good and relevant to sentencing. However, there are circumstances where an offender may accept responsibility for his illegal conduct which may be in addition to the factors listed in the Draft, and which conduct of acceptance may occur after trial and sentencing and may be legitimate. The circumstances surrounding any trial, if a case is tried, involves many considerations by the defeneant and even more trial decisions by his defense counsel. A defendant or his or her counsel has the right to put the government to its burden of proof beyond a reasonable doubt at trial on the merits. A defendant or his counsel may be of the opinion that the defendant is not legally guilty, for example. Some defendants may believe they are not guilty of the charged offense. Others, who know they are guilty and go to trial anyway may later (in some cases anyway), after conviction, be reformed in such a way as to make the person remorseful and lead the person to actual rehabilitation or regeneration. There should be a provision for reduction in sentence when objective considerations establish that the defendant has accepted responsibility, after trial and conviction, within a reasonable time after such conviction. It should be added in this context that many first time offenders are confused by trial proceedings, their own defense counsels, and truly fear the prospect of imprisonment, loss of family; and that a number of defendants are convicted on sufficient, but meager evidence. These are practical consideration that should not be entirely unrecognized in sentencing.

2. If there should be a disagreement as to whether a defendant actually cooperated in a manner as reflected in sections B 331-333, at page 125 of the Preliminary Draft, such a disagreement should be resolved by the District Judge. Any factor which affects sentencing should be resolved by the Judge if disputed. A defendant would have a liberty interest in the factors which go to sentencing.

3. The three-step approach to arriving at an enhancement for prior criminal convictions, see Preliminary Draft, at pp. 131-132, appears to be the easiest formula to utilize in this regard. It is suggested that two multipliers be used rather than one, however. If the current offense involves the same activity which previously resulted in a conviction and sentence a higher multiplier should be used than if the current offense is unrelated to previous illegal conduct. For example, given a base offense value of 30, the multipliers would be 2.50 if the present conduct is unrelated to previous conviction conduct and 3.50 if the present conduct was the same or very similar to previous conviction donduct. This may involve applying the appropriate multiplier to more than one criminal history (sub) score to arrive at a total, but repetitive illegal conduct is more serious than committing an unrelated act in terms of enhancing the sentence. And this may serve as more of a deterrence once the sentencing scheme became known.

One of the shortcomings in the criminal justice system is the fact that most defendants, particularly first-time offenders and those convicted for the first time, are not made aware by the courts or their defense counsels of the effect of enhanced sentences should the offender engage in future illegal activity. This fact should be made clear to all convicted persons by the courts, and counsels. Our high schools should include course material in criminal and civil justice, as an overview, for the general knowledge of all young people. Some deterrence would be served if the public generally understood the workings of the criminal justice system.

3. Concerning drug abuse as a consideration in sentencing, as discussed by the Commission at pp. 133-134 of the Preliminary Draft, it is suggested that item E, at p. 127, be restricted to those offenders who are known users of heroin or other hard drugs. There is no question but that hard drug use contributes to crime, both in and out of prisons. It is an onerous problem and wide-spread within prisons as well as in society. In the context of sentencing it should be mandatory that known drug users take part in in-prison drug treatment programs and continue in such a treatment program until a reasonable time period of drug use abstention is accomplished. This writer

could spend considerable time in this paper commenting as to observations, made in a prison context, of the wide-spread affects of drug use on both drug users and those who became drug users, and in the use of drug-like products which are used as substitutes for hard drugs. It is a problem that cannot be cured or even in some cases adequately controlled by imprisonment. The spill-over effect is of significant magnitude. The problem must be addressed in sentencing, but the emphasis should be placed on meaningful treatment for such persons rather that continued imprisonment per se without treatment.

4. Concerning 'Other Offender Characteristics' listed by the Preliminary Draft at page 136 the following comments are respectfully submitted:

a. If we are to base sentencing on the individual and his characteristics then a reasonable inquiry should be made to determine what, if any, root causes exist that probably resulted in the criminal activity. Where an abnormal emotional or psychological condition is reasonably apparent, the defendant should be examined by a competent psychologist/psychiatrist in the context of the criminal proceedings. The objective is to identify those defendants who can be salvaged and treated, and made productive citizens again, and treat such people. On the other hand, those who apparently consciously earn a livelihood from criminal activity, as evidence by a substantial pattern of such conduct and prior like convictions, should be dealt with more severely. A number of incarcerated persons should be incarcerated in prisons. A number of them currently imprisoned in prisons should have been confined in appropriate treatment centers and treated. Generally, the system as it now operates does not differentiate between the two. Mental and emotional conditions not rising to the level of insanity can temporarily suspend normal faculties of judgment within a person and manifest in criminal behavior of various sorts. When this occurs it is the few who are able to regenerate themselves. Keaving such people incarcerated, without treatment, serves no legitimate objectives in the long run. The same can be said of drug users, alcohol addicts. Everyone who is legitimately concerned about the betterment of the

criminal justice system and society's practical interests must be concerned with salvaging those offenders who reasonably can be rehabilitated/treated and returned to society as productive citizens and not prison-bred criminals. It requires more than reviewing a cold record to make informed sentencing decisions. Certainly, the system is faced with numbers of defendants which is increasinly high. But the long-run stakes are pretty high, too. Sentencing criteria can take these matters into affirmative account.

The comments made herein are not primarily based on theory or statistics. They are based upon observations of hundreds of incarcerated individuals in their daily activities, discussions with many such individuals which perhaps have revealed what ordinarily would not be volunteered to trial officials. It's little wonder that our misconceptions, as a society, and some well intentioned theoritical concepts are missing the mark in effectiveness. In light of all this this writer believes that the Commission has made great strides in the right direction, given the complexities of the over-all problem. It is this writer's position, then, that the characteristics pertaining to the mental and emotional make-up of the individual should be more controlling in the sentencing decision than characteristics evidence by vocational skills, previous employment, education, and age.

Comments On Chapter Four - Determining The Sentence

1. This writer agrees in principle with the 'guideline table' as presented in the Preliminary Draft, at page 140.

In the sentencing process the District Judge or Magistrate should be encouraged to make liberal use of 18 U.S.C. § 3553(b), as indicated at page 141 of the Preliminary Draft, in a mitigating as well as aggravating sense, should the Commission at this time decide not to further delineate in sentencing criteria the matters addressed at point 4., pp. 6-7 of these comments.

2. It is submitted that establishing a fixed amount of time which a particular offender must serve in prison, when such is imposed, based on category of offense, see Commentary, at page 141, is inappropriate and goes against the concept of indivudualized sentencing. The practical effect of such a policy also militates against its use. Once again, speaking of those offenders who reasonably can be rehabilitated and/or treated, continued imprisonment in the absence of a most henious crime serves to the detriment of the individual once successfully treated/rehabilitated and to the detriment of society. The idea of a term of imprisonment, combined with community confinement and community service is suggested. It is not the nature of the offense that should control the amount of times spent in prison, except in the most henious cases, but rather considerations as to the successful treatment and rehabilitation of the particular individual. If the offender is a recidivist he or she would spend more time imprisoned. This writer knows that it is very difficult, if not impossible for one who has not been imprisoned to guage the effect of imprisonment upon the individual. Here again, the concern is for those offenders who can be treated and rehabilitated and not keeping such people imprisoned to a point where the imprisonment experience adversely affects them, and destroys their economic and social viability in the process. Considerable discretion should be left for sentencing judges, or written into guidelines, to recognize these matters rather than imposing sanction units of imprisonment based solely on the nature of the offense.

3. The Commission's comments contained in part F, at page 169 of the guidelines, is certainly relevant to this writer's comments as to treatment of unusual aggravating or mitigating factors.

Certainly, extremely barbaric behavior by an offender should be considered an as aggravating circumstance going beyond the sentencing guidelines. Conversely, if the defendant has an identifiable mental or emotional disorder, treatable but not rising to the level of an insanity defense, this would be a mitigating factor warranting a departure from the normal guidelines. An example of this may be as follows: A married man with a family, who is gainfully employed all his adult life, who perhaps owns his home or is purchasing one, has a good educational background, age 40, suddenly commits a crime. No one was physically injured in the offense. The man is determined to have or have developed a mental disability, perhaps temporary in nature the root cause of which can reasonably be determined; and which is treatable. This may be an unusual mitigating factor. Another case would be perhaps where a husband or wife ends the life of his or her terminally ill spouse, and where there may have been an agreement between the two to do so or the spouse may have been in extreme suffering due to the terminal illness. This could be in some cases a mitigating circumstance.
Another case may be that of the chronically unemployed man who has a family. He steals food or money to purchase food for his children. This could be a mitigating circumstance.

Consistent with sentencing burdens of proof enumerated in the Preliminary Draft, these mitigating circumstances would be demonstrated to the sentencing Judge by a preponderance of the evidence. The sentencing Judge should be statutorily mandated to consider them when they do occur. A substantial sentence reduction should be allowed when this occurs, as reduction from the sentencing range as reflected in the Guideline Table, or probation considered in all such appropriate cases unless the defendant has a serious prior record.

00033
rec'd 11-19-86

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA
PROBATION OFFICE

Birmingham

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CHIEF PROBATION OFFICER

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November 5, 1986

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20044

ATTN: Guideline Comments

Dear Judge Wilkins:

I would like to commend the Commission for its exhaustive work with an almost impossible assignment mandated by Congress. The draft guidelines are comprehensive, with much greater detail than I anticipated. The complexity of the guidelines causes me concern about their eventual application to actual cases sentenced in Federal court.

As a part of my study of the guidelines, I have computed the sentences in some cases previously sentenced in our court and found that most defendants would receive some custodial sentence. I fear that the guidelines as presently drafted will significantly reduce the number of defendants placed on probation.

An overall observation is that guidelines need to be simplified and need to allow for more discretion on the part of the sentencing judges. My specific comments are contained on separate, attached pages. I appreciate the opportunity to comment on these guidelines that will significantly impact the work of U. S. Probation Officers.

Sincerely,

Oscar J. Stephenson, Jr.

Oscar J. Stephenson, Jr.
Supv. U. S. Probation Officer

OJS/th

Attachments

Chapter 1: Introduction and Overview

Section VII - Application of Modified Real Offense Sentencing.

In Example 6 of the examples of how modified real offense sentencing works under the draft guidelines, there seems to be an inconsistent application of these principles. In my opinion, the possession of a sawed-off shotgun definitely relates to the offense of conviction for distribution of cocaine. These weapons are considered standard items as an enforcement or protection tool in the drug business.

On Page 17 in this section, the Commission invites comment regarding the use of a specific rule allowing the sentencing judge to consider all conducts or harms. I believe such a rule should be used in addition to the explicit cross-references to allow greater judicial scrutiny in the determination of what conduct to consider in arriving at the overall offense behavior.

Chapter 2: Offense Conduct

Part A - Offenses Involving the Person

5. Psychological Injury

This is a particularly difficult area of sentencing for the judge to address. As indicated in Chapter 1, the judge now exercises broad discretionary power when considering this and other issues at the time sentence is imposed. The Commission has attempted to offer more explicit criteria for the consideration of psychological injury. However, when the court attempts to differentiate between extreme and significant injury using the definitions provided, there is still room for a great deal of interpretation. I foresee that defense attorneys will want the victim examined by their psychiatrist to rebut the Government's or court's psychiatrist. This also places an added burden on the victim. In this aspect of sentencing, the Commission has attempted to measure an area of human behavior that is elusive and almost impossible to define by a formula. I believe this is one area of sentencing that should be left to judicial discretion.

Part D - Offenses Involving Drugs

By eliminating the use of drug purity in assessing offenses involving drugs, the Commission has certainly made the job of a U. S. Probation Officer easier. However, it seems inherently unfair to the defendant to give the same base offense values to offenses involving 30% drug purity as opposed to the same gross weight involving 80% drug purity when this information is available. This has been a continuing problem with the Parole Commission guidelines, but at least the defendant was sanctioned based on how potent the drugs were as well as their quantity. I won't miss having to consider drug purity, but the Commission may want to reconsider this issue.

Chapter 3: Offender Characteristics

Part B - Post-Offense Conduct

2. Acceptance of Responsibility

This section overlaps to some extent the reduction for cooperation. In one sense, a defendant receives double credit or could for similar post-offense behavior. In the area of computation, it would be consistent to use a multiplier in this section the same as in obstruction of justice and perjury and cooperation. I am not sure why the Commission failed to apply more specific criteria such as 3%, 5%, 10% and 15% based on specific acts rather than the broader 20% range--unless this was to build in some judicial discretion. If probation officers compute most of these guidelines for judges to consider, it is going to be complicated to inform the judge in each case how much 2% would reduce the offense value as opposed to 7% or 13%--up to the 20% maximum.

3. Cooperation

In the area of cooperation, the criteria used are very specific and seem to strongly encourage defendant participation in this aspect of the case. It also possibly encourages the defendant to continue association with the criminal element for his own benefit. It does penalize the person who isn't a sophisticated criminal and doesn't have this option available to help him in reducing his sentence. Also, the more the person has been involved in a serious crime with multiple actors, the greater his chance for sentence reduction--even though his crime is worse. Cooperation is essential to solving many cases, but a 40% reduction seems high when the person's motivation is to negate the impact of his own criminal conduct.

Part C - Criminal History

As drafted, this is the most difficult section to compute in my preliminary scoring of existing cases. The score as now outlined gives more weight to the defendant's having actually served some time rather than the fact that it was a felony conviction. In Item B, Page 2, as an example, a defendant is sanctioned more for serving 60 days for petit larceny than for committing a felony burglary which resulted in probation without incarceration. I believe that a felony conviction should carry more weight regardless of the disposition. Also, Item E, Page 127, carries the same weight as having served less than 3 years, even though drug use itself is not a criminal history violation. Item E doesn't seem to belong in the criminal history score and might more appropriately be considered in Part E - Other Offender Characteristics. Also, the definition that the defendant has been an abuser is too broad and subjective to carry three points' weight.

Another major problem with the criminal history score is obtaining accurate prison records from various sources to accurately document just how long an offender served on a particular sentence. In Alabama, the old Incentive Good Time Law allowed a person to serve a ten-year sentence in just three years in the State system. This law has since been repealed, but it will accrue to the benefit of those sentenced under it when figuring criminal history scores as it is now drafted. For these and other reasons I would prefer to see the criminal history score based on the conviction itself rather than the time served.

Delay Factor for Prior Sentences - Page 129

If I understand how this is written, an offender who during a ten-year period neither sustained a sentence of imprisonment (an executed sentence?) including a maximum term of more than one year, nor is known to have served time in confinement on a sentence of imprisonment including a maximum term of more than one year, then his sentences imposed prior to the beginning of that ten-year period would not be counted. My question is, what if the offender received a sentence where imposition of sentence was suspended and no sentence of imprisonment was sustained--how would this be counted? Does this mean ISS sentences during this ten-year period would not be considered? Hopefully, I have misunderstood this particular guideline. Otherwise, I believe these sentences should be counted. The language in the option for Decay Factor for Prior Sentences on Page 135 also seems to exclude counting ISS sentences which are frequently imposed in Federal courts for felony offenses.

CHAPTER 4: Determining the Sentence

A 411. Imprisonment

Item B seems to offer an alternative where an offender can receive more than 14 sanction units and still receive probation with some incarceration. As I understand this, a person could receive up to 24 sanction units and be placed on probation with discretionary condition (b)(11), requiring him to serve up to the first 12 months of probation in the custody of the Bureau of Prisons. This would be considered to be custody for an interval of time as a condition of probation rather than straight imprisonment. If I understand this option correctly, there is some hope more offenders can receive a sentence of probation. Otherwise, if the 14 sanction unit total was the rule, it seems that very few offenders could receive probation. Hopefully, some of these intervals of time could be served by means of home detention, "house arrest", or intensive supervision.

Chapter 5: Violations of Probation and Supervised Release

This is an area that has traditionally been left to the professional judgment of the probation officer, the supervisor and the court. I believe the present system is effective by permitting the necessary discretion to deal with each individual case on its own merits. To try to reduce violations to a formula of less serious and more serious almost defies understanding. In some cases, a technical violation such as leaving the district without permission may warrant anything from a reprimand to revocation, depending on the circumstances of the situation. It is also difficult to establish what constitutes minimum levels of compliance since so many intangible elements determine at what point a person's probation should be revoked. To take away the officer's discretion in certain situations jeopardizes his training and professional judgment in supervising offenders. I believe officers should have the current level of discretion in dealing with persons under supervision before formally reporting violations to the court, subject to supervisory review and approval.

The issue of credit for time on probation upon revocation is a difficult one. Traditionally, credit for time under supervision has never counted; however, since probation is now a sentence in its own right, maybe it should now be counted. I certainly think any time spent in custody as a condition of probation should count on revocation. If this is an effort to satisfy all the sanction units by counting a probation sentence in figuring the sanction units, then it probably should count. Old practices die hard, and this one seems difficult to consider; but, in all probability, this time should count in some fashion.

Chapter 6: Other Issues

Part E - Determining Offense Values for Multiple Crimes

How this issue is resolved will have a tremendous impact on sentencing. In a case I recently figured, the offender pled guilty to 20 separate counts of Bank Embezzlement. If I aggregated all the offenses together, the guideline months came to 40-50. If I considered the three most serious counts and computed each of them as a separate offense of conviction, the months were 60-74. If I considered each count separately, the months were 360-Life. Based on this limited experience, I would certainly recommend that the offenses be aggregated if they constitute the same behavior or that the three most serious be considered. Otherwise, the guidelines become so skewed as to be unreasonable.

00052
Rec'd 11-20

FEDERAL DEFENDERS OF SAN DIEGO, INC.

5 November 1986

Honorable Leland C. Nielsen
Senior Judge, U.S. District Court
940 Front Street
San Diego, CA 92189

RE: Preliminary Draft/Sentencing Guidelines

Dear Judge Nielsen:

This letter is written in response to your request for input regarding the proposed sentencing guidelines. Simply put, the commission's preliminary draft is a disaster. It is unmanageable, incomprehensible and far too harsh. The enclosed eleven-page outline purports to be a simplified version of the procedures to be followed. However, as you can see from the outline, the procedures, even simplified, are remarkably complex and cumbersome and present numerous technical problems, e.g., application of obstruction of justice guidelines (outline at page 4), application of acceptance of responsibility guidelines (page 5), and adjustment for post offense conduct (page 6). The proposal also carries with it the capacity to dramatically increase the size and cost of the federal bureaucracy as well as to severely clog the courts. In an ideal world, these guidelines are a dream come true for the criminal defense lawyer who specializes in utilizing the technicalities of a system. However, ultimately sentences will be calculated and convicted criminal defendants will be punished. That realism, and an initial review of the preliminary draft of the sentencing guidelines, raise several serious problems.

Probation Guidelines

The commission has completely failed in its obligation to promulgate guidelines to determine "whether to impose a sentence to probation . . ." as required by 28 U.S.C. § 994(a)(1)(A). Instead, the commission arbitrarily assigns point values to a myriad of federal offenses and allows a defendant whose offense scores less than fourteen points to be eligible for probation. The commission relegates rehabilitation to the lowest of the statutory sentencing goals, finding that rehabilitation can be a primary sentencing consideration only for relatively minor

offenses. Consequently, probation is only available in minor (and mostly white collar) offense cases. The transportation of five undocumented aliens for gain, a relatively common offense in this district, is not subject to a probationary sentence. An individual convicted in a "border bust" case involving fifty pounds of marijuana (actually as little as ten pounds) is precluded from probation consideration.

The guidelines completely ignore the age of the offender, the lack of prior criminal record, the reasons the offense was committed, e.g., particular life stresses unlikely to recur, and the general character of the individual subject to the sentence. There must be a recognition in the guidelines that there are residual mitigating factors which must be evaluated and subject to the discretion of the trial judge. Appellate courts subject a trial judges' factual findings to a clearly erroneous review because the trial judge has the opportunity to evaluate the credibility of the witnesses and evidence. Some faith should be placed in the trial judge who likewise has the opportunity to see the offender's family, employer, and other similar supporters and evaluate the "credibility" of a probationary sentence. Not only has the commission severely limited the opportunity for probationary sentences but, as mentioned above, there are no guidelines which assist in evaluating when probation may be appropriate in any case. Certainly, an escape valve must be built into the guidelines to allow a judge to impose probation for any offense where probation is not otherwise prohibited by statute.

Other than the inequities caused individual defendants by this overly restrictive view of probation, there will be tremendous collateral consequences in that the prison population will expand with people who do not need to be and would not otherwise be in prison.

Modified Real Offense Sentencing

This calls for a judge to identify all unlawful acts or omissions done in furtherance of the crime of conviction as well as threatened, attempted or completed injuries or harms that result from the crime. The commission recognizes that judges commonly consider real criminal conduct. See 18 U.S.C. § 3577. However, because actual point totals attach with various unlawful acts or omissions done in furtherance of the crime, the commission's proposal brings with it serious problems. It would

be far preferable to sentence based on the offense of conviction because then at least the offender would be punished for conduct either admitted or proven beyond a reasonable doubt. Under the present system, judges balance the real offense conduct against various mitigating factors, a situation which is precluded under the proposed guidelines. A "modified real offense" sentencing system should at least limit the permissible considerations to harm intended by the offender or which resulted from a reckless indifference by the offender. Certainly, there should not be strict liability for uncharged unlawful acts or omissions.

Under the proposed modified real offense sentencing scheme, there is little, if any, benefit to pleading guilty.

No Provision for a Due Process Hearing/Burden of Proof

The commission somewhat cavalierly concludes that offense characteristics and adjustment factors need only be proven by a preponderance of the evidence. The commentary relies upon the five-to-four decision in McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986), but fails to recognize the sharp division that existed in the Supreme Court over that decision. A complex sentencing scheme should not rely on what is possibly constitutionally permissible but should also contain some basic notions of fairness. To allow certain acts, which are neither pled nor proven, to surface at sentencing and increase a sentence is dangerous and subject to abuse. For example, a defendant convicted of assaulting a government agent by the use of a deadly or dangerous weapon will face a base offense point total of 102 (base offense value of 6, deadly weapon in relation to any crime of violence adding 60 points, and the fact the victim was a government employee adding 36 points). If at the time of sentencing the probation report or the prosecutor shows by a preponderance of the evidence that the victim suffered severe bodily injury, the offense score more than doubles (it would add 120 points) increasing the defendant's guidelines from 90 to 112 months to 198 to 246 months. Because of the dramatic effect on the total sanction units, proof by a preponderance of the evidence is insufficient. It may well be preferable to go through the time and expense of a trial to test the validity of the "enhancement" (adjustment factor) evidence.

Regardless of the standard to be applied, because of the critical impact of the various adjustment offense factors, there must be a provision for an evidentiary hearing to resolve

contested issues. The proposed guidelines do not acknowledge that evidentiary hearings will be necessary to resolve factual disputes about sentencing factors. Other areas where factual disputes will be predictable involve psychological injury, proof of vulnerability of the victim, and alleged obstruction of justice. Actually, all of the adjustment factors are subject to interpretation and which, on many occasions, can only be resolved at an evidentiary hearing.

Base Offense Values for Drug Offenses

While it is recognized that delineations of culpability must be made and offenses must be distinguished from one another on the basis of certain value judgments, the proposal contains a severe socioeconomic bias in violation of 28 U.S.C. § 994(d). For example, the theft of $5 million is treated equally as seriously as a bank robbery by an alcoholic with a note who takes $200. Both base offense totals would equal 60. Possession of two kilos of cocaine is three times as serious as the theft of $5 million and more than three times as serious as insider trading resulting in a profit of $25 million.

Even within the drug offenses, there exists a serious problem in terms of weight of the offenses. According to Part D of the guidelines, at page 55 of the Preliminary Draft, if a mixture contains a detectable amount of a controlled substance, the entire amount of the mixture is considered in measuring quantity. This literally means that a person in possession of three pounds of sugar containing 1% cocaine is subject to a substantially greater sentence than the individual who possesses one-half pound of 100% pure cocaine. The present parole guidelines deal with this very simply by reducing all amounts of drugs to 100% purity and calculating the amount on that basis.

Acceptance of Responsibility

This is an admirable goal of sentencing but the list created by the commission again contains a bias in favor of the white collar offender. Also, given that the acceptance of the responsibility may result in a reduction of 20% of the total offense value, the right to a trial by jury and privilege against self-incrimination may be severely impacted by some of the requirements.

Cooperation

This section is one of the most dangerous contained within the proposed guidelines. By necessity cooperation by criminal defendants should result in some consideration in the criminal process. However, placing the authority to certify cooperation solely in the hands of the prosecutor creates an atmosphere for unscrupulous prosecutors to undermine the relationship between criminal defendants and their lawyers. Ultimately, the prime victim of this kind of arrangement may be the criminal defense attorney. The prosecutors should consider either dismissing the charges against an exceptionally cooperative defendant or there should be some room for the court to exercise discretion in cooperating defendant cases without using a rigid multiplier factor. Again, the system must maintain some balance. This balance is destroyed with power resting solely in the hands of the United States Attorney's Office.

Plea Negotiation

The proposed system will greatly increase the time required to negotiate pleas in that both counsel for the prosecution and defense will need to agree on offense characteristics and adjustment factors. If such an agreement is not reached, there will be great problems with the knowing and voluntary quality of guilty pleas. While the court may be able to satisfy Rule 11 by advising the defendant of the statutory maximum penalty, the defendant should be entitled to know whether his sentence will be doubled by the proof of certain adjustment factors. A guilty plea will turn into as much work, if not more, than a trial.

This letter contains only initial reactions to a review of the proposed guidelines. It is my understanding that the commission is open to change and sincerely wants critique. It also wants concrete suggestions. More judicial discretion and less mathematical precision needs to be built in several of the above-referenced areas as well as in evaluating the impact of criminal history on sentences. The continued viability of Rule 11 plea agreements should be acknowledged and the court and counsel allowed to reach Rule 11 agreements outside the guidelines.

I would urge the Advisory Committee on the Federal Rules to not only discuss its concerns with the preliminary draft but also recommend that Congress revive discretionary motions to modify sentences. Any system, particularly this one, needs some flexibility to consider the individual offender as well as changed circumstances.

Very truly yours,

Judy Clarke

JUDY CLARKE
Executive Director

JCC:teh
Enclosure

HOW TO CALCULATE A SENTENCE UNDER THE PRELIMINARY DRAFT SENTENCING GUIDELINES

1. Offense of Conviction

Begin separately with each "offense of conviction".

2. Statutory Index

Go to the Statutory Index at the end of the guidelines and look up the statute violated. The Index will tell you which section of Chapter Two (Offense Conduct) applies to that offense. If more than one section of Chapter Two is listed in the Index for the statute violated, review all the sections listed and their applicable commentary and determine which of the listed sections best applies.

3. Chapter Two - Base Offense Value

Select the highest "base offense value" applicable to the defendant's conduct according to the instructions in the appropriate Offense Conduct section selected in Step 2.

Here and in all other steps in which you consider the defendant's conduct, the following rules apply:

1. Do not consider:

   a. "conduct for which the offender has already been fully sanctioned", or

   b. "conduct for which further prosecution is barred" (see pg. 10).

   Note: This rule apparently conflicts with other provisions of the guidelines which rely on such conduct to aggravate the defendant's sentence.

2. Consider:

a. "conduct necessarily involved in the offense of conviction, plus the conduct done in furtherance of the offense of conviction and any injuries resulting from such conduct" (pg. 5),

b. "unlawful acts or omissions that were done in furtherance of the crime of conviction, as well as threatened, attempted, or completed injuries or harms that resulted therefrom" (pg. 10),

c. "only those real elements (not necessarily found as elements of the crime charged) that are importantly bound up with the conduct that constitutes the crime charged" (pg. 15).

Note: These three statements of the governing standard of "connected" conduct can be read to cover different behavior and injuries. It is not clear which standard would govern when such conflicts arise.

3. Consider any information produced at trial, in the pre-sentence report, or at a sentencing hearing that is supported by a preponderance of the evidence (pg. 8). The defendant has no right to a sentencing hearing to resolve a factual dispute, but, if one is held, the government has the burden to establish aggravating factors and the defendant has the burden to establish mitigating factors, the parties have the right "to present and cross-examine witnesses," and any "relevant and reliable" evidence may be admitted which is not "barred by evidentiary rules" (pg. 17-18).

4. Chapter Two - Specific Offense Characteristics

Proceed to the "specific offense characteristics" listed in the appropriate Offense Conduct section selected in Step 2 and determine which apply to the facts in the case. These describe conduct related to the crime and may sometimes refer you to different property value or drug weight tables from which you must determine the appropriate number of offense value points. Add the

offense value points for all applicable specific offense characteristics to the base offense value you obtained in Step 3.

5. Chapter Two - Cross-References

Proceed to the "cross-references" listed in the appropriate Offense Conduct section selected in Step 2 and determine which apply. Cross-references will usually require you to look at other Chapter Two Offense Conduct sections. When you look at each of those sections, you total the appropriate base offense value, all the applicable specific offense characteristics values, and all the applicable cross-references values in that section, unless the original cross-reference instruction tells you to do otherwise. In other words, you will usually go through Steps 3-5 for each applicable cross-referenced section.

Now add the points for all applicable cross-references to the number you had at the end of Step 4. This will give you what is called the "total offense value" for the particular offense of conviction you have been working with.

6. Chapter Two - Total Offense Values

Repeat Steps 2-5 to compute a total offense value score for each offense of conviction.

7. Chapter Two - Total Offense Value

Add together all the separate total offense value scores from Step 6. This gives you a number that is also called the "total offense value," but should more accurately be called the "total total offense value."

8. Chapter Three, Part A - Role in the Offense

Go to Chapter Three, Part A, "Role in the Offense" (pg. 120). For each separate offense of conviction, determine whether any "adjustment" or multiplier applies because

the defendant played a more major or minor role in the offense. If the defendant played the same role in every offense of conviction, multiply the number you had at the end of Step 7 (the total total offense value) by the appropriate adjustment (.5-.7, 1.2, or 1.5-2.0). If, however, the defendant did not play the same role in every offense of conviction, then determine the appropriate role-in-the-offense adjustment (multiplier) for each offense of conviction, multiply the total offense value for each individual offense (see Step 6) by the appropriate adjustment for that offense, and add all these adjusted total offense values.

Note: When multiplying, always round down to the nearest whole number.

9. Chapter Three, Part B - Obstruction of Justice and Perjury

Go to Chapter Three, Part B, "Obstruction of Justice and Perjury" (pg. 122) and determine whether this section applies. If it does apply, it is not entirely clear what you are supposed to do. There are several possibilities:

1. Ascertain one appropriate multiplier of between 1.1 and 1.4 to cover all instances of obstruction of justice. Multiply the total total offense value, from Step 7, by this multiplier.

2. Ascertain separate multipliers of between 1.1 and 1.4 for each instance of obstruction of justice. Multiply the total total offense value, from Step 7, by each of these multipliers.

3. Ascertain separate multipliers of between 1.1 and 1.4 for each instance of obstruction of justice. Determine with which offenses of conviction each instance of obstruction of justice was involved. Multiply the total offense value for each separate offense of conviction, from Step 6, by the applicable multiplier(s) for obstruction of justice which pertain(s) to that offense. Total these adjusted total offense values.

10. Chapter Three, Part B - Acceptance of Responsibility

Go to Chapter Three, Part B, "Acceptance of Responsibility" (pg. 123). Here again, there are several possible ways to proceed and it is not clear which is correct:

1. Ascertain what, if any, reduction of between 0 and 20% should apply based on the defendant's post-offense conduct indicating that he has accepted responsibility for any of the offenses of conviction. Multiply the total total offense value, from Step 7, by the appropriate percentage to determine what the reduction should be. Deduct the reduction from the total total offense value.

2. Same as #1, except deduct the reduction from the adjusted total offense value from Step 9 or from the adjusted total offense value from Step 10.

3. Ascertain what, if any, reduction of between 0 and 20% should apply to each separate offense of conviction as a result of the defendant having accepted responsibility for that particular offense. Multiply the total offense value for each individual offense, from Step 6, by the appropriate percentage reduction applicable to that offense. Add all the reductions together and deduct this sum from the total total offense value, from Step 7.

4. Same as #3 above, except deduct the sum of the reductions from either the adjusted total offense value from Step 9 or from the adjusted total offense value from Step 10.

11. Chapter Three, Part B - Cooperation

If the United States Attorney has certified that the defendant cooperated with law enforcement authorities, go to Chapter Three, Part B, "Cooperation" (pg. 125). Multiply the "total offense value from Chapter Two" (probably meaning the total total offense value from Step 7) by .6, .7, or .8, depending on the level of cooperation certified to by the United States Attorney.

12. Chapter Three, Part B - Adjustment for Post-Offense Conduct

The instructions now tell you to multiply the total adjusted offense value you had at the end of Step 8 by the "adjustment for post-offense conduct" that you got from Chapter Three, Part B (see pg. 10, #9). However, following the instructions in Chapter Three, Part B (Steps 9-11) will not yield such an adjustment; instead, the Part B instructions yield three different total adjusted offense values, all different from the one you had at the end of Step 8. The Sentencing Commission will have to rewrite the instructions to clarify what should be done in applying Chapter Three adjustments, particularly when more than one Chapter Three factor applies.

13. Chapter Three, Part C - Criminal History Score

Proceed to Chapter Three, Part C, "Criminal History Score" (pg. 127) and compute the defendant's criminal history score as follows:

For each jail sentence greater than one year,

if the defendant served less than three years, add 3 points;

if the defendant served three to less than five years, add 4 points;

if the defendant served five or more years, add 5 points.

For other jail sentences of 60 or more days, add 2 points.

For any other prior sentence, add 1 point.

Add 2 points if the current offense was committed while the defendant was subject to criminal justice control.

Add 2 points if the current offense was committed within three years of release from a jail sentence of

greater than one year or within three years of the imposition or commencement of a jail sentence of at least 60 days.

Add 3 points if the defendant tests positive for opiate, cocaine or PCP use anytime after arrest or if he abused any of these drugs within the last 10 years.

Concurrent priors count as one sentence (the longest one); consecutive priors count separately.

Always assume the defendant served 1/3 of the statutory maximum, unless he rebuts the assumption.

Do not count suspended sentences.

Do not count certain minor offenses at all and count certain others only if the defendant was sentenced to jail for at least 30 days or to probation for at least one year (see lists on pg. 129).

Only count juvenile offenses against persons, for residential burglary, or for drug trafficking.

If the defendant has not sustained or served time on a jail sentence of at least one year for a 10 year period, do not count convictions prior to the 10 year period, except that violent and drug distribution offenses always count, no matter how old.

Count diversionary dispositions in which there is a judicial determination of guilt or an admission of guilt before a judicial body.

Count military convictions if comparable to civilian crimes and not the result of summary adjudication.

Count foreign convictions if comparable to United States Crimes.

Count tribal convictions.

Total all applicable points to arrive at a "criminal history score."

14. Chapter Three, Part C - Criminal History Adjustment

There are now two alternative possibilities (the Sentencing Commission has not yet decided which to use).

Alternative #1

A. Go to the "Criminal History Score Table" on pg. 131.

B. Look up the criminal history score, from Step 13, in the left-hand column of the table.

C. Determine which of the five "Base Offense Value" ranges applies (see "Note" below).

D. Find the appropriate number of points in the table for that criminal history score and that base offense value.

E. Add the number of points from Step D to the "offense value from Chapter Two" (see "Note" below).

Note: The meaning of "Base Offense Value" is unclear. In Chapter Two, it is used to refer to the offense value points that you begin with before adding points for specific offense characteristics and cross-references. However, it is unlikely that that is what is meant here. It appears that the Commission is using "base offense value" to mean the total total offense value from Step 7. Also, the meaning of the "offense value from Chapter Two" is unclear. It probably also refers to the total total offense value from Step 7.

Alternative #2

A. Select the appropriate "Base Offense Value" range from the column on the left-hand side of the table on page 132.

B. Look across to the second column in the table to see what multiplier to use.

C. Multiply the criminal history score, from Step 13, by the appropriate multiplier from Step B.

D. Add the result of Step C to the "base offense value" to obtain an "adjusted base offense value."

Note: See "Note" to Alternative #1 regarding the definition of "base offense value."

15. Chapter Three - Sanction Units

The instructions indicate that you should now have an "adjustment for criminal history" which you are supposed to multiply times the "adjusted offense value" obtained at the end of Step 12, to arrive at a "sanction unit score" (see pg. 10, #10). However, as explained in Step 12, the instructions do not give rise to one "adjusted offense value" in Step 12. Also, the criminal history section instructions do not result in an "adjustment for criminal history" that can be used as a multiplier; rather, they result in yet another adjusted total offense value. In short, the instructions for Part C suffer from the same problem as the rest of the Chapter Three instructions and must be rewritten before they can be applied.

16. Chapter Four - Guideline Table

Proceed to Chapter Four, to the Guideline Table on page 140. Look up the sanction unit score, from Step 15, in the first or third columns. If the exact score does not appear in the table, "round down to the nearest listed number" (pg. 138). Determine the corresponding guideline range in the second or fourth columns. This will give you a minimum and maximum number of months of imprisonment to be served. 14 or more sanction units always requires that some jail time be served; less than 14 units permits imposition of a probationary sentence, but also permits imposition of up to six months of jail time.

17. Chapters Three and Four - Non-Guideline Sentences

Regardless of the sentence you arrive at through application of the Guideline Table, the following rules apply:

Statutory maximum and/or mandatory minimum sentences always override contrary maximums or minimums resulting from application of the guidelines (pg. 149).

If the current offense and two prior felony convictions are for violent or drug offenses, the maximum statutory jail sentence is imposed (pg. 127).

Aggravate the sentence beyond the applicable guideline range:

1. if the defendant engaged in prior similar conduct that did not result in a conviction,

2. if the offense is part of a pattern of criminal conduct from which the defendant derived a substantial portion of his income, or

3. if the defendant failed to appear in court as required by the conditions of his release (pg. 128).

If the defendant fails to surrender for service of sentence, impose a mandatory consecutive sentence for failure to appear which may exceed "the guideline range" (pg. 128).

Note: It is not clear whether this means the guideline range for the substantive offense or for the offense arising from the failure to surrender.

18. Chapters Four and Six - Other than Jail Sanctions

Rules relating to non-jail sanctions have not yet been decided upon.

19. Chapter Four - Concurrent/Consecutive Sentences

Sentence should be imposed on each count of the conviction. Where the Court has discretion to impose either concurrent or consecutive sentences, it should try to produce a result most consistent with the applicable guideline range. (pg. 149). Consecutive sentences should not be imposed for conspiracy or solicitation and for the object of the conspiracy or solicitation (pg. 150).

Note: It is difficult to understand how these rules can be applied because the guidelines instructions automatically cumulate offense points, and therefore sentences, for all counts of conviction, thereby rendering all sentences consecutive and none concurrent. However, the Commission has also proposed a series of rules regarding cumulation of sentences which would render most but not all sentences consecutive, but which apparently conflict with the guidelines application instructions. These proposed cumulation rules are found on page 168.

(0005)
rec'd 11-20

U.S. Department of Justice

United States Attorney
Northern District of California

16th Floor Federal Building, Box 36055
450 Golden Gate Avenue
San Francisco, California 94102

REMARKS

OF

JOSEPH P. RUSSONIELLO
United States Attorney
Northern District of California

Before

The

UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING - SAN FRANCISCO
CEREMONIAL COURTROOM

NOVEMBER 18, 1986
10:10 am

JUDGE WILKINS, MEMBERS OF THE COMMISSION, THANK YOU SO MUCH FOR COMING TO SAN FRANCISCO AND FOR GIVING ME THE OPPORTUNITY TO DIRECT SOME PERSONAL COMMENTS AND REMARKS TO YOU TODAY. YOU WILL BE HEARING TODAY FROM A NUMBER OF DISTINGUISHED LAWYERS, JUDGES AND SCHOLARS ON SUBJECTS RELATED TO SENTENCING REFORM ABOUT WHICH THEY FEEL VERY STRONGLY AND WITH RESPECT TO WHICH THEY HAVE FORMED VERY SERIOUS VIEWS. I RESPECT THEIR OPINIONS AND WILL PAY CLOSE ATTENTION AS I KNOW YOU WILL TO WHAT THEY HAVE TO SAY, BUT TO BE BLUNT ABOUT THIS MATTER, NO INTEREST IS MORE SIGNIFICANTLY EFFECTED BY THE PROJECT YOU HAVE UNDERTAKEN THAN IS THE PROSECUTORS . . . NOT BECAUSE HE OR SHE IS THE MOST IMPORTANT ACTOR IN THE CRIMINAL JUSTICE SYSTEM . . . HE MAY BE . . . BUT BECAUSE HIS DISCRETION IN CHARGING AND PROSECUTING REPRESENTS, AT ITS BEST, THE EXERCISE OF A JUDGMENT WHICH TAKES INTO

ACCOUNT AND ATTEMPTS TO ANTICIPATE MANY OF THE FACTORS THAT YOU HAVE NOW QUANTIFIED SO THAT, TO THE EXTENT YOU HAVE INSISTED THOSE FACTORS BE INCORPORATED IN THE CALCULATION OF SENTENCE, THEY SHOULD REFLECT AND BE CONSISTENT WITH THE PROSECUTORS' VIEW. THIS IS NOT TO SAY THAT EVERY PROSECUTORS' INSTINCTS ARE ALWAYS RIGHT NOR DOES IT MEAN THAT HIS IDEA OF AN APPROPRIATE SENTENCE IS ALWAYS REASONABLE. MOST OF THE TIME, HOWEVER, HIS OWN EVALUATION OF THE WORTH OF A CASE IS SUBSTANTIALLY CORRECT. IF THE GUIDELINES ON SENTENCING AS FINALLY ADOPTED DO NOT REFLECT THIS SO-CALLED "REASONABLE PROSECUTOR" STANDARD, NOT ONLY WILL THEY SUFFER FROM LESS THAN ENTHUSIASTIC SUPPORT AMONG PROSECUTORS, BUT THERE IS A REAL DANGER THAT ATTEMPTS TO INTERPOLATE FROM THEM OR TO SUSPEND THEIR APPLICATION WILL ULTIMATELY UNDERMINE THEIR VIABILITY. BARGAINING AWAY CERTAIN PROVISIONS OR CONTORTING THE BASE OFFENSE VALUE OF CERTAIN CRIMES IN ORDER TO SATISFY

THE QUIRKS OF ONE SPECIAL INTEREST GROUP OR ANOTHER WILL SURELY DOOM THE INCREDIBLE EFFORT YOU HAVE UNDERTAKEN AND THE EXTRAORDINARY ACHIEVEMENT EVEN THE PRELIMINARY DRAFT REPRESENTS. AS THE INTRODUCTION TO THIS DRAFT CORRECTLY NOTES, THE GUIDELINES ULTIMATELY SUBMITTED "MUST BE WORKABLE, FAIR AND EFFECTIVE."

ONE REASON THE REASONABLE PROSECUTOR SHOULD BE MINDED IS THAT HIS DECISION IS OFTEN A PRODUCT OF CONSENSUS; FROM COLLEAGUES, INVESTIGATORS, VICTIMS, SUPERIORS, THE JUDGES FROM THEIR RECORD OF PAST PRACTICE, HE GETS A SENSE OF WHETHER HE HAS BROAD OR NARROW LATITUDE IN CHARGING, PROSECUTING AND RECOMMENDING SENTENCE. COMPARE, FOR EXAMPLE, AN ESPIONAGE CASE AGAINST AN EMPLOYEE OF A DEFENSE CONTRACTOR (NO LATITUDE) TO A TEN COUNT BANK ROBBERY CASE AGAINST A KNOWN DRUG USER (WIDE LATITUDE) OR A CASE INVOLVING CRIMES AGAINST CHILDREN AS VICTIMS (LITTLE OR NO LATITUDE) WITH A CASE IN WHICH SOPHISTICATED INVESTORS WERE DEFRAUDED BY AN UNSCRUPULOUS

CON MAN (WIDE LATITUDE). IT SEEMS TO ME THAT THE METHODOLOGY THE GUIDELINES SUGGEST BE USED IN FIXING SENTENCE, BASELINES WITH ADD-ONS OR DEDUCTIONS IF FACTORS ARE PRESENT, REFLECTS, IN THE MAIN, THE PROSECUTORS' ATTITUDE AND SHOULD, THEREFORE, BE ACCEPTABLE TO HIM.

FURTHERMORE, EACH OF THE COMPONENTS OF A RECOMMENDED SENTENCE THE PROSECUTOR NOW TAKES INTO ACCOUNT SEEM TO BE INCORPORATED INTO THE SENTENCING GUIDELINES IN ONE WAY OR ANOTHER, AND THIS IS GOOD, EVEN THOUGH THEY ARE NOT NECESSARILY GIVEN THE IDENTICAL WEIGHT THE PROSECUTOR MIGHT APPLY. TRADITIONALLY WE HAVE WEIGHED FIVE FACTORS IN EVALUATING OUR CASE FOR PURPOSES OF "PLEA BARGAIN," A DIRTY TERM IN SOME QUARTERS, BUT, IN REALITY, AN ABSOLUTELY ESSENTIAL AND RESPONSIBLE WAY OF DISPOSING OF CRIMINAL CASES IN AN ERA OF EXPANDED AVAILABLE SANCTIONING AND BETTER CRIMINAL ENFORCEMENT, HEMMORAGING COURT DOCKETS AND PUBLIC CLAMOR FOR MORE ACTION AGAINST DRUGS AND CRIMES ASSOCIATED WITH DRUG ABUSE.

FIRST, HOW SERIOUS IS THE OFFENSE? SECOND, HOW SOLID IS THE EVIDENCE, OR HOW LIKELY AM I TO GET A CONVICTION ON THE CHARGE THAT BEST REFLECTS THE SERIOUSNESS OF THE CRIME? THIRD, WHAT IS THE CHARACTER OF THE DEFENDANT -- WHAT IS HIS PRIOR RECORD OF CRIMINAL BEHAVIOR? HOW BIG A DANGER TO THE PUBLIC IS HE LIKE TO BE IF HE REMAINS AT LIBERTY? FOURTH, WAS HE SUBJECT TO ANY SPECIAL CONTROLS OR RESTRICTIONS WHEN HE COMMITTED THE PRESENT OFFENSE, I.E., PROBATION OR PAROLE? FIFTH, WHAT WAS HIS LEVEL OF INVOLVEMENT OR PARTICIPATION IN THE PRESENT OFFENSE?

THE GUIDELINES SUGGEST WE WILL NOW BE REQUIRED TO PROVE UP BY A PREPONDERANCE OF EVIDENCE AT SENTENCING ANY FACTORS THAT WE SEEK TO HAVE THE COURT CONSIDER IN ADDING TO THE BASELINES. PRESUMABLY THIS MEANS THAT A HEARING WILL BE HELD. SO LONG AS STRICT APPLICATION OF THE RULES OF EVIDENCE IS SUSPENDED, I CAN FORESEE NO INSURMOUNTABLE PROBLEMS WITH THIS APPROACH, BUT IF WE WERE PUT TO PROVING THE AGGRAVATING

FACTORS IN ACCORDANCE WITH BEST EVIDENCE AND HEARSAY STANDARDS, FOR EXAMPLE, THE SENTENCING HEARING WOULD LIKELY BE AS LONG AS A TRIAL AFFORDING NO INDUCEMENT TO THE PROSECUTOR TO FOREGO THE TRIAL IN THE NAME OF ECONOMY AND EFFICIENCY. WE MIGHT AS WELL HAVE A TRIAL.

I'M PLEASED TO SEE THAT THE GUIDELINES TEND TOWARD THE ACHIEVEMENT OF CERTAINTY OF SENTENCE, EQUIVALENCY AND CONSISTENCY -- THAT TWO PERSONS OF RELATIVELY EQUAL STATUS WHO COMMIT THE SAME CRIME(S) CAN EACH EXPECT TO RECEIVE THE SAME SENTENCE.

SOME OF THE ENHANCEMENTS ARE IMPORTANT TO NOTE, TOO, BECAUSE THEY REFLECT EITHER THE GENERAL PUBLIC'S ABHORRENCE FOR CERTAIN KINDS OF CRIME (USING CHILDREN IN THE DRUG TRADE OR SELLING DRUGS TO MINORS), A NEED TO DETER FRAUD AND INSURE THE INTEGRITY OF THE MARKETPLACE IN AN ERA OF DEREGULATION (JAIL FOR WHITE COLLAR CRIMINALS) AND AN ATTEMPT TO DEBUNK THE MYTH THAT PERJURY BY A DEFENDANT CARRIES NO PENALTY (THAT

IT IS AN EXPECTED AND PREDICTABLE WEAPON OF ANY DEFENSE STRATEGY -- THOUGH, THE ENHANCEMENT FACTOR IS TOO LOW, IN MY OPINION.

A FINAL CAUTION. AS WE GET BETTER IN PENETRATING DEEPLY ENTRENCHED ORGANIZED CRIME SYNDICATES, OUR NEED AS PROSECUTORS TO BE ABLE TO BARGAIN MINNOWS FOR CARP AND CARP FOR SHARKS AND SHARKS FOR KILLER WHALES BECOMES MORE VITAL THAN EVER BEFORE. THE GUIDELINES QUANTIFY COOPERATION TO A MAXIMUM OF 40% FOR EXCEPTIONAL COOPERATION (B 333). THIS IS TOO LOW, ESPECIALLY WHEN THE COOPERATION MAY INVOLVE CONDUCT THAT IS DANGEROUS TO THE COOPERATOR OR HIS FAMILY. ANY DISPUTES REGARDING THE ENTITLEMENT TO TERMS OF A COOPERATIVE AGREEMENT SHOULD BE RESOLVED PERHAPS IN THE MANNER THAT GRAY MAIL ISSUES ARE LITIGATED NOW.

YOU HAVE ASKED FOR COMMENT ON CERTAIN OTHER SPECIFIC MATTERS.

I SUPPORT AND URGE INCLUSION OF THE MODIFIED REAL

OFFENSE SENTENCING APPROACH. THE MULTI-VICTIM INVESTMENT FRAUD CASE IS A GOOD EXAMPLE OF WHY IT IS IMPRACTICAL TO CHARGE OR INSIST ON CONVICTION FOR AN OFFENSE BEFORE IT CAN BE CONSIDERED BY THE COURT OF SENTENCING.

AS TO THE RESPECTIVE AND RELATIVE POWER OF PROSECUTOR AND JUDGE TO INFLUENCE SENTENCE, SO LONG AS THE PROSECUTOR'S DISCRETION IN SELECTING CHARGES IS DEEMED INVIOLABLE, HIS PREROGATIVE IS SAFEGUARDED. SO LONG AS HE MUST PERSUADE THE SENTENCING JUDGE BY PROOF THAT ENHANCEMENT SHOULD BE APPLIED FEAR THAT EXCESSIVE CHARGING ALONE MIGHT RESULT IN IMPROPER SENTENCES CAN BE ELIMINATED.

AS TO OTHER MATTERS CONCERNING WHICH YOU HAVE ASKED FOR COMMENT, I EXPECT THE U.S. ATTORNEYS IN COMMITTEE WILL CONFER AND SUBMIT THEIR VIEWS IN CONJUNCTION WITH THE DEPARTMENT OF JUSTICE'S SUBMISSION.

00038
rec'd 11-20-86

U.S. CHAMBER OF COMMERCE

Business-Government Policy Department

November 13, 1986

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

Dear Mr. Chairman:

I am responding on behalf of the U.S. Chamber of Commerce to your invitation to submit views on the Preliminary Draft of Sentencing Guidelines prepared by the U.S. Sentencing Commission.

While we continue to monitor the progress of your extraordinary task, at this time, we are unable to offer comments on the "Preliminary Draft" until U.S. Chamber policy is established on this issue.

However, our Administrative Law Council will be meeting later this month and may formulate policy recommendations on this issue, which then would be submitted to our Board of Directors for final approval.

In the interim, we would appreciate your keeping us on your mailing list, so that we may continue to monitor this most critical issue. Thank you for your cooperation.

Sincerely,

Roger E. Middleton
Administrative Law Attorney

1615 H Street, N.W. □ Washington, D.C. 20062 □ 202/463-5500

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November 25, 1986

MEMORANDUM

TO: Central Files

FROM: Janet Fitzpatrick JF
Librarian

SUBJECT: Public Comment No. 59 - Ninth Circuit Committee

The Ninth Circuit Committee submitted a letter with two attachments. Those two attachments were handled as individual entries into these files. If copies of No. 59 are requested, the following public comments should be attached:

1) Letter from Judy Clarke to Honorable Leland Nielsen dated November 5, 1986 - Public Comment No. 56

2) Letter from Charlie Varnon to Honorable James Burns dated November 7, 1986 - Public Comment No. 67

rec'd 11-20-8

CONSENSUS STATEMENT
of NINTH CIRCUIT COMMITTEE (NOV.18, 1986)

Chief Judge James R. Browning charged our committtee (members listed at end of statement) with the task of fashioning consensus views to be furnished to the Sentencing Commission at the November 18, 1986 hearing in San Francisco. Given the committee makeup (two circuit and two district judges, a Chief Probation Officer, a U.S. Attorney and a Federal Defender), we did not expect to reach - nor did we reach - full consensus. Our differences, however, were surprisingly few. We met November 6, 1986 and have been in contact since exchanging and reviewing drafts of this statement as well as copies of some of the other statements you have received at your hearings in New York and Denver.

I. OVERALL VIEWS[1]

The Draft Guidelines are seen as too harsh[2]; too rigid; too complex; perhaps unworkable; even if workable, widely seen as unworkable[3] by practitioners (prosecutors, defenders, probation officers and sentencing judges) as well as by judges who will review guideline sentences on appeal.

It must be confessed that, at bottom, lay the unanimous opinion that the draft guidelines remove virtually all discretion from the judges (except for the statutory 25% in cases where prison sentences result). All committee members are fully aware that, to a very great extent, this is more a criticism of the statute than of the guidelines thus far offered. We are sympathetic with the Commission. We recognize the difficulty of your task; we admire you for the work, study, and dedi-

cation that have gone into your performance of your duty.

I can assure you, as fellow toilers with us in this brand new sentencing vineyard, that none of our committee embarked on our task in any way other than to try to be of as much help as we can to you in helping you to construct a workable guidelines system that is fair, just, and in compliance with the statute. Each of us has, in fact, taken the same solemn oath that you have to support the Constitution and laws of the United States. We endorse the sentiments expressed by Chief Probation Officer Perry Mathis (Kansas) in his letter of October 27 to Judge Wilkins. We regret, also, that our comments are more negative than positive. We have tried to be as honest in our analysis as Chief Mathis obviously was. I can assure you it gives me no pleasure to seem to view with alarm rather than to be able to point with pride to your work product.

Perhaps it is a waste of your time, and ours, to end up saying that you can't get from here to there; that by eliminating (or substantially reducing) one bundle of disparity, you will have created another; in the bargain, you will have increased the workload of the practitioner to a hitherto unimaginable extent. Further, especially in view of the "cooperation" component of the guidelines, (Chapter Three, Part B(3)) while you have eliminated or very substantially reduced that bundle of disparity which stems from discretion of 600 judges, the statute, and these guidelines will have transferred a great portion of that discretion to about 2200 harassed, heroic, or hapless AUSAs, accompanied by whatever bundle of disparity that will result from their charging and bargaining decisions.

II. Our discussions centered about three main areas of concern, namely Modified Real Offense Sentencing (MROS); Offender Characteristics; and Determining the Sentence. Our time, alas, has not allowed us to submit a written statement as to our primary concerns save as to MROS. Thus, by reference to other statements you have received, we offer our general views. Certain items will be discussed in our oral statement at the hearing.

III. MROS.

All of us had concerns with the formulation of the MROS, which provides that guidelines are to evolve principally from the charge of conviction. The sentencing judge is to identify, as relevant, all offense characteristics stemming from the charge of conviction, as well as unlawful acts or omissions done "in furtherance", thereof ". . . as well as threatened, attempted or completed injuries or harms that resulted therefrom." Excluded are offenses [involving] conduct for which defendant has been fully sanctioned or for which further prosecution is barred. Chapter One, Part VII.

This formulation seems to be stated somewhat differently in the commentary:

> a) The objective is to include . . . only those real elements (not necessarily found as elements of the crime charged) that are <u>importantly bound up</u> with the conduct that constitutes the crime charged. (Emphasis supplied) (P.15).

To accomplish this objective, the draft relies "on explicit cross-references to determine [what] conduct the judge shall take into account." (P. 17). We and other readers are asked "to

decide whether cross-references sufficiently identify additional conduct often associated with the statutory elements . . ." of the charge of conviction. (P. 17).

This standard would not work well in the kinds of typical, regularly recurring cases we get. Let us sketch briefly, a "real" hypothetical. Defendant A is charged with 5 bank robberies, each 1 week apart, each in a separate area or suburb of Portland, Oregon - a place sometimes known as the bank robbery capital of the U.S. (statistical proof furnished on request). Each was a "note" robbery, none apparently related, save for geographical parochialism. (Defendant's car was in such bad shape he couldn't get as far away as Salem or Eugene). No real question exists as to defendant's involvement in all five. A plea bargain is struck, namely, plead to one count, the other four to be dismissed. MROS would bring A to me as a single bank robbery defendant. By way of contrast, defendant B committed only one (identical) robbery, and was caught 15 minutes away; he also pleads guilty. If I sentenced A & B on the same day, MROS would treat them as the same (assuming they have the same offender characteristics). Other comparative examples from other fields - drugs, fraud, embezzlement and the like - could be sketched out if time permitted. We believe this result shows a key defect in MROS, which must be remedied if it can.

In our discussion we struggled to formulate a standard more realistic and useful than MROS's charge of conviction, plus "offenses" of "conduct" or "unlawful acts or omissions" in furtherance or resulting therefrom, or even "related to" (see example 3, P. 16).

Alas, a solution is not nearly so easy to come by. Indeed, your commentary (pages 11-15) spells out - brilliantly in my judgment - the hard choice(s) the statute forces you to make. Nonetheless, we offer here, at least two alternatives, in no particular order or preference:

First would be a standard under which the sentencing judge would be able to consider conduct of the defendant that if he were tried on the charge of conviction:

a) would be admissable under FRE Rule 404; or

b) would from the basis for a count in an indictment which would be joinable under Fed. R. CRIM. P. Rule 8.

While complications and questions instantly come to mind from the simple statement of such a standard, it has at least one very practical virtue. For the practitioners, these are standards with which we are familiar, at least speaking for prosecutors, defenders and judges. Probation officers are not particularly knowledgeable as to Rules 404 & 8, but almost to a person, U.S. Probation Officers are very bright folk, who could pick this up and learn to apply it quite promptly.

Second would be a standard which has been suggested by various papers furnished to you by the Defenders' committee. This would provided that the sentencing judge could consider conduct related to the charge of conviction that is admitted by the defendant.

I hasten to add that our committee doesn't unanimously endorse either one, but merely offers them for such scrutiny as you think they deserve. We hope, in the time remaining between now and December 3, 1986, to expand upon, and to amend the views

expressed here so as to furnish further comments and suggestions as they occur to us upon more mature analysis, and in light of comments and views offered here today.

Before concluding the MROS segment, we also mention one troubling consequence with the intensely practical job - in something like 80-90% of our cases - namely, the taking of a guilty plea, and the necessity for the plea - taken to advise the defendant of the consequences of his plea. In footnote 4 we spell out, briefly, our concerns. I add that while some limited research has been done, further research will be done. Much depends on the extent to which, if at all, the "advice of consequences" duty stems from constitutional rather than real requirements.

IV. The In-Out Decision

Our committee was concerned over the effect of the present draft on the so-called "in-out" decision, or, stated another way, choosing probation rather than prison (or a fine etc.).

In formulating the Comprehensive Crime Control Act of 1984, Congess identified crimes for which probation may not be granted (18 USC 3561(a)(1)). The proposed sentencing guidelines, however, seem to extend that prohibition to the extent that only a very small percentage of offenders would even be eligible for such consideration. Is this what Congress envisioned, or does the language contained in 18 USC 3582(a) (e.g. ". . . recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation") suggest that greater discretion need be exercised before imposing a period of incarceration?

It is also significant to note that Congress has now deter-

mined that "probation" is a "sentence" and, further, has promulgated mandatory conditions and discretionary conditions (18 USC 3563(a) and (b) which impose both punitive sanctions and opportunity for rehabilitation. Accordingly, we suggest Congress envisioned (and we heartily concur) that probation would be utilized to a far greater extent than is permissible under the proposed guidelines.

The problem, of course, is to determine when a sentence of probation will achieve the statutory purposes of sentencing as opposed to when a period of incarceration is required. We submit that there are simply too many variables and/or external forces on a case-by-case basis to be captured in any guideline scheme. Thus, the essence of our proposal is simply this:
Except in those cases in which porbation is precluded by statute, we the Court ought to retain its discretion to impose a sentence of probation or to impose a period of incarceration, in which event the applicable guidelines would apply. We also furnish herewith a statement prepared by Charles Varnon (dated 11/7/86, memo from Varnon to Burns). His statement contains comments on other aspects as well.

V. As to comments, both general and specific, we attach a statement furnished by Federal Defender Judy Clarke (San Diego, letter dated 11/5/86, to Judge Nielsen). We are in general agreement with much of this statement. We also are in general agreement with many of the comments contained in Mr. Katz's (Federal Defender, Colorado) letter dated October 30, 1986. Our committee hopes to supply by 12/3/86 added comments on specific problem areas that we see in other areas of the draft.

VI. Conclusion

Judges Alarcon and I will be pleased to speak briefly (if you allow us) at the hearing on November 18, and to expand upon the matters addressed in this statement. We regret that time has not allowed us to prepare a more comprehensive document for the members and staff of the Commission to study in reacting to documents which these hearings have provided. Again, we regret the negative tone of this report.

Respectfully Submitted,

Ninth Circuit Guidelines Committee

FOOTNOTES

1/ It must be emphasized that our committee of seven 9th Circuit practitioners does not claim that it necessarily is representative of a majority of our colleagues in the Circuit. We have tried, to canvass as many of our colleagues time would permit. Judge Nielsen advises that all of his colleagues in San Diego are in agreement; so are all of mine in Oregon. Further, I have canvassed several other districts; reports from them will be furnished - in a general way, and as accurate as I can make them - as a part of the oral statement. Other committee members have sounded out a number of their counterparts and the same pattern emerges. Thus it would not be very far off the mark to claim that ours is probably a relatively representative cross-section.

2/ We are fully aware that the sentence ranges in the Preliminary Draft are tentative. For the moment they are simply a list of numbers under which 12 means 12 months (1 year in prison), 120 means 10 years, and so on. We also recognize that other numbers could be used, and other equations of sanction units can be employed to mean days, weeks, months or years in prison. The numbers themselves are in this context unimportant. Guidelines could specify for example, say that 24 sanction units means 1 year in confinement, or 2 or 3 or 4 years, for that matter. What is important is that at the ranges proposed in the draft, all but a few defendants will spend some time in custody. The option of "straight" probation supervision will diminish sharply. A411 specifies that where the defendant's sanction score is 14, at least two months or more must be spent in prison, or at least in "custody" for intervals as a condition of probation, § 3563(b)(11). We are aware that the statute calls for heavier sentences, in a number of areas, e.g. 28 U.S.C. § 994 et al. But this draft does not come upon a sentencing landscape with a clean slate. Our "landscape" is now a "system" which achieves (probation non-custody) sentences in about 35-50% of the cases. (In making this assertion, we assume that "partial" custody, such as CTC & residential drug or alcohol programs is not custody). The implications for "custody" bed space needs - so far largely unaddressed by actual appropriations - are obvious, and to us, terrifying.

3/ Seen as unworkable is perhaps the wrong phrase to use. We would, in fact, be able, in a given factual setting, to work through the 16 steps. Doing this, however, would call upon all, or some of us, to spend an inordinate amount of time in the discovery, bargaining, plea-taking and pre-sentence process and sentence hearing process. No doubt, with time, (and perhaps with a PC on the desk of every AUSA, FPD, and USPO) and experience, guidelines in a given case could be determined. Reference is also made to pages 6-9 of letter to Judge Wilkins and the Commission from Bill Graves, Chief U.S. Probation Officer for Colorado, dated 10/29/86.

4/ Under sentencing guidelines, will the judge have complied with the requirements of Rule 11(c)(1) by merely informing the defendant as to the mandatory minimum and the maximum possible penalties provided by law.

Specifically, I'm concerned that a judge, by strictly following the literal language of Rule 11(c)(1) may not be adequately warning the defendant of the fact that if the defendant pleads guilty, the sentencing guidelines will dictate a specific sentence range unless there are aggravating or mitigating factors not adequately considered by the Commission.

As it stands, under Rule 11(c)(1), the judge must inform the defendant of the minimum and maximum penalites provided by the law. United States v. Kearney, 750 F.2d 787, 790 (9th Cir. 1984). Rule 11(c)(1) does not require that the court inform the defendant of the probability of his receiving one sentence or another. Indeed, "it is improper to do so." Lewis v. United States, 601 F.2d 1100, 1101 (9th Cir. 1979). The rule does require that the defendant understand the range of possible sentences and penalities. Id. The rule does not require the district court to inform the defendant of every possible consequence of his plea. The defendant must only be informed of the direct cosequences, not all the possible collateral consequences. United States v. King, 618 F.2d 550, 552 (9th Cir. 1982)(collateral consequences include: 1) the possibility of revocation of parole; 2) the possibility that a federal sentence might be ruled to run consecutively to a state sentence and; 3) potential deportation.) See also Hunter v. Fogg, 616 F.2d 55, 60-1 (2nd Cir. 1980).

If the sanction units add up to, say, 192, the sentence will be (in absence of unconsidered mitigators) 15 to 18 2/3 years, of which defendant will serve 85%. Is it sufficient for the judge merely to recite that the maximum is 20 years (and, presumably, that whatever term is imposed, 85% must be served)? It would not be surprising to find lawyers searching earnestly for case law - and at least some judges holding - that consequences stem from constitutional requirements. If that be the case, I do not know how one can take a guilty plea without a pre-sentence report. I hasten to add that some practitioners believe that compliance with Rule 11 will be sufficient, and that not all factors which are added in would have to be described and referred to at the plea taking.

COMMITTEE MEMBERS:

Circuit Judge Thomas Tang (Phoenix) - 9 years U.S. Circuit Judge, plus 8 years State trial judge experience

Circuit Judge Arthur L. Alarcon (LAX) - 7 years U.S. Circuit Judge, plus 1 year State Appellate Judge and 15 years State trial judge experience

Senior District Judge Leland C. Nielsen, So. Dist. Cal. (San Diego) - 15 years U.S. District Judge, plus 3 years State trial experience

District Judge James M. Burns 14 years U.S. District Judge, plus 6 years State trial judge experience

Chief Probation Officer Charlie Varnon, E. Dist. Cal.(Sacramento) 21 years of probation experience.

U.S. Attorney William Maddox, Dist. Nev. (Las Vegas) - 9 years of prosecution experience.

Federal Public Defender Tom Hillyer, W. District Washington (Seattle)-13 years of defense experience.

Added statements attached:

A) Charles Varnon letter November 7, 1986

B) Federal Defender of San Diego (Judy Clarke) letters and outline, November 5, 1986

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HARVEY M. SILETS

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November 17, 1986

BY FEDERAL EXPRESS

Suzanne Conlin
U.S. SENTENCING COMMISSION
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Suzanne:

Once again, I am terribly sorry that I was not able to attend the Commission's hearing in Chicago, but my health chose a most inopportune moment to fail me, in a modest way. I have, however, completed a written submission, which is enclosed.

I realize that the submission is rather lengthy, but its length is the result of my serious concerns about the Preliminary Draft and the implications thereof. If I have been over-enthusiastic in my comments, please forgive, for it was done with the best of motives.

I hope the submission will be helpful, and please let me know if I can be of any further assistance or participate in any fashion in the Commission's future deliberations.

Very truly yours,

SILETS AND MARTIN, LTD.

Harvey M. Silets /nw
Harvey M. Silets.

HMS/nw
enc.

COMMENTARY ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES ISSUED BY THE UNITED STATES SENTENCING COMMISSION IN SEPTEMBER, 1986

by

HARVEY M. SILETS*

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*Harvey M. Silets is a founding partner of the Chicago law firm of Silets and Martin, Ltd., with a practice concentrated in the area of taxation and white-collar crime. Mr. Silets served as the Chief Tax Attorney in the office of the United States Attorney for the Northern District of Illinois before entering private practice. He was a member of the Advisory Committee on Tax Litigation of the Tax Division of the U.S. Department of Justice and is the Chairman of the Committee on the Federal Rules of Criminal Procedure of the American College of Trial Lawyers. Mr. Silets has authored a number of articles on tax matters, including criminal tax issues. He is a Fellow of the American College of Tax Counsel and a Fellow of the International Academy of Trial Lawyers, and is an Adjunct Professor of Taxation at the Chicago-Kent College of Law. He testified before the Commission at the June, 1986 hearing devoted to the issue of corporate sanctions, and has turned that testimony into an article that will be appearing in an upcoming issue of the American Journal of Criminal Law.

Mr. Silets would like to acknowledge the assistance of Susan W. Brenner, an associate in the firm of Silets and Martin, Ltd., whose work was invaluable in the preparation of these remarks.

I. INTRODUCTION

This submission results from an invitation extended to its author. The invitation specifically solicited the author's comments on the proposed sentencing guidelines for criminal tax offenses; it also invited comment on the general structure and/or animating rationale of the Preliminary Draft of the Sentencing Guidelines.

This submission addresses both issues: Section II discusses the general structure and rationale of the Preliminary Draft, and identifies the conceptual and practical difficulties that inhere in the concept of "modified real offense sentencing" as applied under the draft guidelines. Section III discusses the guidelines that have been drafted for tax offenses and explains how the aforementioned difficulties manifest themselves in this specific area.

II. "MODIFIED REAL OFFENSE SENTENCING"

> The preliminary guidelines operate under a system of modified real offense sentencing that requires a judge to identify all relevant offense characteristics. These include unlawful acts or omissions that were done in furtherance of the crime of conviction, as well as threatened, attempted, or completed injuries or harms that resulted therefrom.

United States Sentencing Commission, Preliminary Draft--Sentencing Guidelines 10 (September, 1986) [hereinafter, "Preliminary Draft"].[1]

According to the Commentary that has been provided for this portion of the draft, the Commission was faced with the initial decision as to "whether to base its sentencing guidelines upon the real conduct in which the offender engaged or only the conduct for which the offender was convicted." Preliminary Draft at 11. The Commission chose the former alternative because, again according to the Commentary, it felt that modified real offense sentencing was essential for the implementation of the new sentencing goals established by the Sentencing Reform Act of 1984.[2]

The Act rewrote federal sentencing goals because Congress concluded that "[i]n the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model." S. Rep. No. 225, 98th Cong., 1st Sess. 38 (August 4, 1983) [hereinafter, "S. Rep. at ___"].[3]

> Recent studies suggest that this approach has failed, and most sentencing judges . . . agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis . . . . Until the present sentencing statutes are changed, . . . judges . . . are left to exercise their discretion to carry out what each believes to be the purposes of sentencing.[4]

S. Rep. at 40 [notes omitted]. Although dissatisfied with the rehabilitative ideal, Congress did not consider it be to the critical flaw in the present system.

This title was reserved for "the judge factor." S. Rep. at 44. "[T]he judge factor" is the role that judicial discretion plays in the articulation and imposition of sentences:

> [E]ach judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another--convicted of the very same crime and possessing a comparable criminal history--may be sentenced to a lengthy term of imprisonment. . . .
>
> These disparities . . . can be traced directly to the unfettered discretion the law confers on . . . judges . . . . This sweeping discretion flows from the lack of any statutory guidance or review procedures to which courts . . . might look.

S. Rep. at 38 [note omitted].[5]

In order to eliminate disparities resulting from the conjoint effects of the rehabilitative ideal and "the judge factor", Congress set out to create a system which would ensure that sentences were consistent along certain parameters.[6] The system that resulted is founded upon determinate sentencing and a new concept, the sentencing guidelines.[7]

A. Purpose of the Guidelines

> A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity. The [Act] requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing. He is then to determine which sentencing guidelines and policy statements apply to the case. Either he may decide that the guideline recommendation appropriately reflects the offense and offender characteristics and impose sentence according to the guideline recommendation or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating

> circumstance and impose sentence outside the guidelines. A sentence outside the guidelines is appealable, with the appellate court directed to determine whether the sentence is reasonable. Thus, the [Act] seeks to assure that most cases will result in sentences within the guideline range and that sentences outside the guidelines will be imposed only in appropriate cases.

S. Rep. at 52 [notes omitted].[8]

A subsequent enactment, the Sentencing Guidelines Act of 1986,[9] "provide[d] the . . . Sentencing Commission [with] limited, additional discretion in the promulgation of sentencing guidelines." H. R. Rep. No. 99-614, 99th Cong., 2d Sess. at 2 (1986) [hereinafter, "H.R. Rep. No. 99-614"]. The legislative history for this measure described the Commission's role as follows:[10]

> The [Sentencing Reform] Act requires a judge to impose a sentence authorized by the applicable sentencing guideline. A judge may go outside the applicable guideline, but only if [he] finds . . . an aggravating or mitigating factor that was not adequately considered when the guidelines were formulated and that should lead to a sentence different from that called for by the applicable guideline. The judge, moreover, is not encouraged to go outside of the applicable guideline, for if the judge does, the aggrieved party is entitled to appeal the sentence. It is clearly intended that judges will confine their exercise of discretion to choosing a point within the range (if any) specified in the applicable guideline. Thus, the Sentencing Reform Act really vests most of the sentencing discretion in the United States Sentencing Commission, the body responsible for drafting the sentencing guidelines.

H.R. Rep. No. 99-614 at 2-3 [notes omitted].[11]

Since judges are "not encouraged to go outside of the applicable guideline", judicial discretion will be confined to

applying the appropriate guideline(s).[12] The constraints on judicial discretion will transform sentencing into a formalistic exercise predicated upon the assessment of "offender characteristics", "offense severity" ratings and permutations thereof. Since the sentencing guidelines are the final arbiter of this process, they must be drafted so as to avoid uncertainty, ambiguity, and bias toward either the prosecution or the defense, while aggressively promoting the fundamental requirements of due process and ensuring that humanistic and policy considerations play some role in the imposition of penal sanctions.

This is, of course, a Herculean task,[13] and the author trusts that the members of the Sentencing Commission will not be mortally offended if he points out certain respects in which the task has not been carried to its necessary fruition. The section immediately below discusses these issues, and explains why they are matters of great concern to those who represent defendants in federal criminal proceedings.

B. Burdens of Proof and Persuasion

The sentencing guidelines are intended to transform sentencing into an exercise unenlightened by the interposition of judicial idiosyncrasy. The realization of this ambition requires (a) a complete restructuring of the policies and practices of the federal sentencing system, since that system is and always has been predicated upon the concept of judicial discretion, and/or (b) a careful evaluation of existing policies and practices to

determine which, if any, are constitutionally acceptable in the absence of discretionary sentencing.

The former alternative represents an undertaking of gigantic magnitude; although the Preliminary Draft is offered as the successful culmination of this undertaking, the author has regretfully concluded that it has, in fact, foundered upon the rocks of the second alternative. That is, the central defect of the Preliminary Draft is that it attempts to retain practices and doctrines that were developed for a system of discretionary sentencing. Since these concepts were designed to assist a judicial officer in the informed exercise of his sentencing discretion, they are animated by considerations that are necessarily different from, and often antithetical to, the considerations that inhere in the new, determinate sentencing system.

This proposition is best illustrated by means of an example, and the best example is the Draft's allocation of the burdens of production and persuasion:

> In determining the appropriate sentence under these guidelines, the court may rely on any information produced at trial, in the presentence report or at the sentencing hearing that the court finds is supported by a preponderance of the evidence. . . .[14]
>
> 1. The court may find that an offense characteristic exists or an adjustment factor applies if a preponderance of the evidence supports such finding.
>
> 2. The burdens of production and persuasion as to the existence of an offense characteristic or an adjustment factor shall be on the government unless the offense

> characteristic or adjustment factor mitigates the potential sentence in which case the burdens of production and persuasion shall be on the offender.

Preliminary Draft at 8-9. The Commentary informs us that the "less demanding" preponderance of the evidence standard was chosen over "either the beyond a reasonable doubt standard used to determine the defendant's guilt or a clear and convincing evidence standard" because

> [t]he use of the preponderance standard at sentencing was recently upheld in McMillan v. Pennsylvania, ____ U.S. ____, 106 S.Ct. 2411 (1986). In McMillan, the Court examined a Pennsylvania statute that permitted a judge to impose a mandatory minimum sentence of five years for specific felonies when the judge found by a preponderance of the evidence that the offender `visibly possessed a firearm.'
>
> The Court found that establishment of the preponderance standard was permissible under the Due Process clause, and noted that `sentencing courts have always operated without constitutionally imposed burdens of proof; embracing petitioners' suggestion that we apply the clear and convincing standard here would significantly alter criminal sentencing, for we see no way to distinguish the visible possession finding at issue here from a host of other express or implied findings sentencing judges typically make on the way to passing sentence.' McMillan, supra, at 2420, n. 8.

Preliminary Draft at 9. As support for its holding that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all", the McMillan Court relied upon Williams v. New York, 337 U.S. 241 (1949).

i. Williams v. New York

Williams v. New York involved a challenge to the imposition of the death penalty: A jury found Samuel Titto Williams guilty of first-degree murder and recommended that he be sentenced to life imprisonment. 337 U.S. at 242-44. The recommendation was not binding upon the court, which was authorized to impose the death penalty notwithstanding the jury's recommendation. Id.

The court sentence Williams to death. Id. at 244. In imposing sentence, "the judge gave reasons why he felt that the death sentence should be imposed." Id. The "reasons" included "the shocking details of the crime, as shown by trial evidence" and additional information that had not been presented to the jury but that was presented to the court in the report of the pre-sentence investigation.[15] Id.

Although Williams did not contest "[t]he accuracy of the statements made by the judge as to [his] background and past practices," he did attack the sentence as having been imposed in violation of the requirements of due process. Id. at 244-45. The Supreme Court rejected his challenge in a thoughtful opinion that analyzed the evidentiary and procedural considerations implicated in imposing "sentence upon an already convicted defendant." Id. at 244.

> [B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. . . .

> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. . . . Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences . . . have . . . taken the place of the old rigidly fixed punishments. . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation . . . have become important goals of criminal jurisprudence. . . .
>
> Indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. . . . [A] strong motivating force for the[se] changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.

337 U.S. at 246-250.

In the above-quoted excerpts and in the even more lengthy analysis contained in the opinion, the Court made it very apparent that its ruling was predicated upon a sentencing scheme the central features of which were judicial discretion and indeterminate sentencing as the instrument for effecting rehabilitation and reformation. See id. at 246-52. In this scheme, since discarded by the Sentencing Reform Act of 1984, the sentencing officer's role is analogous to that of a treating physician: The judge's obligation is to "diagnose" the sources and circumstances of the offender's propensity for malefaction and then to impose a sentence that is optimally calculated to eliminate this propensity and restore the offender "to complete freedom and useful citizenship."[16] Id. at 250.

Because the judge's role is that of diagnostician, he must be provided with complete information about the offender's background and potential for rehabilitation. Only then can he formulate a sentence that is calculated to achieve the desired ends.

ii. Williams and the Preliminary Draft

Williams' holding was, therefore, entered in a factual context that is very different from the factual context that would exist if the guidelines of the Preliminary Draft were to be implemented. Under the guidelines, and under the Sentencing Reform Act of 1984, sentencing ceases to be an exercise in discretion and becomes an exercise in calculation: The sentencing officer is required to calculate the offender's score on a variety of pertinent characteristics and then, through a mathematical exercise, determines the sentence that must be imposed.[17]

In this context, Williams' "additional information" ceases to be a resource to be drawn upon by a judicial officer in the exercise of his informed discretion and becomes the determinant of the sentence that will be imposed. Under the old system, the sound judgment of the sentencing officer was a reliable check upon any potential abuse of the information so provided; since he exercised control over the sentence that was imposed, he was free to disregard "additional information" or to use it as he saw fit.

It was the existence of this discretion that permitted the relaxation of certain evidentiary and procedural requirements, since the ultimate guarantee of fairness and justice was the

judicial officer's informed and conscientious exercise of this authority. Under the proposed guidelines, however, "additional information" becomes evidence that is presented at what would certainly become an adversarial proceeding, the sentencing hearing.

Under the old sentencing paradigm, the premise was that information was provided to the court to assist it in the informed exercise of its sentencing discretion. Under the new paradigm, at least as represented by the proposed guidelines, this changes dramatically: The parties are invited to put in evidence relating to aggravating or mitigating factors. Although this is not spelled out in the guidelines, it logically follows that once the government has put in evidence supporting the existence of aggravating factors, the burden necessarily shifts to the defendant to rebut the government's evidence.

This, coupled with the provisions of 18 U.S.C. sec. 3661,[18] puts the defendant in a perilous position: The government is free to introduce any and all evidence of "the background, character, and conduct" of a convicted defendant. Once the government has introduced evidence, does this mean that the defendant is then obliged either to introduce rebuttal evidence or face a directed verdict based upon the government's submission?

The Commentary says that the preponderance of the evidence standard comes into play "[w]hen a sentencing fact is disputed." Preliminary Draft at 17. Does this mean that the defendant faces the sentencing equivalent of directed verdict if he does not, and

cannot, introduce evidence controverting the evidence that has been submitted in support of aggravation? Or does it mean that the court is free to ignore uncontroverted evidence under some as-yet unexplicated standard?[19]

The Commentary also notes that "[t]he judge may admit all evidence that is relevant and reliable except for evidence that is barred by evidentiary rules." Preliminary Draft at 17-18. The crucial question is "relevant to what?" As the Williams Court noted,

> [r]ules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. . . . A sentencing judge, however, is not confined to the narrow issue of guilt.

337 U.S. at 247. Since the new sentencing paradigm rejects judicial discretion and the rehabilitative ideal, it can no longer rely upon these concepts as the rationale for conducting a free-wheeling inquiry into the nature of the offender's character and the circumstances of his existence. This means, therefore, that the new sentencing paradigm must articulate equivalent concepts to guide the conduct of the sentencing inquiry.

Absent the articulation of such concepts, the reference to "relevant" evidence becomes meaningless. If the guidelines are to be meaningful and practicable, they must define the scope of

the inquiry at the sentencing hearing. Otherwise, the hearing can become an instrument of abuse, at which the government is free to introduce evidence of the most unfounded and scurrilous character and thereby require the defendant to refute whatever has been said against him or face the equivalent of directed verdict on the issue of aggravation.

This raises a related issue, namely, whether the judge's determination, as a fact-finder, will be subject to appellate review under a sufficiency of the evidence standard. Assume the following, hypothetical circumstances: At the sentencing hearing, the government puts in "some" evidence of the existence of aggravating factors; the defendant is unable to or elects not to put in contraverting evidence, and the court imposes an aggravated sentence based upon the evidence adduced by the government.

Can the defendant then seek appellate review, arguing that the evidence was insufficient to support the imposition of an aggravated sentence? If so, then what standard is to be used to determine whether the evidence was sufficient?[20] What, in other words, is necessary to establish a prima facie "case" in aggravation or, for that matter, in mitigation? And if review is available, then is it necessary to make the equivalent of a motion for directed verdict at the close of the government's "case" in order to avail oneself of that possibility for relief?

And this brings to mind yet another, equally unresolved issue: Is discovery available to equip the parties for their respective roles in the sentencing hearing? That is, can the

defendant obtain discovery from the government (a) in aid of his attempting to establish the existence of mitigating factors and/or (b) to enable him to rebut government-adduced evidence of aggravating factors?

The determination of this issue requires the resolution of another, associated issue, namely, the nature of the sentencing hearing: Is this proceeding a continuation of the criminal proceeding or is it a civil proceeding akin to that instituted by the filing of a petition for habeas corpus?[21] One would assume that it is a continuation of the criminal proceeding except for the adoption of the preponderance of the evidence standard, which suggests that the Commission views it as somehow analogous to civil, post-conviction relief proceedings.

If the proceeding is civil in nature, do the discovery provisions of the Federal Rules of Civil Procedure apply? Conversely, if the proceeding is a continuation of the criminal matter, is discovery confined to that allowed under Rule 16 of the Federal Rules of Criminal Procedure? In either eventuality, how much time is to be allowed for discovery and for general preparations for the sentencing hearing?

The Commentary indicates that "[t]he parties will have the right to present and to cross-examine witnesses."[22] Does this mean that the parties will have the right to depose each other's witnesses, prior to the commencement of the hearing, in order to ascertain what they are likely to say?

If so, what use can then be made of such depositions? Can they, for example, be introduced at a subsequent criminal

proceeding in order to impeach and/or convict one who offered testimony at the sentencing hearing? Can they be used as discovery devices by prosecutors who are interested in initiating new investigations into issues tangential to those raised at the sentencing hearing? Can they be admitted into evidence at grand jury proceedings? And what of "live" testimony offered at the sentencing hearing--can it be put to any of these uses?[2] [3]

Do the provisions of the Jencks Act apply to sentencing hearings, so that the government is required to produce "any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified"? See, e.g., 18 U.S.C. sec. 3500. And, if so, is the defendant subject to a "reverse Jencks" obligation to produce statements in his possession?

It would be possible to continue on in this vein, but the purpose of this discussion is not to offer every specific objection that might be made to the Preliminary Draft. The purpose is, rather, to point out that the conceptual rationale of the proposed guidelines is flawed insofar as it attempts to retain certain aspects of the old sentencing paradigm while forcing them into the confines of a new and radically different paradigm.

iii. "Modified Real Offense Sentencing"

The Sentencing Reform Act of 1984 drastically revised the rationale and procedures of sentencing in the federal system. As the Williams Court noted, judicial discretion is a venerable feature of Anglo-American justice, and its influence and effects

are implicit in all of our sentencing practices and assumptions. It is not possible to engraft a new sentencing system upon these practices and assumptions without ascertaining whether, and to what extent, they are constitutionally permissible under a system that discards judicial discretion and replaces it with a structured, almost categorical sentencing procedure.

The allocation of the burdens of production and persuasion is the perfect example illustrating this proposition: Under a discretionary system, the focus of the inquiry is the individual and what measures are necessary to ensure that he is adequately sanctioned for his criminal conduct and that he is "re-formed" into a productive member of society.

Since the focus of inquiry is the individual, and prophylactic intervention in the course of his life, the sentencing officer is provided with the widest possible information about the individual's life, the assumption being that the officer will exercise his discretion in a reasonable, responsible manner that is calculated to achieve these ends.[24] It is this assumption that was responsible for the Supreme Court's decision in Williams,[25] and it is this assumption that underlies all the existing sentencing practices and policies.

Under the new paradigm, however, the focus of inquiry shifts: Because the Preliminary Draft is predicated upon "modified real offense sentencing", the focus of inquiry becomes "all the harms that the offender actually caused during the course of the conduct for which he was charged."[26] Preliminary Draft at 11. Although this concept is never specifically

defined, the Draft does note that it includes "only those real elements (not necessarily found as elements of the crime charged) that are importantly bound up with the conduct that constitutes the crime charged." Preliminary Draft at 15.

One wonders what "real elements" of a criminal offense are if they are not "elements of the crime charged." One is forced to entertain the unfortunate suspicion that they are, or are likely to become, conduct and circumstances for which the government was unable or unwilling to return an indictment. That is, this open-ended definition of "real elements" would permit the government to introduce evidence that was too tenuous to support either the return of an indictment or a conviction beyond a reasonable doubt but which could withstand the attenuated procedural requirements of the sentencing hearing, as discussed above.

Under the existing system, the court could disregard such evidence and enter the sentence that it deemed appropriate. Under the new system as outlined in the Preliminary Draft, the court would apparently not be able to disregard such evidence unless the defendant were able to controvert it by introducing evidence sufficient to satisfy the preponderance of the evidence standard.[27] This is a de facto reallocation of what had been a value-neutral burden of proof: Under the present system, the parties are both free to introduce evidence in aggravation or mitigation, the focus of inquiry being the offender's peculiar characteristics and his potential for rehabilitation.

Under the new system, the government is free to introduce any evidence that is conceivably relevant to "the real conduct in which the offender engaged."[28] Preliminary Draft at 11. This means that the defendant is very likely to find himself in the position of having to prove that he is innocent of conduct for which he has not been charged. And this means that the government is being given the opportunity to ignore the requirement that conduct be proven "beyond a reasonable doubt" before sanctions can be imposed.

This unfortunate state of affairs is the direct result of predicating sentencing upon "modified real offense sentencing." Since the aim of the Sentencing Reform Act of 1984 and of the guidelines to be promulgated thereunder is to standardize sentencing and to ensure that it proceeds, as nearly as possible, "categorically", the logical solution is to predicate the system upon a "charge of conviction offense system." Such a system "considers only those elements of behavior that formed part of the charge of which the offender was convicted." Preliminary Draft at 11.

If the desire is to ensure that sentences are standardized across offense categories, then predicating the sentence upon a charge of conviction offense system would achieve this goal without entangling the sentencing court in a lengthy, complex and possibly unfair inquiry into the "real" circumstances of the affair.[29] Predicating sentencing upon a charge of conviction offense system would mean that sentence could be imposed based upon the evidence introduced at trial; this, in turn, would

protect the defendant by ensuring that sentencing decisions were based upon facts that had been established beyond a reasonable doubt.

This alternative also proceeds upon the constitutionally irreproachable assumption that the legislature's definition of an offense and specification of penalties therefore includes a consideration of all of the "harms" associated therewith. If the ambition is to create a system that achieves the maximum impact upon offense commission by imposing essentially identical sanctions for each instance thereof, then the logical means for realizing this ambition is through a charge of conviction offense system that relies upon standardized offense categories and standardized penalties therefor.

The onus would then be (properly) upon the legislature to draft offense statutes (a) that were directed toward the harms associated with each offense, and (b) that identified the penalties that could be imposed for the commission of each such offense. The Sentencing Commission could then monitor the success of each such penalty, and establish guidelines to be used in determining when imprisonment or lesser sanctions were appropriate.

The Commission could also develop guidelines to be used in determining when the certain offender characteristics could warrant the imposition of a sentence other than incarceration. If sentencing were predicated upon a charge of conviction offense system, then it would be both logical and constitutionally permissible to require the defendant to bear the burden of

establishing the existence and operation of offender characteristics warranting such a sentence.[30]

Unless the system proceeded according to absolutely standardized offense and sanction categories, it would be impossible to eliminate any vestiges of judicial discretion. Since it does not appear that Congress intended to rely upon absolutely standardized offense and sanction categories, a charge of conviction offense system would require the good offices of the Sentencing Commission to ensure that there was an equitable correlation between generalized sanction categories and specific offenses.

This might very well require establishing guidelines analogous to those contained in the Preliminary Draft. The difference would be, however, that the guidelines would be formulated for, and apply to, conduct that had already been established beyond a reasonable doubt. This, alone, would alleviate the procedural problems discussed above, and would obviate the necessity for transforming the sentencing hearing into a second, "mini" trial.

C. Other Problems

It is simply not possible, given the constraints on the author's time and the reader's attention span, to analyze every conceivable issue inherent in the guidelines in the Preliminary Draft. The section immediately above has addressed what is perhaps the most compelling issue, namely, the difficulties inherent in "modified real offense sentencing" as expressed in the Preliminary Draft. This section points out several other

issues which the author feels are of sufficient importance to warrant reconsideration by the Commission.

i. Presumptive Aggravation

One problem, the magnitude of which is second only to that of "modified real offense sentencing", is that the guidelines, as drafted, are skewed so that they at least implicitly establish presumptive aggravation. In so doing, they offend the dictates of due process as interpreted by the Supreme Court in Patterson v. New York, 432 U.S. 197 (1977), Mullaney v. Wilbur, 421 U.S. 684 (1975) and In re Winship, 397 U.S. 358 (1970).

In Mullaney, the Supreme Court was confronted with a Maine statute that "require[d] a defendant charged with murder to prove that he acted `in the heat of passion on sudden provocation´ in order to reduce the homicide to manslaughter." 421 U.S. at 684-85. Under Maine law, murder carried a mandatory sentence of life imprisonment, while manslaughter was punishable by a fine or imprisonment not to exceed twenty years. Id. at 686 n. 3.

Stillman E. Wilbur, Jr. was convicted of murder and appealed, arguing that "he had been denied due process because he was required to negate the element of malice aforethought by proving that he had acted in the heat of passion on sudden provocation." Id. at 687. Wilbur argued that malice aforethought was an essential element of the crime of murder and that, therefore, the burden was upon the prosecution to establish the existence of this element by proof beyond a reasonable doubt.[31] Id.

Maine representatives argued to the Supreme Court that Winship did not apply to Wilbur's circumstance, since "the absence of the heat of passion on sudden provocation is not a `fact necessary to constitute the crime' of felonious homicide in Maine." 421 U.S. at 697, quoting In re Winship, 397 U.S. 358, 364 (1970) [emphasis in original]. They argued that the statutory presumption was outside the compass of Winship because it came into play only after the jury had already determined guilt, and its only effect was upon the quantum of punishment inflicted.[32] 421 U.S. at 697.

The Supreme Court rejected this argument, holding that "[t]he safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." 421 U.S. at 698.

> [I]f Winship were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. . . . If Winship were limited to a State's definition of the elements of a crime, . . . States could define all assaults as a single offense and then require the defendant to disprove the elements of aggravation.

421 U.S. at 698-99 n. 24. The Court also held that Winship's protections extend to the allocation of the burdens of production and persuasion:

> In Winship the ultimate burden of persuasion remained with the prosecution, although the standard had been reduced to proof by a fair

> preponderance of the evidence. In this case, by contract, the State has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous . . . conviction. Such a result directly contravenes the principle articulated in Speiser v. Randall, 357 U.S. 513, 525-26, (1958): `Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the fact-finder at the conclusion of the trial. . . .'

421 U.S. at 700-01.

Many of the guidelines contained in the Preliminary Draft are inconsistent with the holding in Mullaney in that they presume the existence of aggravating factors unless the defendant comes forward with evidence sufficient to rebut that presumption by a preponderance of the evidence.[33] This directly contravenes Mullaney's holding that the prosecution must bear the initial burden of production and the ultimate burden of persuasion upon factors that bear upon the severity of the punishment that is inflicted.[34]

ii. Other Issues

One author has already observed that, under the new Act and the sentencing guidelines, "a substantially enlarged sentencing process in the district courts, more wide-ranging and adversarial, can be anticipated."[35] This same author also observed that it is readily foreseeable that "it will become an important part of the effective assistance of counsel for defense lawyers to litigate the application of the guidelines."[36]

This points out another, terribly important issue, namely, the effect which the system contained in the Preliminary Draft must have upon an already-overburdened court system. As was noted above, the transformation of the sentencing hearing into a "mini-trial" will have serious consequences; first of all, it will be necessary to determine what evidentiary and procedural rules apply to the proceeding. Once that determination has been made, it will then be necessary to address the pragmatic issues raised thereby.

That is, as an example, assume that it is determined that discovery is permissible in this proceeding and that it is governed by the Federal Rules of Civil Procedure or some analogue thereof.[37] This determination, alone, will present the court system with an incredible number of decisions that must be made as to the scope of discovery, the amount of time allowed for discovery and similar issues. These problems will, in effect, double the amount of time required for the final resolution of a criminal proceeding.[38]

To turn to yet another issue, there is the problem of preserving one's rights to appeal while not exposing oneself to the possibility of an unnecessarily harsh sentence. Assume, for the moment, that a criminal defendant (a) has been convicted after a trial in which he chose not to put in a defense based upon his determination that the government's proof was insufficient to establish a prima facie case, or (b) has entered a conditional plea under Fed.R.Crim.Pro. 11(a)(2), which allows a

defendant to enter a plea while reserving the right to appeal on a specified issue.[39]

The time comes for sentencing. What is the defendant to do when the government introduces evidence in aggravation at the sentencing hearing? If he stands mute, and declines to introduce evidence on his own behalf, he runs the risk of receiving an enhanced sentence. If, however, he decides to introduce evidence on his own behalf, can that evidence later be used against him, as the basis for denying his appeal? If he decides to waive his Fifth Amendment privilege against self-incrimination and testify in his own behalf, can that testimony then be used to supplement the trial record and provide the basis for ruling against him on his challenge to the sufficiency of the evidence introduced against him?[40]

The Preliminary Draft does not address the operation and effect of plea bargains.[41] The Federal Rules of Criminal Procedure expressly permit the parties to plea bargain a sentence.[42] The Sentencing Reform Act of 1984 did not change this aspect of the Federal Rules.[43] What the Act has done is to raise a number of questions regarding plea bargaining under the new provisions.

As an example, may the parties enter into a plea bargain that calls for a sentence that is outside the applicable guidelines? If they do enter into such a bargain, is the court bound to honor it, or can the court disregard "unconventional" bargains at its discretion? If the court disregards such a

bargain, can the defendant then petition the appellate court for reinstatement of the bargain?[44]

If the parties can "bargain away" applicable guidelines, then what effect will this have upon the sentencing system?[45] If the parties cannot "bargain away" applicable guidelines, then what is the incentive for engaging in plea bargaining?

This raises another issue: Under the present system, a defendant can plead guilty to certain conduct, contained, let us say, in Count I of a two-count indictment, and thereby assure himself that the penalty imposed will reflect only a portion of the unlawful conduct attributed to him. The net effect is to lessen the defendant's exposure to penal sanctions; since this effect has advantageous consequences for the defendant, it represents a direct inducement to engage in plea bargaining.

But will the same result ensure under the new system? Under the proposed guidelines, a defendant could plead guilty to Count I of the same two-count indictment, and then find that the conduct alleged in Count II was being introduced into evidence against him at the sentencing hearing, under the guise that it constituted part of the "actual harm", or "real conduct," involved in the commission of Count I. Although the sentence that would result from this scenario should be less than would have been imposed had the defendant been convicted of both counts, the fact remains that the advantageous consequences of the plea bargain have been markedly reduced.

One wonders, therefore, if defendants in the new system may not find it more to their advantage to proceed to trial and

require the government to prove the allegations contained in both counts beyond a reasonable doubt. Although this alternative is fraught with its own risks, it holds out more hopeful possibilities than pleading to one count in the certainty that the conduct in the remaining counts will ominously appear, like Banquo's ghost, at the sentencing hearing.

Although there are other observations that can be made, the author will conclude this discussion with one final point, which is that the system established by the guidelines markedly increases the bargaining power and, indeed, the power of the prosecutor. His ability to draft indictments ensures that he will be able to manipulate the guidelines to his advantage, by crafting indictments that will permit the maximum possible exploitation of charged and uncharged conduct, and to the defendant's distinct disadvantage.[46] Since the author assumes that the Commission intends, insofar as possible, to establish a system that is value-neutral in regard to the comparative bargaining-power of the parties, he would respectfully suggest that the Commission reconsider the guidelines in light of their potential for producing "inflated" sentences resulting from the clever manipulation of charging considerations.[47]

III. "OFFENSES INVOLVING TAXATION"

The comments presented in Section II, supra, apply with equal force to the guidelines that have been proposed for "offenses involving taxation", and the reader should consider that they have been incorporated into this section by reference.

The purpose of this section is not, however, to reiterate issues that have already been considered but, instead, to comment upon issues that are peculiar to tax offenses and the guidelines that have been proposed therefor.

With that purpose in mind, this section has been divided into two sub-sections, the first of which discusses specific problem areas in order to illustrate how the issues considered in Section II, supra, affect particular guidelines. The second sub-section demonstrates that the tax guidelines are flawed because they have been generated by a sentencing paradigm that is constructed around a central, undefined term.

A. Specific Problem Areas

Guideline sec. C211 is concerned with the offense of tax evasion,[48] and provides as follows:

> The base offense value is determined by the table below.[49] Application of the table is to be based upon the tax deficiency, i.e., the total amount of tax that the taxpayer evaded or attempted to evade. The deficiency does not include any interest or penalties. If multiple counts are involved, e.g., when the taxpayer evaded taxes in several years, the deficiencies should be added. If the offense involved an attempt to evade taxes that, as of the time of the offense had not yet become due, compute the deficiency using a tax rate of 30%.

Preliminary Draft at 44. The general guideline is supplemented with the following "specific offense characteristics":

> If all or part of the taxpayer's income was obtained unlawfully, application of the table is to be based upon the deficiency plus the amount of any unreported unlawfully-obtained income. Unreported income is presumed to have been obtained unlawfully, unless

> otherwise established by the offender.
> Example: Suppose that the offender's tax deficiency is $25,000 and the amount of unreported income is $60,000. Unless it is established that the unreported income was obtained unlawfully, the deficiency . . . would be $85,000 and the offense value would be 26 rather than 18.

Preliminary Draft at 44-45 [emphasis added].

The first issue to be addressed is the issue that is raised by the italicized portion of the above quotation, namely, the fact that "[u]nreported income is presumed to have been obtained unlawfully, unless otherwise established by the offender." Section II(C)(i), supra, demonstrated that it is constitutionally impermissible to rely upon presumptions which assume the existence of aggravating factors and require the defendant to bear the burdens of production and persuasion to the contrary.

And yet, that is precisely what this statement accomplishes. A defendant who has been convicted of tax evasion bears the burden of producing evidence sufficient to establish that his unreported income was not obtained unlawfully; if he fails to satisfy this burden, he has also failed to discharge his burden of persuasion and will be given an enhanced sentence based upon the assumption that all of his unreported income was obtained through unlawful means.[50]

Aside from the fact that it is inconsistent with the requirements of due process as interpreted in Mullaney, Winship and Patterson, the presumption is also subject to objection on other grounds. First of all, the existence of the presumption directly jeopardizes the offender's right to rely upon his Fifth Amendment privilege against self-incrimination.

Assume that the offender did not take the stand during trial, and assume, further, that the source of his unreported income was conduct which is, itself, not illegal but the circumstances of which could expose him to additional criminal charges.[51] Our hypothetical offender is faced with two equally unattractive choices: (1) exercise his privilege, allow the presumption to stand unrebutted and receive a sentence that is enhanced in direct proportion to the amount of income received; or (2) waive the privilege, reveal the circumstances under which the income was generated and face the possibility of additional criminal charges.

Requiring the offender to elect between the Scylla of exercising his privilege and suffering therefor or the Charybdis of waiving the privilege and suffering for that choice would seem to be inconsistent with the Supreme Court's decisions in Garrity v. New Jersey, 385 U.S. 493 (1967) and in Spevack v. Klein, 385 U.S. 511 (1967), both of which held that no penalty can be attached to an individual's right to exercise his Fifth Amendment privilege against self-incrimination.[52] The presumption contained in the above-quoted adjunct to guideline sec. C211 directly imposes a penalty upon one's right to stand silent and is therefore inconsistent with the requirements of the Fifth Amendment.

In addition to the fact that the unlawfulness of the income is "presumed", the proposed specific offense characteristics for guideline sec. C211 are also subject to another objection. The guideline is predicated upon the concept of "unlawfully obtained

income", and yet this concept is never defined. When is income "unlawfully obtained" for the purposes of guideline sec. C211?

Is "unlawfully obtained income" only income that is generated by activities that are prohibited by lawfully enacted criminal statutes? If so, does the concept extend to activities that are unlawful under state statutes or is it limited to activities that are prohibited by federal criminal statutes? Or is the concept intended to have a wider meaning, extending to activities that are "immoral" or "wrong" or "unethical"? The uncertainty inherent in the guideline's use of the concept of "unlawfully obtained income" is best illustrated by means of yet another example. Assume that an individual is the sole stockholder of a corporation, and assume, further, that he has been skimming money from the corporation's receipts. Let us say that he has been diverting all the corporation's even-numbered sales receipts to his own use, and reporting only the income generated by the odd-numbered sales receipts. Having done so, he then signs an income tax return that is based upon and reflects his diversion of approximately half of the corporation's actual income.

Our perpetrator is indicted, tried and convicted of tax evasion. When the time for sentencing comes, is he liable for an enhanced sentence as one whose "income was obtained unlawfully"? Was the unreported income "obtained unlawfully" in that it was the product of theft from his own corporation? Or is "unlawfully" obtained income limited to income that is the direct

proceeds of "unlawful" activity such as drug dealing, numbers running and prostitution?

The difficulty is that the guideline places the burden upon the offender to demonstrate that his income was not obtained unlawfully, and then fails to provide any guidance as to what is necessary to establish that income is, in fact, "lawful." Aside from the impermissibility of enacting such a presumption, the whole concept of "unlawfully obtained income" is so amorphous that it imposes tremendous conceptual and practical difficulties upon an offender who is required to demonstrate to the contrary.[53]

Turning to another, equally important issue, most of the tax offense guidelines are predicated upon, or include a consideration of, the amount of tax that has not been paid.[54] Until now, the amount of tax that had not been paid was not relevant to establishing the offense except insofar as the amount provided inferential evidence that the omission of the income was due to factors other than negligence or inadvertence. Under the proposed guidelines, however, the amount of income becomes a significant factor in determining the sentence that will be imposed.

One concern that must immediately come to mind is the question as to how this amount will be determined at the sentencing hearing. Will the government be allowed to introduce evidence that was not presented at trial? Will the issues at the sentencing hearing be confined to the issues that were defined at trial, or will the government be allowed to introduce any "dirty

laundry" that it has unearthed that involves the defendant's tax and/or business affairs? If the Commission is seriously committed to including the amount of unpaid tax as a factor in sentencing, then the guidelines must be reformulated so that they narrow the concept to reflect only that conduct with which the defendant was charged and of which he has been convicted.[55]

It may be, however, that the better course is to eliminate this element entirely, or at least to minimize its importance. in this regard, the author would agree with a statement which Ian M. Comisky[56] submitted to this Commission in a letter dated July 11, 1986.[57] In his statement, Mr. Comisky makes the following observation regarding the proposed tax offense guidelines:

> Under the proposal, a person convicted of evading $2,000,000 of taxes would be classified with someone who evaded $100,001 in tax liability and a person who evaded $89,999 of tax would be grouped with someone attempting to evade $1200 of tax. The tremendous disparity between these offenders will defeat the purpose for which the Guidelines were created. In addition, it may not be appropriate to treat a $100,000 tax evasion when 6 million dollars of taxes were paid with the return in a similar fashion to a $100,000 tax evasion when only $20,000 of taxes were paid with the return.

Comisky letter at 3.[58] Comisky also quotes a statement from Roger Olsen, then acting Assistant Attorney General and now Assistant Attorney General, in the Tax Division of the Department of Justice, in which Mr. Olsen made the following comment about the proposed tax offense guidelines:

> In short, we urge that the Commission should not use the amount omitted, falsely characterized or deducted, as a primary or controlling factor in judging the seriousness of tax crimes. Rather, . . . the amount in

> dispute in tax cases is but one of a numbers [sic] of factors.[59]

The use of the amount of unpaid tax as a sentencing consideration is an issue that is addressed in more detail in Section III(B), infra. The point here is, simply, that the guidelines' reliance upon the unpaid tax is misplaced, as it gives rise to arbitrary and erratic distinctions that are a poor substitute for the idiosyncrasies of sentencing under the present system, and that can very easily give rise to inequity and injustice in sentencing.

What if the offender has been convicted of a conspiracy offense, either conspiracy to evade and defeat tax or conspiracy to impede the Internal Revenue Service in the performance of its duties?[60] Either offense can be established without the necessity of proving that some amount of tax is due and owing.[61] Must the amount of unpaid tax be proven at the sentencing hearing, even though it was never an issue at trial? If so, this will certainly require that the sentencing hearing become a far more elaborate proceeding than is apparently contemplated by the Preliminary Draft.[62]

Since it is simply not possible to analyze every issue that arises from the proposed tax offense guidelines, this portion of the discussion will conclude by considering an issue that is inherent in guideline section C212. Guideline section C212 is concerned with the offense of "willful failure to file return, supply information or pay tax." Preliminary Draft at 45. This guideline, like so many of the others, predicates its base offense value upon the amount of the tax deficiency.[63]

However, the amount of tax that has not been paid is not a necessary element of the criminal offense of failure to file a return. In order to establish the commission of this offense, the government need only establish that the taxpayer had sufficient gross income to oblige him to file a return. Gross income is not, however, synonymous with "gross receipts", as was established by the holding in Siravo v. United States, 377 F.2d 469, 473 (1st Cir. 1967).

In Siravo, the court held that "total receipts must be reduced by the cost of goods sold and other costs representing a return of capital to arrive at gross income for a manufacturing business." 377 F.2d at 473. Assume, for the moment, that an individual has been engaged in a manufacturing business, and that he has been convicted of failure to file a return. Assume, further, that he did not put in evidence at the trial because he is convinced that he will be able to obtain a reversal upon appeal, upon an issue that is irrelevant to the point under consideration.

What should he do at the sentencing hearing? Assuming that he wishes to do so, and that doing so will not violate his Fifth Amendment rights, can he then re-open the issue of gross income at the sentencing hearing? Can he present evidence at the sentencing hearing of allowable costs that would reduce his gross income (a) below the point required for filing a return, and/or (b) to a sum lower than that alleged by the government?

In either eventuality, he will enjoy a net advantage, since the sentence that will be imposed will be substantially reduced.

The unresolved question is, however, whether the evidentiary issues heard and determined at the trial on the merits then become res judicata for the sentencing hearing? This is an issue that must be resolved, not only for the tax offense guidelines, since it implicates fundamental due process concerns and goes to the entire rationale of the sentencing proceeding.

B. Concluding Remarks

As must be apparent from the discussion immediately above, the central problem with the tax guidelines is the same problem that is encountered in connection with all of the proposed guidelines, at least, the guidelines that have been proposed for non-violent, "white-collar" offenses. That problem is that the guidelines are predicated upon the proposition that they are intended to sanction offenses based upon the "actual harms" inflicted thereby.

This proposition is at once the result of and the reason for the Commission's decision to premise the guidelines upon the concept of "modified real offense sentencing." See Preliminary Draft at 11-18. The initial Commentary uses an example to illustrate the reasons why "modified real offense sentencing" was chosen as the operative paradigm for the guidelines:

> First, a man walks in a bank, hands a teller a shopping bag, pretends to have a gun, and passes a note that says, `I have a gun. Give me all your money.' The teller puts $1,500 in the shopping bag and the offender walks out. Second, a man walks up to a teller in a bank and points a loaded gun. The offender demands money. After the teller gives him $1,500, he strikes her with the gun and demands that she collect money from elsewhere

> in the bank. He leaves the bank with $20,000. Assume that the grand jury charges both these defendants with violations of the same statute, 18 U.S.C. sec. 2113(a), and that both are convicted. A guidelines sentencing system based solely upon offense of conviction treats these two offenders similarly. . . . A real offense sentencing system, however, would take account of all the harms that the offender actually caused during the course of the conduct for which he was charged. Thus, a real offense system would punish the second man more severely in light of the gun, the extra money taken, and the physical injury caused.

Preliminary Draft at 11 [emphasis added].

Even assuming, arguendo, that a real offense system would more perfectly "do justice" in the situation described above, it does not necessarily follow (a) that it applies with equal force to non-violent offenses, and/or (b) that identical factors can be employed in assessing the "harms" inflicted by violent and non-violent offenses.[64] The central difficulty is that while modified real offense sentencing may have an intrinsic appeal when one is confronted with an elemental offense such as that described above, its appeal and its utility tend to break down when the attempt is made to extrapolate it into other categories.

In the example above, the "harms" are readily apparent, on a basic, intuitive level. In the first instance, the "harm" is theft, the deprivation of the $1,500; the deprivation is apparent, even if the victim, presumably, the bank, is relatively impersonal. In the second instance, the "harm" is even more readily apparent at that same intuitive level, namely, the actual use of a loaded weapon and the actual infliction of physical injury.[65]

The "harm" in both instances is readily apparent because the offenses are what might be termed "linear" offenses, that is, there is a direct, one-to-one relationship between the offender and his victim.[66] It is very easy to hear a description of the offense conduct and readily apprehend the social evil that has resulted therefrom. This is true both because of the relatively simple nature of the conduct at issue and because of the fact that this is what one might term "conventional criminal conduct." That is, it is conduct that has been condemned at least as long as mankind has kept written records and is, therefore, more easily comprehended, both in its commission and in its implications.

Non-violent offenses, or "white-collar crimes", are, however, quite a different story. Aside from their relative novelty, they differ from violent offenses in that both the criminal conduct and the resulting "harms" are more abstract and less intuitively apparent. The majority of "white-collar crimes" have been defined as crimes because of social policy considerations.[67]

That being the case, the level of "harm" inflicted by their commission must be ascertained with reference to the social policy considerations that were responsible for their enactment. The proposed guidelines beg this question by attempting to rely upon the amount of money that was involved in a particular transaction. As was noted in the section immediately above, this is a poor standard and does not adequately reflect the "evil" that punishment is intended to reach.

Perhaps an example will illustrate this point: Assume that there was a company that was in the business of processing and providing asbestos for use in construction and other industries. Assume, further, that this asbestos company was aware, as long ago as, say, 1920, that asbestos was highly dangerous, resulting in various fatal respiratory diseases and a particularly malevolent form of cancer.

Now assume that, possessing this knowledge, the company deliberately exposed hundreds of its workers to asbestos without providing protection that was readily available. The company chose not to equip its workers with such protection because to do so would directly increase the costs of production and thereby cut down on the company's products. At the same time, the company was supplying asbestos for use in literally thousands of buildings across the country.

At some point in time, the workers and former workers realize what has been done to them, and they initiate personal injury and wrongful death actions against the company. At the same time, the owners of buildings in which asbestos has been installed bring property damage actions intended to recover for the costs which they will incur in removing the asbestos and replacing it with other, less deadly materials. Assume that the average personal injury claim is for the sum of $150,000 and that the average property damage claim is for the sum of $1,000,000.

And assume, finally, that criminal action is instituted against the company for its conduct in both regards. The company and its representatives have been tried and convicted of both

categories of offenses. How would a "modified real offense sentencing" paradigm chose the sanctions for each offense? Would such a system punish the property damage conduct more severely because the transaction costs were higher, in terms of monetary considerations? If not, how would such a system ascertain the relative levels of "harm" inflicted by the two different types of conduct, both involving the same instrumentality and the same general level of culpability?

This may be a poor example, but it is intended to indicate that not all criminal conduct is reducible to a dollar amount. The author would strongly suggest that the members of the Commission reconsider their commitment to using finances as a primary factor in determining the "harm" inflicted by a particular offense and in setting the punishment therefor. Even if one assumes, for the purposes of argument only, that financial considerations are appropriate in sanctioning certain types of offenses, this proposition does not necessarily hold in regard to white-collar offenses.

Of far more significance in the latter area are the social policy considerations responsible for the articulation of the offense, the forces that prompted the commission of the offense and the offender's potential for becoming and remaining a useful, productive member of society. Even if Congress has chosen to replace rehabilitation as the primary goal of federal sentencing, rehabilitation and the analysis that has been developed under the old system should still play a part under the new sentencing paradigm.

Endnotes

1. The Preliminary Draft also notes that

> [t]he following offenses are excluded in determining an offender's sentence under the guidelines:
>
> 1. conduct for which the offender has already been fully sanctioned;
>
> 2. conduct for which further prosecution is barred.

Preliminary Draft at 10.

2. The rejected alternative is "a charge of conviction offense system [which] considers only those elements of behavior that formed part of the charge of which the offender was convicted." Preliminary Draft at 11.

The Sentencing Reform Act of 1984, which is contained in Title II of the Comprehensive Crime Control Act of 1984, established the following as the goals of federal criminal sentencing:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

Pub.L. 98-473, Title II, sec. 212(a)(2), 98 Stat. 1989 (Oct. 12, 1984), to be codified as 18 U.S.C. sec. 3553(a)(2), as amended by Pub.L. 99-217, secs. 2, 4, 99 Stat. 1728 (Dec. 26, 1985) (effective November 1, 1987). See also Preliminary Draft at 6-8.

3. Senate Report No. 225 was issued to accompany S. 1762, which was a proposed Comprehensive Crime Control Act of 1984 that was passed by the Senate on February 2, 1984. See 1984 U.S. CODE CONG. & ADM. NEWS 3182. Much of Title II of the enacted Comprehensive Crime Control Act of 1984 was derived from the provisions of S. 1762. See id.

4. The report also includes the following comments on the unreliability of the rehabilitative ideal:

> The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is `rehabilitated.' Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.

S. Rep. at 38. And the report goes on to criticize indeterminate sentencing:

> The sentencing provisions of current law were originally based on a rehabilitation model in which the sentencing judge was expected to sentence a defendant to a fairly long term of imprisonment. . . . The Parole Commission was charged with setting his release date if it concluded that he was sufficiently rehabilitated. At present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of `coercive' rehabilitation--the theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons.

S. Rep. at 40. For a theoretical discussion of the reasons for the decline of "the rehabilitative ideal", see F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981). Allen also discusses the reasons for the increased popularity of punishment as retribution, or what he calls "just deserts." See id.; see also M. FOUCAULT, DISCIPLINE AND PUNISH--THE BIRTH OF THE PRISON (1979).

5. The original version of the above-quoted passage includes references to the Parole Commission, to which is attributed the responsibility for disparities in sentence implementation. See S. Rep. at 38. These references were deleted because they are irrelevant to the point at issue.

The drafters of the Sentencing Reform Act described the goals of the new measure in a report issued by the Committee on the Judiciary: "The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole

release, and make criminal sentencing fairer and more certain." S. Rep. No. 223, 98th Cong., 1st Sess. 62 (1983). The report accompanying the Comprehensive Crime Control Act of 1984 included the following comment in its discussion of the necessity for the implementation of sentencing guidelines: "Recent studies indicate that sentences too often reflect the personal attitudes and practices of individual sentencing judges." S. Rep. at 53, n. 72.

6. This undertaking is predicated upon the assumption that sentencing disparities are inherently undesirable; this assumption results from the rejection of the rehabilitative ideal.

The rehabilitative ideal required that sentences reflect the pertinent idiosyncrasies of offenders and their offenses, since it conceptualized criminality as being analogous to illness and susceptible to similar treatment. The conceptualization led to the assumption that there was an optimally "interventionist" sentence for each offender, and that the determination of this sentence was the province of the particular judge who had an opportunity to observe the offender and to inquire into his character and the circumstances of his offense. See, e.g., D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971); D. MELOSSI & M. PAVARINI, THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM (1981); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 513-20 (1973). See also People ex rel. Forsyth v. Court of Sessions of Monroe County, 141 N.Y. 288, 36 N.E. 386 (1894) (upholding court's "inherent" power to suspend sentence in the presence of mitigating factors).

Although idiosyncratic sentencing is an essential element of the rehabilitative ideal, the rejection of the latter neither requires nor permits the rejection of the former. The Eighth Amendment's prohibition of "cruel and unusual punishment" has been interpreted as requiring that sentences be proportionate to the offense and the circumstances thereof, and even the retributive ideal is predicated upon the concept of "just deserts", of achieving some parity between the offense and the punishment imposed. See, e.g., Solem v. Helm, 463 U.S. 277, 284 (1983); Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Cal. L. Rev. 839, 844 (1969). Indeed, even the new act requires that the sentencing officer consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Pub.L. 98-473, Title II, sec. 212(a)(1)(2), 98 Stat. 1989 (Oct. 12, 1984), as amended by Pub.L. 99-217, secs. 2,4, 99 Stat. 1728 (Dec. 26, 1986), to be codified at 18 U.S.C. sec. 3553(1) (effective Nov. 1, 1987).

It is this issue, i.e., the necessity for achieving

some parity between the offense and the punishment imposed, that the Preliminary Draft fails to resolve. How can "modified real offense sentencing" achieve consistency and objectivity through the implementation of "categorical" sentences without sacrificing the idiosyncratic parity that is required by the Eighth Amendment and that will be required by 18 U.S.C. sec. 3553(1)?

The legislative history of the Sentencing Reform Act reveals that, although the drafters rejected the rehabilitative ideal, they retained the concept of parity:

> The Committee does not intend that the [sentencing] guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

S. Rep. at 52. The conflict between the language that is quoted above and the language that was quoted earlier, in the discussion of Congress' commitment to consistency and objectivity in sentencing, is not a matter that can be resolved in this essay. The purpose of this essay is, among other things, to point out the existence of the conflict, and to suggest that the Commission should consider the necessity to temper justice with mercy, to consider modifying the guidelines so as to facilitate "the thoughtful imposition of individualized sentences."

7. "The sentencing guidelines to be developed by the Sentencing Commission are at the heart of the congressional effort to curtail . . . judicial discretion, mitigate disparities in sentencing and inject more predictability into the process." Rezneck, The New Federal Criminal Sentencing Provisions, 22 AM. CRIM. L. REV. 785, 786 (1985). See also n. 5, supra.

In adopting a "a determinate sentencing system with sentencing guidelines", Congress was following an example set by the state of Minnesota. See S. Rep. at 61. At the time the new legislation was drafted, Minnesota was the only state that was operating under such a system. See id., citing Minn. Stat. Ann. secs. 244.04, 244.05, 244.08, 244.09, 244.10 (West Supp. 1983). The National Academy of Sciences conducted a study which concluded that

> the Minnesota sentencing reform had been more

> successful than any other State or local reform effort in . . . reducing unwarranted sentencing disparity, increasing emphasis on punishment for violent offenders, and avoiding unintended burdens on the prison system. . . .
>
> The . . . study concluded that the Minnesota sentencing guidelines system was more successful in changing sentencing behavior to reduce unwarranted sentencing disparities for three reasons. First, the sentencing guidelines were required by legislation rather than adopted voluntarily by the courts. Second, the guidelines prescribed what sentencing behavior ought to be rather than merely describing past sentencing practices. And third, the Minnesota statute included a mechanism--availability of appellate review of all sentences outside the guidelines--to assure judicial compliance with the guidelines. The study also found that Minnesota was able to create a model of its criminal sentencing system that permitted it to test the impact of any given set of sentencing guidelines on its prison system, thus enabling it to fashion guidelines that avoided any unintended impact on the prison system.

S. Rep. at 62 [notes omitted], citing NATIONAL ACADEMY OF SCIENCES, PANEL ON SENTENCING RESEARCH, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (A. BLUMSTEIN, J. COHEN, S. MARTIN & M. TONRY, EDS., 1983).

8. > The court shall impose a sentence of the kind, and within the range [established by the Sentencing Commission] unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described [therein].

18 U.S.C. sec. 3553(b), added by Pub.L. 98-473, Title II, sec. 212(a)(2), 98 Stat. 1989 (Oct. 12, 1984), as amended by Pub.L. 99-217, secs. 2, 4, 99 Stat. 1728 (Dec. 26, 1985), effective Nov. 1, 1987.

9. Pub.L. 99-363, 100 Stat. 770 (July 11, 1986).

10. No Senate Report was issued for this enactment; the quoted material is excerpted from the House Judiciary Committee Report accompanying H.R. 4801, the measure that became the Sentencing Guidelines Act of 1986. See U.S. CODE CONG. & ADM. NEWS 1762 (September, 1986).

11. See also id. at 4 ("The Act . . . places . . . limitations on the Commission's discretion, but these limitations do not seriously restrict the Commission or prevent it from issuing such guidelines as it deems appropriate.").

In the passage that immediately precedes the above-quoted material, the report notes that although the Act appears to give the judge greater control over the punishment that is meted out, i.e., by abolishing parole and halving good time credit, "other provisions of the Sentencing Reform Act reduce judicial control." H.R. Rep. No. 99-614 at 2.

Although the Act does not specifically authorize appeals from sentences that are within the applicable guideline(s), it appears that such appeals are possible. See, e.g., Conyers, Unresolved Issued in the Federal Sentencing Reform Act, 32 FED. B. NEWS & J. 68, 69-70 (1985); see also H.R. Rep. No. 99-614 at 3 n. 8.

12. The validity of this conclusion is reinforced by the statement which the President issued upon signing the Sentencing Guidelines Act of 1986. See U.S. CODE CONG. & ADM. NEWS 1770-71 (September, 1986). The Act amended 28 U.S.C. sec. 994(b), which is concerned with guidelines that "establish a sentencing range" for a particular offense. As amended, 28 U.S.C. sec. 994(b) provides that

> [i]f a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the [minimum] term of the range is 30 years or more, the maximum may be life imprisonment.

28 U.S.C. sec. 994(b), as amended by Pub.L. 99-363, 100 Stat. 1770 (July 11, 1986) [emphasis added and technical correction included]. See, e.g., Statement of President Ronald Reagan upon signing H.R. 4801, reprinted in U.S. CODE CONG. & ADM. NEWS 1770-71 (September, 1986). The original version provided that the maximum of the range was not to exceed the minimum "by more than 25 per centum." See, e.g., Pub.L. 98-473, Title II, sec. 217(a), 98 Stat. 2019 (Oct. 12, 1984).

The amendment was prompted by concern that the "25%

rule" would "create[] problems for the Commission in drafting guidelines calling for short terms of imprisonment", the concern being that "the 25% rule would result in such a proliferation of guideline ranges that it would be virtually impossible to draw enough meaningful distinctions to justify all of the guideline ranges." H.R. Rep. 99-614 at 5-6. The amendment was also prompted by the concern that there was "no way to compute the minimum term of imprisonment in a range where the maximum term is life imprisonment." Id. at 6, quoting Testimony of William W. Wilkins, Jr. before the House Judiciary Committee, Subcommittee on Criminal Justice, on H.R. 4801, at 3 (May 14, 1986).

In approving the amendment, President Reagan issued a statement, the language of which reveals the minimal role that judicial discretion is to play under the new sentencing scheme:

> I am today approving H.R. 4801, but I do so with serious reservations. . . . The purpose of the Sentencing Reform Act, which I submitted to the Congress as part of the Comprehensive Crime Control Act of 1983, was to establish a determinate sentencing system with narrow sentencing ranges for criminal offenses. The range of up to six months provided in this bill is far in excess of what we visualized in 1983 and, if implemented by the Sentencing Commission, would restore an undue measure of discretion to judges that could threaten to undermine the core purpose of the Sentencing Reform Act to establish fairness and certainty in sentencing by confining judicial discretion within a relatively narrow range.

Statement by President Ronald Reagan upon signing H.R. 4801, reprinted in U.S. CODE CONG. & ADM. NEWS 1770-71 (September, 1986) [emphasis added]. It is difficult for one accustomed to the present system to understand why a range of six months represents the bestowing of "an undue measure of discretion" upon sentencing judges.

13. For one commentator's assessment of "the magnitude of the task facing the Sentencing Commission," see Rezneck, The New Federal Criminal Sentencing Provisions, 22 AM. CRIM. L. REV. 785, 788-90 (1985).

14. The omitted material is a citation to 18 U.S.C. sec. 3577, which was redesignated as 18 U.S.C. sec. 3661 by the Comprehensive Crime Control Act of 1984. See Preliminary Draft at 8. 18 U.S.C. sec. 3661 provides as follows:

> No limitation 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.

18 U.S.C. sec. 3661, formerly sec. 3577, renumbered 3661, effective Nov. 1, 1987, pursuant to Pub.L. 98-473, Title II, c. II, sec. 235, 98 Stat. 2031 (Oct. 12, 1984), as amended by pub.L. 99-217, sec. 4, 99 Stat. 1728 (Dec. 26, 1985); sec. 3577 was added by Pub.L. 91-452, Title X, sec. 1001(a), 84 Stat. 951 (Oct. 15, 1970).

15. The "additional information" concerned Williams' involvement in "`thirty other burglaries in and about the same vicinity' where the murder had been committed" and "certain activities . . . as shown by the probation report that indicated [that Williams] possessed `a morbid sexuality' and classified him as a `menace to society.'" 337 U.S. at 244.

16. See also 337 U.S. at 248 nn. 10, 13; id. at 249 n. 14.

17. See, e.g., Preliminary Draft at 9-10.

18. See n. 14, supra.

19. If this is the intention, then the Preliminary Draft has retained the concept of judicial discretion despite its ambitions, and instructions, to the contrary.

20. If appellate review of the sufficiency of the evidence is not permissible, then the Preliminary Draft effectively reinstates discretionary sentencing without, however, including the moderating effects of a sentencing system that is predicated upon a commitment to rehabilitation and the attendant guarantees thereof. That is, if no review is permitted, then the defendant is thrown to the ungoverned mercies of the government and of the sentencing court: Although the court may be constrained by the number of offender and offense characteristics that are conceivably relevant to the matter that is before it, the court could predicate findings of aggravating factors upon little or no evidence, thereby imposing a sentence that is far harsher than is actually warranted.

In enacting the Sentencing Reform Act of 1984, Congress was concerned about "the judge factor", the frequency with which sentences reflect the predilections of particular jurists rather than the objective realities of the offense and the harm inflicted thereby. See, e.g., S. Rep. at 41-56. Assuming, arguendo, that "the judge factor" can and should be eliminated, the fact remains that the Preliminary Draft fails to do so. If there is no appellate review of

the sufficiency of the evidence supporting a particular sentence determination, then, under the circumstances assumed herein and in the text above, judges will be free to indulge their predilections by manipulating their findings on certain criteria, including aggravating and mitigating factors.

Assume, for example, that a particular judge has a strong "prosecution bias". That being the case, he is likely to utilize a very low evidentiary threshold for finding the existence of aggravating factors, which would mean that his sentences will be more severe than those imposed by a "defense-oriented" judge who requires a substantial evidentiary foundation before he will incorporate aggravating factors into his sentences.

It may very well be that it is impossible to eliminate all vestiges of idiosyncratic sentencing, and it may very well be that it is undesirable to do so. The author's concern is, however, that the Preliminary Draft establishes a system with a distinct "prosecution" bias. If federal sentencing is to proceed according to a categorical, as opposed to a discretionary, paradigm, then the categories of that system must be completely value-neutral if they are to serve the ends of justice and the goals identified in 18 U.S.C. sec. 3553(a)(2).

21. Habeas corpus is a separate civil action and not a further step in the criminal case. See, e.g., Ex parte Tom Tong, 108 U.S. 556, 559 (1883); Advisory Committee Note, Orders of the Supreme Court of the United States Adopting and Amending Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code.

22. The Williams Court offered the following comments on the use of witnesses at sentencing:

> We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination . . . . The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

337 U.S. at 250.

23. These questions are intended to illustrate the fact that the sentencing hearing could very easily become an instrument of abuse, a device which the government could use as a "fishing expedition" into the existence and particulars of suspected but as yet unconfirmed offenses. Under the guidelines as written, the government could offer evidence that could not be admitted at trial, because it was insufficient to establish the commission of any criminal offense beyond a reasonable doubt, and use this evidence (a) to obtain sentence aggravation if the defendant was unable to refute it, and/or (b) to develop leads that might be used in other investigations. The latter possibility, of course, would exist if and when the defendant chose to put in evidence contraverting the government's "case" against him. And it is easily foreseeable that the government might be persuaded to put on a remarkably tenuous "case" in order to force the defendant to put on evidence that might save himself while jeopardizing the future of others.

24. See also United States v. Tucker, 404 U.S. 443 (1972). The present system enforces this assumption, of course, through the present provisions of Rule 35 of the Federal Rules of Criminal Procedure. See, e.g., Fed.R.Crim.Pro. 35, in effect until Nov. 1, 1987.

25. The Preliminary Draft predicates its allocation of the burdens of production and persuasion upon the holding in McMillan v. Pennsylvania, 91 L.Ed. 2d 67, 106 S.Ct. 2411 (1986). This predication is, however, misplaced, as it is based upon an impermissible generalization of a situation-specific holding. The issue in McMillan was the permissibility of employing the preponderance of the evidence standard in finding the existence of a particular aggravating factor. See 91 L.Ed. 2d at 73-75. As is discussed in more detail in Section II(C), infra, the Court upheld the use of the standard in the narrow context presented in McMillan without, however, doing violence to the principles that were responsible for the Court's holding in Williams.

26. The differences between the two system are dramatically highlighted by the material contained at Part E of Chapter Three of the Preliminary Draft. Chapter Three is devoted to "offender characteristics", and includes issues such as "role in the offense" (Part A), "post-offense conduct" (Part B), "criminal history" (Part C), and "plea agreements" (Part D). Part E is "other offender characteristics." See Preliminary Draft at 136. The "other offender characteristics", as listed in Part E, are:

    1. age;
    2. education;
    3. vocational skills;
    4. 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;
5. physical condition, including drug dependence;
6. previous employment record;
7. family ties and responsibilities;
8. community ties;
9. role in the offense;
10. criminal history; and
11. degree of dependence upon criminal activity for a livelihood.

Preliminary Draft at 136. As noted above, the last three characteristics are addressed in preceding sections of Chapter Three. Characteristics 1 through 8 are not, however, addressed in the Preliminary Draft. See Preliminary Draft at 136.

The Commentary notes that the Commission has not decided how the unaddressed characteristics should be factored into the sentencing process. Id. at 137. The Commentary notes that several suggestions have been made, one of which is "allow[ing] the court the discretion to consider one or more [of] them, as appropriate, in setting the sentence within the 25 percent range." See n.12, supra.

The fact that these factors, which are a primary concern in sentencing under the present, "rehabilitative" system, have been allowed to languish unconsidered and unaddressed vividly illustrates the dramatic difference between the old and new sentencing systems.

27. As noted above, it is unclear whether the court could disregard the evidence if it found that it was insufficient to establish the government's prima facie case, however that concept may be defined.

28. As opposed to "only the conduct for which the offender was convicted." Preliminary Draft at 11.

29. Indeed, the net effect of the Draft's reliance upon "modified real offense sentencing" is to exacerbate the unfortunate effects attendant upon what Congress referred to as "the judge factor." See Section II(A), supra. That is, the proposed system is a semi-categorical sentencing system that relies upon offense characteristics that are extraneous to the charged offense in calculating its "sanction units." See, e.g., Preliminary Draft at 9-10, 138-39. In relying upon factors that are extraneous to the charged offense, the proposed guidelines deprive the convicted offender of the right to be punished only for conduct that has been proven beyond a reasonable doubt, and thereby heightens the

potential for sentences that reflect judicial prejudices and/or vindictiveness.

If the substitution of a charge of conviction offense system is found unacceptable, then the author strongly suggests that the final guidelines incorporate a rule of the type that is discussed in the Commentary to the guidelines for the application of modified real offense sentencing. See Preliminary Draft at 17. The rule in question would allow a sentencing officer to consider "all real offense elements unless any such element constitutes a separate crime, in which case the government must charge that offense separately." Id.

The proposed guidelines reject both this rule and a rule allowing "the sentencing judge to consider all conduct or harms (threatened or accomplished) committed in furtherance of the crime committed." Id. Instead, the proposed guidelines substitute a system of cross-references, the rationale of which is that they "identify additional conduct that is often associated with the statutory elements charged in [an] indictment." Id.

The only reason given for rejecting the rule that would bar consideration of elements that constitute separate crimes is that "the Commission does not believe that this particular rule would work in the federal system, where the existence of separate crimes often depends upon the happenstance of factors creating federal jurisdiction." Id. Although the statement is never clarified, the logical conclusion seems to be that the rule was rejected out of a concern that the fortuitouness of federal jurisdiction would render it under-inclusive and, therefore, limit its effectiveness.

The author would respectfully suggest, however, that the better alternative would be to incorporate the rule in question, and then to supplement it with specific cross-references whenever they may be necessary to avoid the consideration of conduct which logically constitutes a separate criminal offense but which is not so defined under applicable federal statutes.

30. The reference is, of course, to establishing the existence and operation of the as-yet-undefined "other characteristics" listed at page 136 of the Preliminary Draft. The suggestion is that the offender be allowed to establish the existence of such characteristics in order to establish that a sentence of a non-incarcerative sanction should be imposed. Requiring the offender to bear such a burden is, at once, constitutionally permissible and pragmatically appealing, since the offender has primary access to the information required for such a demonstration and since aggravating factors are a constitutionally

cognized burden for defendants. The incorporation of this factor would require, of course, that the Commission undertake to define the proof required for each mitigating factor and the relationship which there factors would have, jointly and/or severally, to the non-incarcerative sentences discussed at pages 145 through 149 of the Preliminary Draft.

31. Wilbur relied upon the Court's decision In re Winship, 397 U.S. 358 (1970), which held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. The Maine Supreme Court had rejected Wilbur's argument, holding that the state could rely upon a presumption of malice aforethought and require the defendant to rebut the presumption by establishing that he had acted in the heat of passion. 421 U.S. at 688, discussing State v. Wilbur, 278 A.2d 139 (1971).

32. > [P]etitioners seek to buttress this contention by arguing that since the presence or absence of the heat of passion on sudden provocation affects only the extent of punishment it should be considered a matter within the traditional discretion of the sentencing body and therefore not subject to rigorous due process demands.
>
> 421 U.S. at 697, n. 23.

33. This is a matter that is discussed in more detail infra, in the critique of the tax offense guidelines. It is also important to note that the guidelines in the Preliminary Draft suffer from what might be termed "systemic presumptive aggravation." That is, aggravating factors, and the effects thereof, have been specified in great detail. Nowhere is this more apparent than in Chapter Three, which is devoted to "offender characteristics." See Section II(B)(III), supra.

As noted above, the chapter has taken great pains to specify offense values for such aggravating offender characteristics as "role in the offense," "post-offense conduct" and "criminal history." See Preliminary Draft at 121031. It is true that the section on "post-offense conduct" does include a consideration of mitigating factors; it is noteworthy, however, that the factors that have been included, e.g., cooperation with federal authorities, surrender, and restitution, are factors that are of primary importance to the prosecution.

Traditional mitigating factors such as age, education, mental, emotional and physical condition, community and family ties and other, similar considerations have been left

unaddressed. If the guidelines are to be truly value-neutral, then these and other mitigating considerations must be factored into the sentencing calculus in order to ensure that some equitable balance is struck between mitigation and aggravation. If the Commission determines to retain the mathematical structure of the Preliminary Draft, then the author would suggest that mitigating factors be given negative scores, so that the total mitigating factor score can be summed and subtracted from the offense value. The author would also suggest that the Commission define multipliers to be used in circumstances in which certain mitigating factors will have a cumulative and/or additive effect the true influence of which would not be felt absent recourse to such a factor.

34. See, e.g., 421 U.S. at 697-98. It is in this respect that McMillan is distinguishable from Mullaney and from the sentencing paradigm contained in the Preliminary Draft. McMillan upheld a Pennsylvania statute that made convicted felons "subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person `visibly possessed a firearm' during the commission of the offense." 91 L.Ed. 2d at 73. The issue in McMillan was the permissibility of employing the preponderance standard in this determination; McMillan unsuccessfully argued that the standard for the determination should be either the beyond a reasonable doubt or the clear and convincing evidence standard. See id. at 74-81.

The Supreme Court held that the preponderance standard was constitutionally acceptable, and upheld the statute because "consistent with Winship, Mullaney, and Patterson, [it] `creates no presumption as to any essential fact and places no burden on the defendant.'" 91 L.Ed.2d at 74, quoting from the Pennsylvania Supreme Court's decision, _____Pa._____, 494 A.2d 354, 359 (1985) [emphasis added].

All McMillan means, therefore, is that the preponderance of the evidence standard is an appropriate standard to be employed in determining the presence or absence of aggravating and/or mitigating factors. It does not mean that the burden of establishing any such factor can be alleviated by establishing a presumption in favor of the proponent thereof.

35. Rezneck, The New Federal Criminal Sentencing Provisions, 22 AM. CRIM. L. REV. 785, 790 (1985).

36. Id. at 791.

37. As Rezneck notes, in the article cited at n. 34, supra, "H.R. 6012, 98th Cong., 2d Sess. (1984), which attempted to spell out some of the procedures for the sentencing hearing,

was not enacted." 22 AM. CRIM. L. REV. 791 n. 39.

38. The sentencing hearing will also have a negative effect upon the conservation of judicial resources that is currently effected by guilty pleas. Under the present system, of course, pleas ensure that matters are concluded with minimal impact upon the court's resources and calendar. Under the proposed system, however, the guilty plea will no longer have this necessary effect; under the new system, as noted above, even guilty pleas are likely to require the convening of lengthy sentencing hearings which will necessitate the expenditure of additional judicial resources. This, too, will have a cumulative negative effect upon the already-overburdened federal court system.

39. "With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea." Fed.R.Crim.Pro. 11(a)(2).

40. The above-described situation is perfectly analogous to that which exists when a criminal defendant has made a motion for judgment of acquittal at the close of the government's evidence, the motion has been denied, and he proceeds to put on a defense:

> [A] criminal defendant who, after denial of a motion for judgment of acquittal at the close of the government's case-in-chief, proceeds with the presentation of his own case, waives his objection to the denial. The motion can . . . be renewed . . . but appellate review of denial of the later motion would take into account all evidence introduced to that point.

United States v. Foster, 783 F.2d 1082, 1085 (D.C. Cir. 1986) (en banc). Under the so-called "waiver rule", a defendant who proceeds with the presentation of his evidence thereby risks putting in evidence that will "fill[] in the gaps in the government's case." 8A J. MOORE, MOORE'S FEDERAL PRACTICE para. 29.05 (2d ed. - 1986 revision). The author's concern is that an analogue of the waiver rule will emerge in the context that is discussed in the text, above.

41. See Preliminary Draft at 166.

42. See, e.g., Fed.R.Crim.Pro. 11(e)(1)(B), (C).

43. See, e.g., Rezneck, The New Federal Criminal Sentencing Provisions, 22 AM. CRIM. L. REV. 785, 794 n. 61 (1985).

44. The availability of appellate relief for violations of plea bargains is established by 18 U.S.C. sec. 3742, which was added by the Sentencing Reform Act and which establishes the mechanisms for appellate review of sentences. See 18 U.S.C. sec. 3742, as added by Pub.L. 98-473, Title II, sec. 213(a), 98 Stat. 2011 (oct, 12, 1984), as amended by Pub.L. 99-217, sec. 4, 99 Stat. 1728 (Dec. 26, 1985), effective Nov. 1, 1987.

Under 18 U.S.C. sec. 3742(a)(3)(B), a defendant can seek review of a sentence that "was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission . . . and the sentence is greater than . . . the sentence specified in a plea agreement . . . under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure." The equivalent right is granted to the government in 18 U.S.C. sec. 3742(b)(3)(B), which allows it to seek review of a sentence that is less than a sentence specified in a plea agreement under either subsection of Fed.R.Crim.Pro. 11.

The unanswered question is, however, whether the above-cited provisions of 18 U.S.C. sec. 3742 apply to plea bargains the terms of which are outside the applicable guidelines.

45. "[I]n Minnesota where a sentencing guideline [system] is already in effect, the plea bargaining process has superseded the guidelines and has reintroduced the disparities which the system [was] intended to eliminate." Rezneck, The New Federal Sentencing Provisions, 22 AM. CRIM. L. REV. 785, 795 (1985), citing the remarks of Professor B. James George at a conference on the Comprehensive Crime Control Act of 1984, as reported in 36 CRIM. L. REP. (BNA) 2343 (February, 1985).

46. See, e.g., Rezneck, The New Federal Criminal Sentencing Provisions, 22 AM. CRIM. L. REV. 785, 795-96 (1985).

47. The potential for such abuse could, of course, be dramatically reduced if the final guidelines were to include a rule of the type that is discussed in n. 29, supra.

48. 26 U.S.C. sec. 7201 makes it a criminal offense to "willfully attempt[] in any manner to evade or defeat any tax imposed by this title or the payment thereof."

49. The table, which is omitted here, lists thirteen deficiency categories, each of which is accompanied by a corresponding "base offense value." Preliminary Draft at 44. The first category is for deficiencies of "up to $1,000" and carries a base offense value of 10; the second category is for deficiencies of from $1,001 to $5,000, and carries a base offense value of 12. The next to the last category consists

of deficiencies of from $1,000,001 to $2,000,000 and carries a base offense value of 54, while the final category is for deficiencies of over $2,000,000 and carries a base offense value of 60. See Preliminary Draft at 44.

50. In the example quoted above, the tax deficiency was $25,000 and the amount of unreported income was $60,000. If the base offense value is calculated on the basis of the tax deficiency alone, it results in a score of 18. If the offender is unable to rebut the presumption of unlawfulness, however, the additional $60,000 is added into the equation, and the base offense score rises to 26.

The sinister implications of the presumption are even more evident in another, possibly more realistic, example: Assume that the tax deficiency is $28,000 and the amount of unreported income is $100,000. If the base offense value is calculated upon the amount of tax deficiency alone, the score is 18. If the offender is unable to prove that his unreported income was obtained through lawful means, however, then the $100,000 is added to the $28,000 tax deficiency, which means that the base offense value rises to 30, a net increase of 12 offense value points.

51. A vivid, if perhaps slightly bizarre, illustration serves to demonstrate the validity of the point at issue: Assume that an individual, a male, owns and operates a "mom and pop" grocery store. Assume, further, that the individual has been indicted and convicted of tax evasion, his conviction having resulted from the government's proving unreported income through a net worth case. The time comes for sentencing. The defendant has a secret that he did not reveal at trial, namely, that the increase in net worth resulted from his having operated the store on two shifts, a daytime shift and a nighttime shift. Each shift was operated with the assistance of a different wife, a different "mom", as it were.

What should the defendant do at his sentencing hearing? he can rebut the presumption that his income was unlawfully obtained by revealing his secret. If he does so, however, he exposes himself to a bigamy charge. His only hope of avoiding an enhanced sentence on the tax evasion conviction is to reveal his secret and expose himself to the possibility of being tried and convicted for bigamy and receiving an additional sentence for that offense. The net effect of the above-quote presumption is to enact a penalty for his exercising his Fifth Amendment right to remain silent, an effect which is blatantly unconstitutional.

52. Garrity involved police officers who, when questioned about the alleged fixing of traffic tickets, answered the questions after being told that they were entitled to remain silent but that if they did so, they would be removed from

office. See 385 U.S. 494-95. In Spevack, an attorney who had exercised his privilege and refused to testify at a judicial inquiry was disbarred because the Appellate Division of the New York Supreme Court held that the privilege was not available to him under the holding in Cohen v. Hurley, 366 U.S. 117 (1961). In Garrity, the Court held that the threat of losing one's employment was sufficient coercion to implicate the protections of the privilege. 385 U.S. at 496-97. In Spevack, the Court overruled Cohen and held that under the Fifth Amendment a person has the right to remain silent without suffering any penalty therefor; the Court found that, since "penalty" refers to the imposition of any sanction which makes assertion of the privilege "costly", disbarment was a penalty sufficient to implicate the protections of the Fifth Amendment. 385 U.S. at 515-17.

53. One commentator has noted yet another concern, namely, "that this factor should not be used to punish individuals for unproven offenses." See Comisky letter, infra n. 55, at 5.

54. As discussed above, the tax evasion guideline, sec. C211, determines base offense values according to the "total amount of tax that the taxpayer evaded or attempted to evade." preliminary Draft at 44; see also n. 48, supra. Guideline sec. C212, which applies to the "willful failure to file [a] return, supply information or pay tax", uses a base offense value that is "80% of the offense value for Tax Evasion specified in sec. C211." Preliminary Draft at 45.

Guideline sec. C213, which applies to "fraud and false statement" offenses, includes a cross-reference to the base offense values for tax evasion. See Preliminary Draft at 45 ("If the conduct was in furtherance of an effort to evade payment of a tax . . . . the offense value is the offense value for sec. C211.") Guideline sec. C214, which applies to the offense of "aiding, assisting procuring counseling, or advising tax fraud", uses a base offense value of 10, but includes the following as a specific offense characteristic:

> If the conduct occurred in connection with an effort to evade a specific tax obligation, the base offense value is that for evasion of tax by the principal from sec. C211 (Tax Evasion).

Preliminary Draft at 46.

Guideline sec. C216, which applies to the offense of "failing to collect or truthfully account for and pay over tax", uses the base offense values given in guideline sec. C211. See Preliminary Draft at 46. And, finally, guideline sec. C217, which applies to the offense of "failing to deposit collected taxes in trust account as required after

notice", uses a "base offense value [of] 6, or 25% of the offense value from sec. C211 (Tax Evasion), whichever is greater." Preliminary Draft at 46. (These references to the guidelines are, of course, not intended to blur the conceptual distinctions between 26 U.S.C. Section 7201 and 26 U.S.C. Section 7206(1) offenses. In 26 U.S.C. Section 7201, the government must prove that there is a tax due and owing, which requires that the government prove the existence of additional unreported income. 16 U.S.C. Section 7206(1), on the other hand, merely requires that the government establish that the return was false as to a "material matter", which may or may not be unreported income.)

55. And even if this proposal is incorporated into the proposed guidelines, there is still another issue that remains to be resolved, namely, whether the computation of tax for sentencing purposes includes only those items alleged and proven at trial or whether it includes items such as the disallowed deductions that always appear in the Revenue Agent's Report. Often, items in the Revenue Agent's Report are considered for a civil fraud case, but are eliminated from the criminal case, since only the clearest items are used in a criminal proceeding. Under the guidelines, if an offender is convicted based upon the government's proof of "clearly fraudulent" items, can the government go back at sentencing and reopen these issues, introducing items that could not have been proven beyond a reasonable doubt but which can satisfy a preponderance of the evidence standard?

56. Chairman, Sub-Committee on Constitutional and Attorney-Client Privileges, Committee on Civil and Criminal Tax penalties, American Bar Association--Section on Taxation.

57. The letter was addressed to the Honorable William W. Wilkins, Jr, Chairman of the Sentencing Commission, and expresses the reactions of members of the American Bar Association's Committee on Civil and Criminal Tax Penalties. It is hereinafter cited as "Comisky letter at ___."

58. Comisky also discusses an alternative approach to the problem:

> [S]ome Commentators have suggested that the Guidelines should group tax evasion by the percentage of total tax liability which has been understated. For example, persons understating their tax liability by 100% would be grouped together even if one person owed $200,000 and the other only $20,000 in additional taxes. The argument in favor of this approach is that these persons are equally culpable. While this Committee is not in total agreement on the importance of

> this factor as a sentencing criteria, it serves to highlight the conceptual difficulties with the Commission's present approach.

Comisky letter at 3. The use of the amount of unpaid tax liability as a sentencing consideration is a matter that is addressed in more detail in Section III(B), infra.

59. Comisky letter at page 4.

60. The government can prevail by establishing the existence of either variety of conspiracy. See, e.g., United States v. Mackey, 571 F.2d 376, 387 n. 14 (7th Cir. 1978).

61. See, e.g., United States v. Fruehauf Corp., 577 F.2d 1038, 1071, 1072 (6th Cir. 1978); United States v. Buckner, 610 F.2d 570, 573 (9th Cir. 1979).

62. See, e.g., Preliminary Draft at 17. The Commentary includes the following observations on the sentencing hearing:

> Factual disputes are unlikely in the vast majority of cases, for the jury will have resolved some disputes and the presiding judge will be able to determine the presence of associated conduct from evidence produced during the course of the trial. . . . If a hearing is necessary, it will be less formal than a trial . . . . [although] [t]he parties will have the right to present and to cross-examine witnesses.

Preliminary Draft at 17. The comments above are intended to illustrate that the above observations are incorrect, at least as regards tax offense cases. As noted above, in these cases it is very likely that the trial evidence will not conclude the factual issues that must be considered at sentencing. Aside from the other difficulties inherent in the proposed tax offense guidelines, this factor means that they will require extensive and elaborate sentencing hearings that can only be convened after the parties have been allowed ample time to engage in discovery and pursue other preparations for litigating the issues that have not been resolved at the trial on the merits. At the very least, this will have a dramatic effect upon the federal judiciary's ability to handle its docket with efficiency and some level of expedition.

63. See n. ___, supra. Guideline sec. C212 uses a base offense value that is "80% of the offense value for Tax Evasion specified in sec. C211." Preliminary Draft at 45. However, "[i]f the offense involved only a failure to pay tax when due, the base offense value is [only] 50% of the base

offense value specified in sec. C211." Id.

64. The terms "violent" and "non-violent" offenses are necessarily imprecise, but are used in the discussion both because they refer to familiar categories and because no particularly apt substitute is readily available. The categories are intended to denote the conceptual distinction between what might be termed "linear" offenses, in which there is the equivalent of a one-to-one relationship between the offender and his victim, and "non-linear" offenses, in which there may be a definable offender but the victim category is generalized and difficult to define with precision.

65. Presumably, the "harm" in this instance would also include some level of psychological injury, especially since this is a factor that is explicitly included in the guidelines for violent offenses. See Preliminary Draft at 34.

66. See n. 63, supra.

67. Tax offenses, for example, are defined as offenses because of social policy interests in ensuring the timely and accurate payment of federal and state income taxes. Antitrust offenses have been defined as criminal offenses because of a social policy commitment to free unrestrained trade and a competitive market. Various consumer offenses have been defined as offenses because of rising concerns about the public's right to be guaranteed products that meet certain minimal levels of safety and effectiveness. All of these criminal offenses are the result of social policy considerations that are, at once, relatively recent development and that result from considerations that are far more abstract than those involved in condemning a bank robber who strikes a helpless teller.

11-21-86

United States District Court

Central District of California
United States Courthouse
Los Angeles, California 90012

Chambers of
A. Wallace Tashima
United States District Judge

Telephone
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November 13, 1986

United States Sentencing
Commission
1331 Pennsylvania Ave., N.W.
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Re: Your Preliminary Draft

Medames and Gentlemen:

I have reviewed your first published draft of "Sentencing Guidelines" (Sep. 1986). I have two precise and limited comments:

1. The draft Guideline Table (p. 140) allows a non-imprisonment sentence only for less than 14 sanction units. This is quite low. Such guidelines may be acceptable for the "straight" substantive offenses, but may present a problem to the sentencing judge in the case of conspirators (including conspirators who are convicted of a substantive offense under a Pinkerton theory) and aiders and abettors. In these cases, there can exist wide differences in culpability between persons convicted of the same offense. Application of the Guideline Table would be problematical in some of these cases. The sentencing judge needs to be given more discretion in such cases. I do not know how this should be done, but some examples come to mind. E.g., apply a "not more than x sanction units" rule to such cases, or increase the range by an exception such as to allow deduction of sanction units based on a finding of degree of participation, peripheral nature of role, etc.

2. The Commission would impose as a mandatory condition of probation (condition K, p. 144) and supervised release (condition K, p. 147) that:

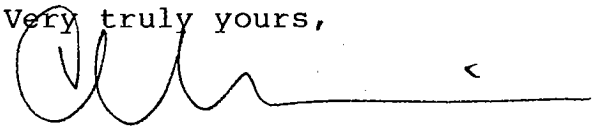
> the offender shall not enter into any agreement to act as an informer or special agent of any law enforcement agency;

I first doubt the Commission's legal authority to impose mandatory conditions which differ from the statutory conditions. However, I address the policy issue. I do not know what policy supports this condition, although in my experience, such "agreements" are extremely rare. However, in

the rare case such an agreement may serve the interest of justice and the broader interests of the nation. I am personally familiar with one such case which I will be happy to discuss personally with any Commissioner.

Thank you for this opportunity to comment.

Very truly yours,



A. Wallace Tashima
United States District Judge

00862
11-21-86

Written submission of

Professor David J. Gottlieb

To the United States Sentencing Commission

November 14, 1986

I am a Professor at the University of Kansas School of Law. My major teaching interest is in the areas of criminal procedure and prison litigation. I have had the opportunity to teach, study, and write about federal parole and sentencing.[1] In addition, my responsibilities at Kansas have included supervision of a law school clinic in which students represent inmates at the United States Penitentiary in Leavenworth, Kansas. A major focus of our efforts in the clinic has been representation at federal parole hearings. Prior to coming to Kansas, I served as an attorney at the Federal Defender Appeals Unit of the Legal Aid Society of New York. I've provided this extended introduction so that you might understand that my comments stem from over a decade of actual practice as well as from academic interest. I'm pleased to have this opportunity to respond to the initial draft of the sentencing guidelines published by the United States Sentencing Commission.

While the initial draft has some strong points, I believe it also has some significant substantive and procedural weaknesses. Unless the guidelines are substantially modified, they

[1]See Federal Parole and Federal Sentencing: A Report on the Present and Some Thoughts for the Future, 13 Loy. U.L. Rev. 669 (1982).

will produce an unwarranted increase in both the length and frequency of imprisonment. The draft also significantly understates the number of factual findings that will be required in the sentencing hearing, and the difficulty under present law in making those decisions. I begin with a discussion of these general weaknesses, and then move on to specific issues.

I. The In-Out Decision

With the exception of capital punishment, the sanction of imprisonment is the most severe sanction available to society to punish offenders. It is a sanction that cannot, given current resources, be applied to all federal offenders. In fact, at the present time over half of the defendants convicted of federal crimes are sentenced to a fine or probation.[2] Moreover, irrespective of resources, prison is a sanction that should not be applied to all. As Congress has recognized, the goals of retribution, deterrence, and rehabilitation can be satisfied, for most non-violent offenders, by punishments other than imprisonment. See 28 U.S.C. § 994(j). Because of the scarcity and severity of imprisonment, states that have adopted guideline sentencing systems have made the decision whether to impose imprisonment or an alternative such as fine or probation the critical starting

[2]According to figures of the Administrative Office of the United States Courts, in 1984, of 36,104 defendants convicted, 17,710, or 49%, were sentenced to imprisonment. In 1985, of 38,530 defendants convicted, 18,679, or 48%, were sentenced to imprisonment. See Annual Report of the Director -- Administrative Officer of the United States Courts 180 (Table 42) (1985).

point in the drafting process.[3] For reasons that are unapparent, the Sentencing Commission has chosen to reject the wisdom of these state experiments.

The Commission seems to proceed on the assumption that most federal crimes should result in sentences of imprisonment. The Commission lists a wide array of crimes and penalties, assigning a numerical score to each. Under the scheme as proposed, any score over 13 will require imprisonment. Those individuals who score 13 or under may still be sentenced to a short term of imprisonment if the judge so elects. At no point has the Commission found a fine or probation the presumptive or even preferable mode of sentencing.

The guideline system imposed by the Commission will dramatically increase the use of imprisonment as a criminal sanction. The Commission has set the level of "street" crime such as burglary and robbery so that imprisonment will be mandatory in every case. Virtually all drug offenses will also produce a mandatory prison sentence. Even more striking is the Commission's treatment of non-violent crime. For most offenses, save driving while intoxicated, either the base offense, or a small amount of aggravating factors, will produce a numerical score over 13, and require a sentence of imprisonment. To cite but a few examples, virtually all insider trading offenses will be set at 14 sanction units and above; all secuities fraud convictions will mandate imprisonment; all criminal antitrust offenses will mandate im-

[3]See A. Von Hirsch, Past or Future Crimes 22-23 (1985).

prisonment; all trafficing in passports, and smuggling of aliens will require imprisonment. The Commission has also determined to treat harshly all tax evaders, requiring anyone convicted of evading more than $5,000 to serve a term of imprisonment. In all of these cases, imprisonment would be called for even for first offenders. In addition to its harsh view of these typical "white collar" crimes, the guidelines will require imprisonment for many non-violent offenders of the type more regularly seen by federal public defenders. To give two examples, a defendant with no prior involvement with the law who takes a letter containing a $1001 social security check will be required to serve a term of imprisonment. For a defendant with two prior prison terms who is a drug abuser, the theft of just one piece of junk mail will produce a guideline score requiring his imprisonment.

The setting of the in-out line at 14 sanction units will almost surely result in a net increase in the use of imprisonment. Yet there is no basis in the statutory mandate given the Commission to justify this increase. Indeed, the Comprehensive Crime Control Act of 1984 clearly states that the Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases when a defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. 28 U.S.C. §994(j). First-time tax evaders or mail thieves should not be receiving mandatory prison terms.

What is worse, the Commission has compounded its error by expressing no preference whatsoever for probation or fines for

those defendants who rate under 14 sanction units. Probation is merely an option available to the judge. If the court wishes to sentence the offender to six months' imprisonment, it may do so. The result is that many defendants in the 0 to 13 range will also receive a term of imprisonment. The Commission's failure to mandate or even prefer probation is directly contrary to its statutory mandate. 28 U.S.C. §994(a)(1)(A) directs the Sentencing Commission to promulgate guidelines for the determination of "whether to impose a sentence to probation, a fine, or a term of imprisonment." This directive precedes the Commission's obligation to determine the length of imprisonment once such a term is imposed.

The failure to consider a presumptive sentence of probation will also continue unwarranted sentence disparities in the federal system. While the mandatory imprisonment standard for those receiving 14 or more sanction units will assure that judges will not, out of a sense of leniency, be able to introduce disparity and sentence to probation those who the Commission believes merit imprisonment, judges will be able capriciously to imprison those deserving of probation.

Moreover, the failure to consider probation and fines ignores the requirement that the Sentencing Commission take into account the capacity of penal and correctional facilities in making its decision. The failure to give sufficient attention to the in-out decision can be expected to result in a significant increase in the federal prison population. That has surely been

the result in other states that moved to determinate sentencing without attention to the in-out distinction.[4]

I recommend that the Sentencing Commission give far greater attention than it has yet given to deciding those cases when fine-only or probation convictions are appropriate. I urge the Commission to seriously consider present practice, and attempt to insure that approximately half of federal offenders receive sentences not requiring imprisonment.

Finally, the Commission should consider more carefully whether the in-out decision must be tied directly to its point system. There is strong evidence that the drafters contemplated an in-out decision separate from the determination of the length of incarceration. Thus, 28 U.S.C. §994(a)(1)(A) sets the first priority of the Sentencing Commission to determine the type of sentence appropriate. The next section, §994(a)(1)(B), directs guidelines to determine the length of the particular sentence. There is nothing in the Comprehensive Crime Control Act that requires these decisions to be made along the same matrix.[5] In fact, the current point system fails to take into account factors that may be relevant to the probation determination. 18 U.S.C. §3553(a)(2) directs the court, in deciding which sentence to impose, to take into account factors including the need to afford the defendant educational and vocational training. In many

[4]Von Hirsch & Mueller, California's Determinate Sentencing Law: An Analysis of Its Structure, 10 N.E.J. Crim. & Civ. Conf. 253 (1984).

[5]Thus, the requirement that the guidelines for imprisonment not vary by more than 25% applies to those cases where imprisonment has been decided upon. It does not limit the discretion of the Commission in deciding upon standards for probation.

cases, this factor may indicate the desirability of a sentence to probation. These considerations are not included within the quantified point system, and they may be difficult to quantify. However, an effort to establish some sort of system to determine the substantial percentage of federal defendants deserving probation should be made.

In order for the Commission to perform its job to decide upon those defendants who merit probation, a study of the current system should be undertaken. The study should identify current supervision levels and the available services that can be relied upon if probation is imposed. Even more important, the Commission must identify those categories of offenses and offenders that are now sentenced to probation. If departure from current practice is warranted, and a greater number of defendants sentenced to imprisonment, it should be done so explicitly, with justification for the variance.

II. Increase in Imprisonment Ranges

A second disturbing feature of the intitial draft is the substantial increase in prison terms mandated by the guidelines for some federal crimes. The guidelines will not only increase the number of defendants incarcerated, but will increase the length of the terms for those defendants currently suffering imprisonment. For example, the guidelines for robbery result in staggering increases over the current parole guidelines. Under the current parole guidelines, a $10,000 armed robbery committed by an individual with one prior conviction who had served five years for the conviction and was on drugs at the time of the

robbery would require a term of 36-48 months. The sentencing guidelines would more than triple the actual term of imprisonment, resulting in a term of from 162-202 months. We recognize the desire of the Sentencing Commission to severely sanction robbery. Nevertheless, there is reason to be wary about guidelines that triple the typical sentences served by robbers, both in terms of their effect on prison overcrowding and as a simple matter of whether such long terms are just and appropriate. The hypothetical case referred to would require an actual prison term of 17 years for a robbery in which no weapons were fired, and no physical or psychological injury was inflicted. If the Commission is going to use a modified real offense system for sanctioning robbery, maximum sentences should be reserved for the most serious cases, those involving kidnapping and physical injury.

Similar severity is shown in the burglary guidelines. A burglary of an occupied dwelling by a first offender, absent other aggravating factors, will require a 48 to 60 month prison term; a simple burglary will require a 12-18 month term. Under current parole guidelines, the ranges of imprisonment would be 24-26 months and six months' imprisonment, respectively.

The Commission has also chosen to sanction severely all drug offenses. The prison terms for distribution of heroin or cocaine are set well above the parole guideline level. An individual involved in distribution of heroin can expect a sentence approximately four times greater under the Sentencing Commission guidelines than that obtained by the parole guidelines. The guidelines require extreme increases in sentencing ranges for distri-

bution of even small amounts of cocaine.[6] The guidelines also severely sanction simple possession under 21 U.S.C. §844. Possession of even the smallest amounts of hallucinogens by a first offender will require a prison term.

One does not have to be a social scientist to predict the outcome of the Commission's suggested guidelines. Many more people will be sentenced to prison, and those sentenced for street crime can expect far longer terms. With the exception of crimes involving drug distribution, there is no support in the statute or legislative history for these draconian sanctions. At a time when federal resources are strained, the guidelines promise a major increase in spending for prison construction and staffing. States such as Minnesota have shown that a concern with reducing disparity and increasing predictability need not result in an increase in the amount of incarceration. I urge the Commission to consider moderation of its sentence guidelines.

III. Modified Real Offense Sentencing

The Commission's decision to use a modified real offense system seems a sensible compromise between the Parole Commission's system of full-blown real offense sentencing and the pure charge of conviction system used in some determinate sentencing

[6]To give one example, earlier this week, a local federal court sentenced a white-collar defendant following his conviction for cocaine offenses. According to newspaper accounts, the defendant was involved in the distribution of approximately three ounces of cocaine. The offenses, the first ever for this individual, occurred following the break-up of his marriage and his own descent into cocaine use. The individual was sentenced to three years' imprisonment. Under the parole guidelines, he can expect from 12 to 18 months of actual imprisonment. Under the sentencing guidelines, this individual would be required to serve a term of 72 to 90 months.

systems. I agree that the pure real offense system used by the Parole Commission produces the potential for procedural unfairness. We have frequently been confronted, at parole hearings, with allegations of criminal conduct having little or nothing to do with the charge of conviction. By the same token, I also agree with the Commission's judgment that a pure charge of conviction system would tend to increase prosecutorial power and would create unwarranted similarity of sentences. Judges should be able to give harsher sentences to individuals who use violence in robberies than those who do not; at the same time, it is certainly appropriate to punish peripheral members of large conspiracies less harshly than those in a managerial role.

While a modified real offense system has its advantages, two factors are required in order for it to function fairly. First, the procedural system must be adequate to resolve the factual disputes put before the sentencing authority. Second, in order to avoid the wide-ranging inquiries that have characterized federal parole hearings, as well as the charge that inmates are being sentenced for crimes other than that for which they were convicted, the modified offense system must be parsimonious about the factors regarded as "bound up" in the criminal conduct. I believe that the initial draft of the Commission guidelines has substantial weakness with both these precepts.

My experience with federal sentencing and parole convinces me that the Commission has vastly underestimated the likelihood of serious factual disputes at sentencing. The Commission states: "Factual disputes are unlikely in the vast majority of

cases, for the jury have resolved some disputes and the presiding judge will be able to determine the presence of associated conduct from evidence produced at trial. Agreement among the parties, particurly when a guilty plea is entered, is likely to resolve most others." (Draft at 17) Both the Commission's premises and conclusion are likely incorrect.

To begin, it is simply untrue that in the "vast majority" of cases the judge will be able to resolve factual disputes from the jury's verdict or the evidence at trial, for the simple reason that more than 80% of federal cases never go to trial.[7] The overwhelming majority of cases terminated by pleas of guilty will not resolve the factual issues considered by the guidelines. While such cases will frequently include a plea statement by the defendant concerning his involvement in the crime, the statement will probably not cover all the elements contained in the guidelines. Instead, it is likely that, like today, judges will attempt to rely on information in the presentence report, and, like today, defendants will often object to that information.

For the minority of cases that proceed to trial, many factual issues will remain unresolved. For example, the aggravating factors with respect to robbery include whether a weapon was used, whether physical injury was inflicted, whether psychological injury was inflicted, and how much money was stolen. Most defendants who go to trial on robbery cases have no interest

[7]See Annual Report of the Director, Administrative Office of the United States Courts 180 (Table 42) (1985).

in contesting such facts at trial, for most robbery prosecutions turn on the question of identity.

It is possible, as the Commission suggests, that by "information bargaining" the prosecution and defense will be able in guilty plea cases to resolve some factual disputes. However, there is no reason to believe that such bargaining will occur in most cases. Information bargaining is possible now, for purposes of both sentencing and parole, yet my experience is that it is a fairly rare phenomenon.

In sum, based on my experience with federal trials and parole, I would estimate that factual contests would be fairly frequent. That result would accord with current practice. As a rough estimate, I would warrant that close to half of our federal parole cases involve substantial argument over factual issues involving the real offense committed by the defendant or the defendant's prior record.

Because factual contests will be frequent, there is a critical need for procedures that will guarantee accurate fact-finding. The ethical underpinnings of a real offense guideline system require that differences in offense conduct be treated with different sanctions. If the factual findings concerning the underlining offense conduct are made in an unreliable manner, the real offense system not only violates due process, it becomes unjust. Our current sentencing system finesses this constitutional and ethical problem by permitting the sentencing judge to avoid deciding a closely contested factual question. The guideline system will not permit such a maneuver. Accordingly, I

believe that the Sentencing Commission should take steps to insure adequate hearing procedures.

Under amendments to Federal Rules of Criminal Procedure 32(a)(1) and 32(c)(2)(b), to take effect in November, 1987, the probation officer will be required to determine the sentencing classification, guideline range, and any mitigating or aggravating factors. The amendments will require the presentence report to state the financial, social, psychological and medical cost to victims, and the extent of non-prison programs and resources available to the defendant. Thus, the burden of beginning the sentencing process rests with the Probation Department.

It is critical that this process be conducted in an accurate and reliable way. At present, Probation officers have been known to rely on unverified hearsay and conclusory investigative agency reports often contained in the part of the report labelled the "offical" or prosecutor's version. This reliance should no longer be tolerable. Probation officers must be given the resources to conduct a truly independent investigation about the offense and its impact. That includes access to independent economic experts to determine the economic harm in fraud cases, psychiatrists to determine psychological harm, or doctors to determine the scope or extent of injury. Similarly, defense attorneys must be given the tools to contest allegations concerning cross-referenced crimes and offense characteristics.

Steps must also be taken to assure that the evidentiary hearing is adequate to determine contested issues. At present,

Rule 32 does not contemplate full-blown evidentiary hearings in the ordinary run of cases. Such procedures must be guaranteed. The draft of the Sentencing Commission's guidelines speaks vaguely (p. 17) of the right to present witnesses and cross-examine. However, it does not explicitly require an evidentiary hearing, nor does it state the circumstances when in-person testimony from the government will be required. In fact, the draft (p. 8) seems to contemplate a judgment based upon any facts produced at trial, in the presentence report, or the sentencing hearing. If so, the Commission is assuring itself sentences based upon inaccuracy and injustice. It is common knowlege among defense attorneys that presentence reports often include inaccurate and wildly exaggerated claims of a defendant's involvement in criminal activity. Unless the factual predicates underlying these assertions can be challenged under cross-examination, inaccurate sentences will result. Uncritical reliance upon facts produced at trial will also produce unjust sentences. As I have noted, defense attorneys will often fail to contest, at trial, evidence unrelated to guilt or innocence. A defendant claiming he is not the one who committed a bank robbery would be foolish to contest the amount of money allegedly stolen. The use of such unchallenged evidence at sentencing without an evidentiary hearing is unjust, for it forces a defendant to either dilute his trial rights or risk being sentenced on inaccurate information.

In order to assure accurate and just sentences, the Commission should propose a change in Rule 32 to mandate evidentiary hearings on contested issues. Absent a defense stipulation, the

Government should be required to prove offense characteristics, with witnesses subject to cross-examination.

The Commission should also give greater attention to the standard of proof it believes should be applied at the hearing. The Commission argues for a preponderance of the evidence standard, citing Supreme Court authority that such a standard is constitutional. While the Commission is probably correct in its legal conclusion, it has simply ignored the issue of whether that standard is the one most likely to produce fair and just sentencing decisions. My experience with the United States Parole Commission leads me to believe that a higher burden, such as "clear and convincing evidence," might be appropriate.

The current Parole Commission operates, as would the new sentencing guidelines, under a preponderance of the evidence standard. The Commission weighs the government's report of criminal involvement against the defendant's claims and attempts to conclude which version is the more probable. In the typical case where a defendant argues his lack of culpability, and is confronted with hearsay information in a government report, the usual result is an uncritical decision in favor of the government. The defendant, after all, has already been convicted, and is at least implicitly unworthy of belief. Hearing examiners typically give little or no weight to an inmate's claim, yet treat as presumptively reliable virtually any information contained in government reports. A requirement of "clear and convincing evidence" might convey to judges the message that reports of aggravating factors must be explicit and credible

before being accepted. At the very least, the Commission should not pass over the burden of proof question without more critical analysis.

IV. The Scope of Modified Real Offense Sentencing

I have previously stated my agreement with a modified real offense system. I also believe that the road map system developed in the guidelines is as good a means as any for minimizing confusion. Nevertheless, the system still presents potential for confusion and injustice. In its desire to be complete as possible, the Commission has attempted to include a vast array of potential harms in its real offense scheme, and to quantify these harms with exacting precision. A fairly simple robbery prosecution may require as many a dozen different fact findings, including whether a loaded weapon was used, whether a take-over occurred, the amount of money taken, whether property was destroyed, whether physical injury occurred, whether psychological injury occurred, whether hostage-taking occurred, the offender's role in the offense, and the criminal background. There are at least four problems with the detailed structure of the guidelines.

First, guidelines of this detail insure a welter of litigation. Each one of these issues may need to be the subject of an evidentiary hearing. Disagreement over the application of these factors may result in an appeal. Each new element creates the opportunity for confusion or misapplication of the guidelines. The parole guidelines, which require far fewer findings, still manage to produce a good deal of confusion and litigation.

Second, the Commission, by attempting to include everything, has added material that is simply not critical to the culpability of offenders. For example, my experience with bank robbery prosecutions has been that the amount of money taken was not a critical, or often even a terribly important, aspect of the sentencing decision. Judges, quite appropriately in my view, focussed primarily on the danger posed to the public by the robbery, and any physical injury that might have been inflicted, rather than the amount of money taken. I believe that the federal parole guidelines, which do not require a calculus of the amount of money taken in most robbery cases, are both more modest and superior to the sentencing guidelines in this respect.

Third, by including a tremendous array of associated conduct, the guidelines will result in a great deal of double-counting. In the case of robbery, the guidelines separately sanction take-over robberies and hostage-taking, both of which prohibit virtually the same conduct. Similarly, the guidelines regarding 21 U.S.C. §848 appear to require counting the same kind of conduct four separate times.

Finally, I believe the system is unjust, insofar as it includes harms supposedly "related to" or resulting from the criminal conduct (page 16), even if those harms were not committed or intended by the defendant himself. For example, the draft includes as an example the child hit by the speeding get-away car driven by the co-defendant after a bank robbery. According to the draft as I understand it, every participant in the robbery would be charged for the injury, even if the act was

not performed by the defendant, if the defendant was not in the car, if the defendant did not even know a car was going to be used for the robbery. The inclusion of acts occurring after the crime, particularly those committed by other co-defendants, subjects a criminal defendant to a species of strict liablity that is unjust. Again, the federal parole guidelines are superior, for they at least provide that an offender is not to be held liable for acts committed by codefendants over which the defendant had no control and which he could not be expected to foresee.

V. Specific Issues

A. The Income Tax Presumption

In addition to increasing the sanction formerly imposed on income tax violators, the guidelines require aggravation for a tax evader if the violation is based upon failure to declare illegally obtained income. The draft then states, "Unreported is presumed to have been obtained unlawfully, unless otherwise established by the offender." This presumption offends both due process and common sense. It offends due process, because Supreme Court case law requires that a valid presumption in a criminal case may exist only if the fact presumed is more likely than not to be derived from the fact proven. That condition is clearly not applicable to the presumption the Commission has attempted to fashion. One does not have to be a criminal defense attorney to be aware of the "underground economy." Millions of dollars in lawfully derived income are not included in W-2 forms, yet are legally obtained. The notion that everyone who hides

income has obtained the money illegally offends common sense.

B. Offender Characteristics--§A311

This section provides for an increase in the guidelines for an individual who is "in a position of control over a criminal enterprise." Neither the section nor the commentary provides a definition of "criminal enterprise." The failure to provide such a definition assures future litigation about the meaning of this provision. The comments do advert to those individuals convicted under 21 U.S.C. §848 for a continuing criminal enterprise. If the definition in that section is meant to be incorporated in A§331, I believe that an explicit statement to that effect would be helpful. If a different definition is required, the section should provide one.

C. Offender Characteristics--§A314

This section provides for a reduction of up to 50% for a "minor participant" in the offense. I applaud the Commission for going as far as it has; it urge it to consider going even farther, and permit an even greater reduction for a peripheral participant in a consipiracy. The federal conspiracy laws permit the inclusion, in a single indictment, of literally dozens of individuals with an incredible range of culpability. The same narcotics conspiracy indictment may include the organizer who received millions of dollars over a period of years as well as the "mule" who made one or two deliveries and received nothing by way of compensation. The same gambling indictment may include the organizer of the enterprise, who received millions of dollars in income, as well as the "clerk" who totalled the bills. In

recognition of this diversity, a greater reduction for peripheral members of a conspiracy should be enacted.

D. Criminal History Score

The Commission has chosen, in its criminal history score, to place tremendous weight on the length of the prior sentence imposed. A one year sentence amounts to two points, a five year sentence is scored as five points. The Commission concedes that this scheme will perpetuate previous sentence disparities, but states it is willing to tolerate that disparity. I urge the Commission to reconsider its position. The Commission's plan will result in a tremendous penalty for an individual with only one prior conviction, if that conviction has resulted in a term of over five years. On the other hand, an individual in another state who received several convictions for similar offenses, but received a short term of imprisonment or no term at all, will receive a smaller score. The scheme will perpetuate sentence disparities; it fails to take account of the widespread difference in rates and times of incarceration of various states. I believe that the Parole Commission system that penalizes the fact of conviction and the fact of imprisonment over 60 days is a far more equitable scheme.

Respecfully submitted,

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00085
11-24-86

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
PROBATION OFFICE

November 17, 1986

RAYMOND L. FRANK, JR.
CHIEF PROBATION OFFICER

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Washington, D. C. 20004

Attn: Guidelines and Comments

Dear Chairman Wilkins:

As requested, attached are comments on individual pages regarding specific areas of the Preliminary Sentencing Guidelines.

Thank you for the opportunity to comment.

Sincerely,

Raymond L. Frank, Jr., Chief
U.S. Probation Officer

RLF/nld

attachment

Length of Sentences

The Preliminary Draft of the Proposed Sentencing Guidelines seems to impose particularly stringent sentences on drug related cases. I understand that this is a reflection of the present philosophical attitude in the United States. However, it should also be realized that these proposed sentences are going to result in much larger numbers of individuals going to prison for considerably longer periods of time.

The Bureau of Prisons reports that the U. S. Prison System is presently about 50% over-crowded. Without a massive effort to build a large number of new institutions, the population will become unmanageable.

A recent case in the Eastern District of Michigan involved a man in his mid-twenties who was a peripheral figure in a multi-defendant cocaine conspiracy. His Rule 11 Plea Agreement indicated a maximum sentence of 36 months. He pled guilty to a conspiracy count and was therefore responsible for the entire offense behavior. Although he was a peripheral figure, under the new guidelines, he would have to serve a sentence of 126 to 156 months. Of course, this could be that we have misinterpreted the guidelines in this particular offense. However, it is this type of case that will add to the already overburdened prison system.

Chapter 1, Section VI, Application Instructions

Although the Application Instructions are clear and sequential, some of the points need further refining. For example, step number 2 indicates that the Probation Officer or Court Officer should "determine which is most appropriate to the offense before the Court". With different individuals scoring, the same defendant has come up with different sections as being appropriate to the offense. Step number 7 also is open to individual interpretation.

In step 8, it refers the reader to Chapter 3, Part A, Role In the Offense. This is also open to interpretation not only by the Probation Officer but by the Assistant United States Attorney. If a particular attorney feels that an individual should be treated differently, they can overplay or downplay that particular offender's role in the offense and charge the defendant with a more serious or less serious offense.

Probation Officers have each looked at and scored the same presentence report. They have arrived at different scores because of different interpretations of the 12 steps. Perhaps with practice it will become more uniform. If not, perhaps each probation office will need a "special master" to score and interpret each presentence report written in that district.

The 12 steps as proposed in the guidelines are sequential and precise. However, they do entail a considerably longer time to arrive at a sentencing range than the system presently in place. Perhaps with practice it will become a more expedient process. If not, it will add to the already growing work load.

Rule 11 Plea Agreements and Disparity in Sentencing

One of the reasons given for sentence disparity is the diversity in Judicial Sentencing philosophies throughout the United States. The United States Attorneys in most Judical Districts have the authority to negotiate Rule 11 Plea Agreements with defense counsel. Unless some strong measures are put into the new sentencing guidelines, I feel that the disparity in sentencing will become more wide spread than it presently is.

Since the District Judges will now be bound to sentence within a range of time, the Assistant United States Attorney will be able to decide the amount of time that the defendant will serve. For example, the United States Attorney may decide to charge a defendant with a lesser offense than that actually committed. The sentencing guidelines would provide for a lesser sentence and, the Assistant United States Attorney having this knowledge, would be able to bargain for a lesser charge with the defendant. Therefore, sentencing disparity may be taken out of the hands of the U. S. District Judges and placed in the hands of the Assistant United States Attorneys.

For further clarification, perhaps an Assistant United States Attorney in one jurisdiction returns a multi-count indictment against a number of defendants. In exchange for the cooperation of one of the defendants, the Assistant United States Attorney decides to charge that defendant with a simple possession of narcotics charge rather than the large scale drug offense. In another jurisdiction, another Assistant United States Attorney might insist that all the defendants indicted be charged with the same offense. Therefore, the disparity is taken out of the hands of the Courts and placed in the hands of the Assistant United States Attorneys. My personal feeling is that the disparity in the present sentencing system would be multiplied if this power was given to the thousands of Assistant United States Attorneys in the Federal Criminal Justice System.

Comment on Page i

I must take exception to the comments addressed in paragraph 1 on page i. This paragraph seems to be an indictment of the Probation System. It indicates that Federal Judges "are provided little guidance during the sentencing process". For more than 50 years the U. S. Probation System has conscientiously and professionally provided U. S. District Judges with recommendations and sentencing alternatives based on a thorough and accurate presentence report. Granted, disparity does exist because of georgraphical and idealogical differences in the makeup of U. S. District Courts. However, I do not believe that it is the result of a "lack of guidance".

00067
11-24-86

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November 12, 1986

United States Sentencing Commission
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ATTN: Guideline Comments

Dear Sirs:

I have reviewed the preliminary draft of your work and submit my comments for your consideration. I am a sentencing consultant with 23 years experience. My vita is attached.

I choose to comment little on the specifics of your work. It is a monumental effort to translate perceptions of severity into numbers. And of course, it is not cast in concrete; nor will it ever be. But, I do believe that it is not politically wise, or in tune with the crime patterns of today, to continue with the myth that cocaine is not as serious as heroin.

I note that the sanctions for the two drugs are not the same. Two kilos of heroin bring a more severe punishment than do two kilos of cocaine. I believe the sanctions should be the same and the differentiation between cocaine and heroin is no longer valid.

I also urge that the Commission grapple with the problem of the public's perception of what a crime is worth in terms of sentencing. One of the advantages of parole was it allowed judges to impose sentences which made good play in the press but which, in reality, were not as long, thanks to parole. In other words, the public and the system is used to hearing "15 years" for bank robbery. In the old days, such a sentence meant close to seven years of custody. Under the new system, "15 years" means 10 or more. This is going to crowd our overcrowded prisons and result in longitudinal disparity. ("My older brother only did 4 years and I did six and we stole the same car.") Your maximum sentences must be made lower, even though such a sentence will sound low to a public trained by many years of sentencing practices.

The Commission has analyzed the key components of criminal behavior but, as of yet, has not analyzed the key components of the offender. It appears that the Commission is stymied. You do not know if a factor like age is even relevant. From a victim's point of view it matters not that the burglary was 18 and not 57. The stereo is still gone. The harm done is the same. But society must make a distinction.

Age and other offender characteristics are relevant. Ask any judge. Ask any cop. Ask anybody in the business. The timid, backward, shy 18 year old is treated much differently than the mature, sophisticated, cocky 25 year old. It's in our marrow to do so. It may not be rational, it may not be an approach that reduces crime and compensates the victim, but it is a fact of American justice that cannot be legislated out of the system without creating a bad taste in the mouths of those who work in the system.

One must guard against unnecessary imprisonment. Society must make distinctions between necessary incarceration and unnecessary incarceration for many reasons. One is monetary cost. The numbers I have heard is it costs $50,000 to build a cell and $16,000 a year to keep someone in it. Therefore selective use of the prison cell is cost effective.

Another is human cost. Unnecessary imprisonment is a waste of a human resource. An inmate is not productive. S/he does not pay taxes, does not participate in the economy, does not support others, does not create, does not invent, does not contribute in any way. To the contrary, s/he is a drain, totally dependent on the state for everything, including the support of dependents. And imprisonment runs the risk of making that status as a dependent permanent. Scar a youth with imprisonment and you may throw her/him so far off track that s/he can never recover.

I suggest you take the offender characteristics and quantify them just as you have done with the offenses. It's difficult, but no more difficult than what you have already done. There are thousands of criminologists and practitioners who can help you reach a consensus. The Parole Commission has already started this with their salient factor score. Once quantified, the scores can be used to reduce the minimum months a judge must impose. Perhaps more importantly, they can be quantified into a probation salient factor score which will augment and override the crime score.

To do so, however, creates the problem that seems to obsess you: disparity. The offense is the same but the sentence is different. But should 18 year old, bank robber, mental retardate John Jones receive the same sentence as 25 year old Phil Jones?

And what about motive? What happened to the old story of the man who robbed a store to feed his starving children? How does that compute? It must you know. I suppose the answer is in the judicial ability to go below the guidelines. But, that is

difficult to rely on when all the pressure is against a judge doing just that. And it means that the administration of justice is officially on record as being insensitive to the plight of that unfortunate bank robber.

Don't let the bug-a-boo of disparity force you into creating harshness and insensitivity into a system which deals with the problems of human existence on a daily basis. (Is disparity really the problem? When was the last time you heard of citizens complaining that a defendant received a 20 year sentence when all others were receiving 10 year sentences?)

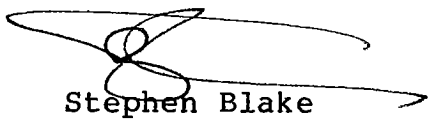
I am trouble by the continuing acceptance of imprisonment as the ultimate punishment. It is a 200 year old concept that your commission has an opportunity to change. We should keep up with the times. How about taking the high road and begin now to teach all of us that crime cannot be measured by length of time in jail. Urge the courts to make one decision first before all others: whether or not probation is a viable sentence with extensive reasons given.

What about monetary sanctions? Where do they fit? Let's face perhaps unpleasant facts. Rich defendants do buy their way out of a prison term by having the ability to pay a large fine and/or restitution. It sounds undemocratic but it is a reality and it helps to pay the costs of the justice system. Fines and restitution should always be ordered and sentences should be lower in exchange. But I don't see how that is factored in. And of course it can't be factored in publicly, on the record. But you must create some method for it or the recently increased fine ceilings will go begging.

I don't envy your task. You are tampering with a system which is used to achieve many different purposes simultaneously. Something is going to break. But throwing all people in jail for all crimes for some period is going to break the prison system and the bank first.

I wish you luck.

Very truly yours,



Stephen Blake

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NOVEMBER 1986

VITA OF STEPHEN F. BLAKE, J.D.

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MAJOR POSITIONS:

1975-1983	United States Probation Officer, Southern District of California
1972-1974	Corrections Specialist, Law Enforcement Assistance Administration Pilot Cities Project, Criminal Justice Program, University of New Mexico
1971-1972	Executive Assistant to the Director, Department of Corrections, Washington, D.C.
1971	Acting Warden, Women's Detention Center, Washington, D.C.
1969-1971	Chief, Classification and Parole, The Youth Center, District of Columbia Department of Corrections, Lorton, Virginia

PROFESSIONAL SOCIETIES:

Federal Probation Officer's Association; American Correctional Association; National Council on Crime and Delinquency; American Society of Criminology; California Attorneys for Criminal Justice; National Association of Criminal Defense Lawyers; Criminal Defense Bar Association, San Diego; Associate, American Bar Association.

MISCELLANEOUS ACTIVITY

Member, San Diego County Technical Advisory Committee on Health Services Management; Chairman, San Diego County Advisory

Committee on Drug Abuse; Member, San Diego County Advisory Committee on Drug Abuse; Past Member, Mayor's Emergency Command Center, Washington, D.C.; Past Chairman, Management Team, Department of Corrections/American Federation of Government Employees Negotiations; Former Assistant Professor, Washington D. C. Technical Institute

PUBLICATIONS

1986	Arrested! Now What?, International Self-Counsel Press, Seattle.
1985	"House Arrest--The Hot, New Sentence Option", The Champion, Vol IX, No. 10, p. 18.
1974	Case Mortality Study of Felony Arrests in Bernalillo County, University of New Mexico Press
1973	Juvenile Justice in Albuquerque/Bernalillo County, University of New Mexico Press
1973	Heroin and Crime in Albuquerque, University of New Mexico Press
1972	Evaluation Report: The Southwest Valley Youth Development Program, University of New Mexico Press

11-24-86

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
PROBATION OFFICE

November 19, 1986

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REPLY TO: Arlington

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Attn: Guidelines Comments

Dear Sir:

This is in response to your request for comments on the preliminary draft of the Sentencing Guidelines. The attached comments and suggestions were compiled by the Northern District of Texas Committee on Sentencing Commission Issues. The committee is composed of six United States Probation Officers of varying years of experience in the present system. The enclosed comments have been reviewed by the Chief United States Probation Officer of this district, Al Havenstrite, who established the committee and has approved the submission of our comments.

We hope our input will be of some assistance to you.

Sincerely,

Jane McPhillips
U.S. Probation Officer

JM/mb

GENERAL COMMENTS

- There was a general feeling that the Commission may be trying to take into account too many variables. It is a noble idea, but is it practical? Each stage in determining final sentence provides an opportunity for mechanical error and many of the stages encourage and invite subjective arguments.

- Mechanical calculations need to be simplified and/or explained very clearly.

- The Commission may be overly optimistic in its assumption that most conflicts will be resolved without requiring a hearing. On controverted issues (page 17) there will have to be some procedure devised whereby issues can be identified and argued at sentencing without straining the Court's time. Please give some thought and directions on procedure. Roles of the U.S. Attorney and the Probation Office in the procedure need to be clearly defined.

- The idea of a term of supervised release seems to be at odds with the concept of determinate sentencing. Also, the potential impact on the Courts' workloads may be enormous. The whole idea of supervised release needs further thought before implementation.

CHAPTER 2
OFFENSE CONDUCT

1. Part A - Offenses Involving the Person

- The categorizations of physical and psychological injury need to be simplified. Especially in the area of psychological injury, the distinction the Commission attempts to make between extreme and significant injury is a good try, but still not workable.

- It should be established precisely who is to provide expert testimony on physical and psychological injury and who is to pay for it within the government. Our concern is that under the old system the entire victim impact concern ended up squarely on the U.S. Probation Office. The intent of the legislation placed the burden on the U.S. Attorney's Office and that is not what happened. The new system should clearly specify the U.S. Attorney's responsibility especially if expert testimony is involved.

2. Part D - Offenses Involving Drugs

- This section appears to have been "lifted" from the Parole Commission guidelines in a haphazard manner. Why is so much importance attached to the amount of dope rather than the actual sale when the latter is the basis for the crime? The property offenses sections take this concept into account, but the drug section does not. The amount of drugs sold is a factor that goes to amount of damage to society and level of sophistication of the defendant. These considerations should be factored in through the use of a drug table similar to the tables used in a financial offense. Purity of the drug could then be utilized also. The chain of distribution idea (the better the dope, the higher the subject in the chain) makes sense and is based on years of research by the Parole Commission.

- The base offense values for drugs appear to be very high. Granted, this was the intent, but we wonder if it has not been overdone and/or not well thought out in comparison with other crimes. For example, is the man who sells a kilo of cocaine (section B211, base value of 168) more dangerous to society than the man who willfully carries a bomb aboard an airplane (section K216, base value of 24 plus 48 = 72)?

3. Part F - Offenses Involving Fraud

- Clarification is needed on the explanation of multi-count indictments found on page 76. The necessary information is there, but instructions need to be explained in clear, concise language.

- In working with fraud cases there was some general confusion with cross references and what base value to use. Again, this could be just a matter of giving a clearer explanation.

Chapter 3
OFFENDER CHARACTERISTICS

1. General Comment

This entire consideration of offender characteristics feels like it is in the "wrong place." Aggravating or mitigating factors should be taken into consideration at the end of all other considerations/calculations. On a mechanical level it would be easier, and conceptually it would be more clear regarding the weight to be given these additional considerations.

The basic most important elements of the system are the offense and the prior record. The offense of conviction is a proven fact and the prior record is a proven fact. With the exception of cooperation which is based on a certified fact, the adjustments are based on subjective judicial determination with the information the Judge relies on coming from investigative reports. It feels wrong having something like this effect the basic offense value which in turn effects the weight of prior record.

On a mechanical level it is awkward also. This is the scenario. The probation officer, Assistant U.S. Attorney, and defense attorney will be meeding in a presentencing conference to clean up any errors in the probation officer's calculations and to decide what issues if any will be argued at sentencing. The probation officer then presents those issues to the Court. Meanwhile, behind the scenes, the probation officer is making calculations of various sentencing outcomes (if the Judge decides this way then this; if the Judge decides that way then that). For the most part arguments will be in the offense area as so much is at stake there. The offender characteristics will also be argued solely because they are so easily arguable. Any decent defense attorney can present an argument on those characteristics. Why? Because he is not arguing facts he is arguing about how those facts should be viewed. The way the situation stands now the probation officer could possibly have to prepare for numerous combinations of variables (unless you contemplate the Judge sitting on the bench with a calculator, or unless you contemplate the Judge holding a presentencing hearing to decide the issues which seems like an unnecessary waste of judicial time when the problem is only a mechanical one).

The situation would be simplified if aggravating and mitigating characteristics were somehow tacked on at the end. The Court would decide the issues at stake to get offense value, tie that in with the criminal history score and then deal with factors that may effect the total number of sanction units. This is much easier conceptually and mechanically than putting very arguable considerations right in the middle and allowing them to mess with offense values which in turn mess with criminal history score value.

2. Part A - Role in Offense

- Defining a defendant's role in the offense will be based on information from investigating agents. It took the system many years (and much screaming on the part of the defense attorneys) to get unproven facts and exaggerations out of the Prosecution Version of the presentence. Be careful or this section will put it all back in. Leave out a), c), and d) under section A311. Also, insist that information needed to make a judgment call on role in offense be in the indictment (e.g. defendant sold dope 15 times over a year, obviously criminal enterprise on an ongoing basis). Trying to capture the old RICCO type defendant in this section may lead to all kinds of abuses for other defendants.

- With regard to the range of multipliers in section A311 and more particularly, section A314 (minor participant role), is this fine-tuning really necessary? The Court will have to first make a finding that defendant was a minor participant and then find that .6 is the proper multiplier rather than .5 or .7. This appears to be an unnecessary complication.

3. Part B - Post Offense Conduct

- Since there are so many stages of adjustment added to or subtracted from base values, it would seem best to simplify these calculations whenever possible.

- The mechanical application of using the multipliers is confusing in certain situations. This entire section needs mechanical clarification.

- The acceptance of responsibility section is vague. Every defendant who pleads guilty is going to expect this. They are all sorry when before the Court.

- The '20% reduction' for acceptance of responsibility is subject to various interpretations, i.e. reduction in what?, and needs clarification.

- The range of multipliers under obstruction of justice (a number between 1.1 and 1.4) seems silly and a needless complication.

- When adjusting for cooperation, the attempt to 'fine-tune' with three definitions is again needlessly complicated considering the impact on the offense value. In the real world the defendant either cooperates or he does not.

4. Part C - Criminal History

- Juvenile offenses create difficulties due to problems of proof (records confidential and difficult to obtain) and problems in defining convictions (juvenile adjudication language varies from state to state). The Commission may want to limit juvenile offenses to those involving persons. Those offenses usually get prosecuted on a more formal level with clear convictions.

- The score table is preferred to the alternative approach for purposes of clarity and ease of use.

- Clarification is needed with regard to convictions resulting in a fine only (page 127, 1C).

- Adding points for positive urine tests during the period of prosecution (page 127,1E) is a problem in two ways. Urine tests are very fallible and adding points for one positive U/A is not just. A second consideration is that this whole approach will discourage defendants from being honest about past and present use; it will discourage people from seeking treatment.

1. Section A411(e) Imprisonment

- The range between months of imprisonment seems too broad in the higher sanction units. The ranges vary from six months to sixty-eight months depending on number of sanction units. Is there some reason for this difference in the amount of discretion the Court is allowed? Legislation permits a 25% variation between the minimum and maximum guidelines, but was the intent to give broader discretion for more serious crimes?

- There is a problem with allowing 'rounding down' in the sanction units. This will encourage big arguments over a few points. For example, if I have 65 units my range is 48 - 60 months. If I have 66 units my range is 54 - 66 months.

CHAPTER 6, Part E
DETERMINING OFFENSE VALUES FOR MULTIPLE CRIMES
(Pages 167-168)

Comments regarding this section were compiled by probation officers in this district who worked through numerous PSI's using the guidelines. The cases that caused the most conceptual and practical difficulty were those involving multi-count indictments with multi-convictions. As the multi-count indictment is the rule rather than the exception in federal prosecutions, we feel that it is crucial that the Commission examine this area in depth and make the concepts and the directions for application clear.

We think that the best way to explain our confusion is to start with the basic premises under modified real offense sentencing system, then use simple examples to point out a problem we see, and then show how that problem is exaggerated in a multi-count indictment. The basic premise in a modified real offense sentencing system is that the Judge identifies relevant offense conduct. The guidelines tell the Judge what conduct is relevant via the specific offense characteristics and cross references. However, the Judge may also identify other "unlawful acts or omissions that were done in furtherance of the crime of conviction, as well as threatened, attempted, or completed injuries or harms that resulted therefrom." These "acts or omissions" are for the most part going to be actual criminal offenses that are related to the offense for which the defendant has been charged and convicted. In reality these are going to be dismissed counts of the indictment. The problem we have with the guidelines is that sometimes the additional offenses are handled by aggregating the actual base offense value of the crimes and in other sections, depending on the type of crime, those other actual offenses are merely factored in. By 'factoring in' we mean that the specific offense characteristics or cross references tell us to add in some value for those other offenses.

Let us try to illustrate the problem with using examples that you set out in the sentencing guidelines. "The offender is indicted for two separate bank robberies in a two-count indictment. The bank robberies are unrelated and are not in furtherance of a conspiracy. As part of a plea agreement, Count Two is dismissed under the government's motion. The offender pleads to Count One. The offense value for the bank robbery in Count Two is not added to the offense value for the bank robbery in Count One. Because the second bank robbery is not related to, resulting from, or done in furtherance of the first, it is not considered in sentencing the offender." This example says that had the second bank robbery been related to, resulting from, or done in furtherance of the first then it would be considered in sentencing the offender. The way it would be considered is that the offense value for the second bank robbery would be added to the first. A second example is as follows. "The offense of conviction is conspiracy to steal and forge one social security check. At sentencing the Judge finds by preponderance of the evidence that the offender stole, forged and cashed 20 checks. All of the offenses related to the 20 checks done in furtherance to the conspiracy, or that resulted therefrom, are used to calculate the

total offense value for the conspiracy." In this situation the specific offense characteristics and cross references on forgery take into account the other checks/crimes. Some value commensurate with number of checks involved and amount of dollar loss is added to the base offense value.

It appears that aggravated criminal conduct and victim impact are captured without aggregating offense values for each actual offense in the check example, but in the bank robbery example (assuming for our purposes that the robberies were related) the actual offense values are aggregated for each separate offense. We are contending that a better method in the latter situation would be for the actual offense of bank robbery to have a cross reference that captures the related crime. That added in value should not rise to the level of the basic offense value.

Our reasons for objecting to the situation as it stands now are two-fold. One reason is that in a purely mechanical sense aggregating offense values in a multi-count indictment can be a nightmare. There very frequently will be an overlap problem in assigning offense values. There will also be factual disputes due to the large offense values at stake. Our second reason for objecting to the situation is that we feel it will lead to disparity in sentencing.

We can illustrate these problems with a very common example. Mr. X sells drugs four times to an undercover agent. All four sales involve cocaine and happen within a one week period of time. He is charged in a four-count indictment reflecting the four sales. He pleads to two of the counts; the U.S. Attorney agrees to move for dismissal on the other two. The Court finds that the four sales were related to each other and all should be considered in sentencing. The cross references do not take into account a repeated series of sales and therefore if the Judge feels that it is appropriate to take all four sales into account then he must aggregate the offense value. Let us say the sales made by the defendant were of ten grams of cocaine each. He has no prior record and there are no other significant variables. The base offense value for the sale of ten grams of cocaine is 28. There were a total of four sales which aggregate into 112 sanction units. The construction of sentence rule (A422) tells us that we had better not go over 96 to 120 months as a penalty no matter how we put these counts together. Because of the overlap problem you certainly cannot sentence the man to 120 months on Count One and 120 months on Count Two. Therefore, we look at various combinations; consider three sales on Count One with a 72 to 90 months range; consider two sales on Count One with a 44 to 54 months range, ditto on Count Two and run them consecutive; or, how about just looking at what he was actually convicted on, that gives a range of 16 to 22 months on Count One and a range of 16 to 22 months on Count Two. On a purely mechanical level, we are contending that there is no way to work out a set of rules (as the Commission tried to do on page 168) that will provide a mechanical clarity and consistency throughout the system. Secondly, this is also the area where disparity in sentencing will be prevalent.

Anytime the guidelines allow adding in an actual offense value this looks and feels like sentencing someone on an offense on which he has not been convicted.

There will be disparities because there will be many Judges who are so uncomfortable with aggregating actual offense values that they will choose to ignore the other offenses altogether (which is the only other alternative). Disparity in another sense can come in as follows. Judge number one (who has no objection to aggregating offense values) decides based on a preponderance of the evidence that there are not four sales there are just two. Judge number two (who also has no problem with aggregating offense values) looks at the facts and on a preponderance of the evidence standard decides that there were four sales. Now look back at what that defendant is going to be exposed to depending on which Judge he comes before. Of course, there are always going to be different penalties; one Judge found one way and one found the other. The point is that in a system that is supposedly designed to reduce disparity, the penalties end up being way too far apart.

The way the guidelines utilize specific offense characteristics and cross references would appear to us to be a way around the problems enumerated above. No one is going to be uncomfortable with factoring in some value that recognizes that the defendant did in fact make four sales, not two. This is essentially what happens in the present system; the Commission is attempting to put numerical values on that type of thing to provide some type of consistency throughout the system. We are suggesting that you take that concept even further, work it into every offense section and disallow aggregating actual offense values for crimes for which the defendant has not been convicted. This need not be a complicated task. Factor in for every offense some value for other offenses related to the original offense that take into account financial injury, physical injury, or property damage. Repeated offenses of the same nature could be a catch-all category. Do not attempt to fine tune the latter with regard to actual number of extraneous offenses. If a defendant is named in a 15-count indictment reflecting that he illegally transported aliens 15 times and he pleads to the first two counts he would be in exactly the same position had he pled to the first two counts of a four-count indictment. All that would be factored in is that he did in fact have repeated offenses of a similar nature and the value would only be factored in once on one count.

In our drug example, if a sale alone was given an offense value (rather than attaching an offense value to amount of drug in that sale) that cross referenced to a table for amount of total drugs sold, then the situation can be handled with less mechanical difficulty, less conceptual confusion and less potential disparity. A value would be factored in only once on one count. Even if Judge one and Judge two make different findings about the amount of drugs (whether to add in the amounts in Counts Three and Counts Four or not), the penalties will not end up being grossly disparate.

In conclusion, we think that the basic concepts of the modified real offense system get confused in the multi-offense/indictment situation. Even if you find our analysis incorrect or our suggestions not practical, please accept that our bewilderment is important. If there is a basic conceptual premise on how to deal with the multi-count offenses, please be crystal clear conceptually and with any rules you formulate.

0006
11-24-86

STATEMENT OF JEFF BROWN
SAN FRANCISCO PUBLIC DEFENDER
BEFORE THE UNITED STATES SENTENCING COMMISSION
NOVEMBER 18, 1986

I appreciate the opportunity to appear before the Commission, and I am honored to be included with the distinguished witnesses on today's calendar.

I am perhaps the most ill-equipped of all witnesses. I have never practiced in the federal courts and I have the most cursory knowledge of federal rules. I have had, however, some first-hand experience wth a root and branch change in sentencing in the state courts, and I hope that my reflections may be of use to you today.

First, let me congratulate the Commission on an outstanding product. I do believe that your general recommended approach is eminently sound. You are aiming at consistency in sentencing and attempting to decrease the wide variation that now exists in sentencing practices among the federal district courts. It is clearly undesireable under the present system that similar defendants with similar fact situations are often treated quite

dissimilarly. Your proposed modified real offense sentencing with its base offense values will go a long way toward reducing this inequity in sentenceing.

My second comment may contradict what I have just said: don't expect this sentencing system to end sentence disparty. The commission's proposal will, perhaps, make judges consider more fully all the factors that should influence sentencing. It will to some extent force judges to consider those sentencing values which they might otherwise ignore. But the federal judiciary with its lifetime tenure is too independent and too spread out for sentencing equality to become a reality. Probably all you can expect is to narrow the inconsistency -- a clearly desirable and worthwhile goal.

California as you know enacted the Determinte Sentencing Law in 1976 and gave sentencing equality a top-priority. For all of the monitoring, however, sentencing still varies for similar offenses. There are vast differences between counties and even among judges within the same counties.

7704D/11/86

The practices of an individual courthouse, the attitude of local judges and prosecutors, and the caseload will continue to be paramount even after the enactment of these well thought-out guidelines. The parties to the settlement of the case will adjust the point total to reflect the agreed-upon disposition, no matter how elaborate the method of calculation. There are some specific issues addressed by the Commission's report which I feel I can comment upon:

(1) Sentencing Bargaining -- The Commission has asked for comment on sentence bargaining. Having worked in a jurisdiction where sentencing bargaining is allowed, it is hard for me to conceive living without it. However, I do feel that sentencing bargaining, if permitted under the proposed sentencing process, would undercut whatever gains might be made toward sentencing uniformity. Sentence bargaining, in my judgment, really takes away from the court the ability to shape a sentence. The sentence does not reflect so much the court's overall assessment of what, given similar facts and background, is the appropriate

disposition. Rather it reflects the relative skills of the attorneys on both sides, their workload, and their own peculiar sense of an appropriate disposition. If the proposed guidelines are to be followed with any fidelity, the control over the sentence must rest, as much as possible, with the court.

(2) Aggravating and Mitigating Circumstances -- There probably should be authority vested in the court to depart in the most unusual of circumstances from the guidelines. The Commission undoubtedly did whatever it could to take as much as possible into consideration in setting up its base value points. But circumstances will arise in individual cases where the point total will indicate a sentence that is either too harsh or too light. In those instances, the courts should be permited to deviate from the guidelines with a careful exploration of the reasons for doing so on the record

(3) Multiple Crimes -- I would favor a limitation as set forth in Rule 6 at page 168. Excessive stacking of multiple crimes creates sentences that make it impossble for offender

rehabilitation within a reasonable period of time. In California the Determinate Sentence Law has been amended to allow stacking of several crimes arising out of the same course of conduct. The result has been that in certain cases astronomical penalties are imposed. A rapist, for example, can spend much more time in prison than a murderer. There appears a consensus of opinion in the California system that the stacking of crimes for penalty purposes distorts both the nature of the crime and the danger it may, in the long term, represent.

(4) Permissive Satisfaction of All Sanction Units -- I suggest that the courts be allowed wide discretion in fixing orders for the discharge of sanction units. Attempts at constructing equivalencies will probably result in confusing sentence ordering and inequality of sentencing. I doubt if judges will understand one another's orders, and I doubt whether they will apply the equivalencies in the same way.

(5) Prior Criminal Records -- My concern is that, as a matter of justice, the guidelines must allow a "wash-out" period

for old offenses. I feel the delay factor, set forth on page 129, is sound, but I feel it should be extended to all offenses, except perhaps violent homicides. Otherwise the courts will find themselves tacking more time on an offense whether or not the old offense bears any similarity to the new offense. Additionally, I feel he court should be authorized to strike the prior offense if the court feels it is too remote or too dissimilar from the new offense.

I would strongly caution the Commission against the use of juvenile records. In many jurisdictions they are not accessible, whereas in others they are. If juvenile offenses are counted, the courts will be taking them into account where they are available and not counting them where then are unavailable. The net effect will be unequal sentencing.

Moreover, juvenile proceedings have been conducted with varying degrees of fairness over the years. The application of In re Gault has been slow. The lack of jury trial in many cases means coercive pleas. It is enough, I think, that the courts

should use juvenile records where the juvenile has been tried as an adult.

(6) Other Offender Characteristics -- The considerations set forth in Part E are as important as anything else in sentencing. How they should figure in a point system I frankly do not know. It is my feeling that they should probably not be given quantative values. Rather, they should be factors the court takes into consideration in granting or denying probation or in discharging sanction units.

Again, I appreciate the opportunity of offering these few comments. I commend the Commission for its efforts and believe that approval of the Commission's proposals by the Congress will be a major step towards equity and fairness in the federal system.

7704D/11/86

00361
11-25-86

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November 07, 1986

MEMORANDUM

Honorable James M. Burns
United States District Judge
Portland, Oregon

Dear Judge Burns:

I offer for whatever assistance it may be to you, a very rough draft of my recollection of the results of the Pasadena proceedings. I apologize for the length of this summary, but as George Bernard Shaw or some other such renowned wordsmith once stated, I didn't have time to write a shorter one.

As we continue to review the work of the Commission and attempt to offer constructive criticism, it becomes evident that the Commission may be faced with a situation where the solution may be as bad as the problem. The Commission's primary mandate from Congress is to reduce unwarranted disparity in sentencing. To achieve that goal, judicial discretion must be reduced and structured. Most of the problems we observe in the proposed guidelines seem to be best resolved by increasing judicial discretion, and that in turn increases disparity. To the extent my remarks are critical of the work of the Commission, I want to assure you I am sensitive to the difficulty of your task.

I have some concerns regarding the modified real offense sentencing system as set forth in the guidelines. In general, I believe consideration should be given to a system whereby specific offense characteristics and cross-referenced behaviors may be considered along the lines of the joinder of offenses provisions of Rule 8(a) and the Rule 404(b) provisions governing admissibility of evidence of other crimes, wrongs, or acts. Such a system, which I believe would still be within the scope of the modified rule offense concept, would provide

standards which are familiar to the bench and bar and would provide a consistent standard to assist our circuit courts in resolving factual conflicts.

As an alternative or supplement to this suggested system, offense values might be increased based on the offender's admitted or proven responsibility for related acts or harms.

I realize the offense values set forth in Chapter 2 of the guidelines are tentative, but many of my colleagues have expressed the strong feeling that the prison terms resulting from these numerical values are unrealistically high and internally inconsistent in some cases. Several purposes of sentencing are set forth in the statute, but the substantial real time prison terms called for by the guidelines suggest incapacitation is the primary goal of sentencing. Incapacitation is entirely appropriate for career criminals who involve themselves in crimes of violence or major drug cases, but prison terms of two to three times those presently served under parole guidelines seem excessively harsh for offenders with limited criminal histories and limited participation in major crimes.

One solution would be to provide a very broad range of reductions under criminal history, cooperation, and role in the offense sections of Chapter 3. Obviously, as those reduction percentages are expanded, the potential for sentencing disparity increases. We are concerned that as a practical matter, our system as it exists and with the realistic limitations on its ability to expand, cannot accommodate the increase in numbers and duration of prison terms called for by these guidelines.

I am aware the Federal Defenders through the Legislative Committee and as individuals, have submitted detailed testimony regarding concerns with the role in the offense adjustments in Chapter 3. I support a system providing for reasonable discretion to differentiate between the manager of a major drug importation and distribution organization and a naive mule enticed into illicit activities for a couple of hundred dollars when both are convicted of the same crime. I believe the Defenders offer some valid concerns worthy of the Commission's consideration.

Criminal history information is an important and legitimate consideration in criminal sentencing, but the formula proposed may be too complex and may tend to perpetuate disparity of prior sentences. In my own state, due to severe conditions of prison overcrowding, an offender convicted

in a major drug case may walk out the gate in a few months. In another state where these problems do not exist, the same crime may result in service of a term of several years. Also, the task of the probation officer to determine the term actually served may be too burdensome to justify the amount of assistance this information will provide to the Court. The rebuttable presumption of service of one-third of the term imposed may reduce the burden on the probation officer, but frequent hearings may be required to consider the sufficiency of the defendant's rebuttal evidence. Additional complications may result from attempts to determine credit for time served prior to conviction, for pre-release halfway house terms, and work release programs.

A more straight-forward system of considering criminal history may be to assign one value to all felony convictions and a lesser value to all misdemeanors. This would sacrifice some of the sensitivity to the nature of the prior records, but I think the trade-off in reduction of complexity would justify that sacrifice.

Acceptance of responsibility and cooperation reductions have generated lively discussions among my colleagues. Unfortunately, these discussions did not produce a consensus opinion. We did agree that little or no reduction for guilty pleas combined with the fixed and predictable guideline terms will probably provide little motivation for plea agreements. Also, we noted that the professional criminal may cut a deal for dismissal of several counts of an Indictment and then get a further reduction for pleading guilty and accepting responsibility. On the other hand, the amateur criminal who believes everyone should go to trial may be convicted of his one and only crime with no reduction in the term. This "pro-am" problem must be addressed in any formula for reduction of sentence.

Reductions based on cooperation with agencies of the government are a necessary part of effective law enforcement. While I think it's entirely proper that the attorney for the government express an opinion as to the specific value of the cooperation and the appropriate reduction, I believe this opinion should be advisory in nature, and the final decision regarding the amount of the reduction must rest with the judge.

I urge the Commission to re-examine the strict limitations established in Chapter 4 on the Court's authority to impose

a sentence of probation. Restricting probation to those cases with a guideline range of zero to six months suggests a determination has been made that probation is appropriate only when no significant sanction is required to serve the goals of sentencing set forth at 18 USC 3553.

The COMPREHENSIVE CRIME CONTROL ACT defined probation as a sentence in itself which constitutes a final judgment. It is one of the three distinct kinds of sentences authorized as consistent with the objections of protecting the public providing just punishment, deterrence, and promoting rehabilitation of the offender in the most effective manner. The guidelines restriction on probation sentences suggests the Commission has not adequately considered that probation has evolved from the mere suspension of a punitive sanction to an effective program of community corrections. The imposition of conditions such as community service, home detention, community detention, and curfews enables the Court to fashion a probation sentence which will provide punishment, control, and deterrence as well or better than a short term in a prison camp followed by a brief term of supervised release. A collateral benefit will be less disruption of families, more effective restitution programs, and the best opportunity for rehabilitation which may keep the offender out of the system in the future.

I understand the Commission may be of the opinion that expansion of probation eligibility is prohibited by the 25% range provisions of 28 USC 944(b). I do not join in that interpretation, but if that is the law, I believe expansion of probation eligibility is of such importance that amendment of the statutes should be pursued aggressively by the Commission.

I do not suggest that no limitation should be placed on the judges' discretion to impose a sentence of probation. I do recommend that the threshold sanction unit score be increased to at least somewhere in the range of 24-36 units. I realize some of the imprisonment sanction units may be satisfied by custody during nights, weekends, or other intervals of time as a condition of probation, but as a practical matter due to severe overcrowding of our local jail facilities, those conditions of probation will be unavailable to the Courts. Also, the Commission may wish to consider a specific criminal history score above which the offender would not be eligible for probation, and I would have no objection to that limitation.

These modifications of the guidelines will reduce the frequency of findings that mitigating circumstances were not adequately considered to support a probation sentence which is not called for by the guidelines. At the same time, the extremes of disparity would still be eliminated and our limited prison budgets would be spent in a more effective manner.

There is a great deal of speculation regarding the nature of the plea negotiations under the guidelines sentencing system. With the limited reductions authorized for acceptance of responsibility, we may anticipate a temptation to fact-bargain, especially in cases calling for very long prison terms. The bank robber who forced the victim teller into the vault at gun point in the furtherance of his crime may come to the Court with stipulated facts that he was unarmed and that the teller went into the vault and enticed the robber to follow her. It is not likely a sentence imposed under a set of stipulated but questionable facts will be appealed, so it will fall to the District Court to see that these guidelines are not undermined. This responsibility must be carried out by the judge who has a calendar to manage and who is not totally disinterested in the settlement of complex cases. There is also concern that aggressive scrutiny of and participation in plea negotiations is contrary to the provisions of Rule 11 and may raise legitimate separation of powers issues.

As we all continue in the struggle to develop a fair and workable sentencing system, it's beginning to appear that we may be able to approach a perfect system with requisite flexibility with out unwarranted disparity only when one exceptionally wise judge sets in some place like Topeka, Kansas and sentences all offenders.

Respectfully submitted,



CHARLIE E. VARNON
Chief U. S. Probation Officer

CEV:je

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11-25-86

FEDERAL PROBATION OFFICERS ASSOCIATION

National Officers 1986

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Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Re: Draft of the Sentencing Guidelines

Dear Judge Wilkins:

Attached please find the FPOA Position Statement containing the collective thoughts and comments of the Executive Board relative to the Commissions Sentencing Guidelines Draft. Additionally, I have attached the thoughts and statements of several Board members that had provided input to Susan Smith, our legislative chairperson, for your information and consideration.

I will be representing the FPOA Board at the Public Hearing held on December 3, and reading the attached statement. I look forward to seeing you and the other members of the Commission again. I hope that our feedback to you has been beneficial, and I look forward to working with you in the future.

Sincerely,

Rory J. McMahon

Rory J. McMahon
Secretary, FPOA

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PREPARED STATEMENT OF THE

FEDERAL PROBATION OFFICERS ASSOCIATION

FOR THE

U.S. SENTENCING COMMISSION

PUBLIC HEARING ON THE SENTENCING GUIDELINES DRAFT

DELIVERED BY:

RORY J. McMAHON

SECRETARY, FPOA

PREPARED STATEMENT OF THE FEDERAL PROBATION OFFICERS ASSOCIATION:

Mr. Chairman, I am Rory J. McMahon, Secretary of the Federal Probation Officers Association, and a Senior U.S. Probation Officer, working in the Southern District of Florida, assigned to the Ft. Lauderdale office. I wish to thank you, Chairman Wilkins, and all of the distinguished members of the U.S. Sentencing Commission for allowing us the opportunity to address you today regarding the recently promulgated sentencing guidelines draft.

I would like to divide our comments into two sections; general comments and specific recommendations. First, we would like to make some general comments about the overall guidelines and their implementation, then I will make specific comments and recommendations regarding issues of specific concern.

The efforts and progress of the Sentencing Commission in addressing the basic injustices and uncertainty of present sentencing practices, and the development of a " truth in sentencing " system are laudatory. Based upon a review of the Draft and prior discussions with members of the Commission, it is apparent that the U.S. Probation System will maintain an integral role in the new sentencing guidelines system. We strongly recommend that the Commission gice concrete support, by whatever means are available and appropriate, to insure that U.S. Probation offices

are adequately trained and staffed, to facilitate congressional intent and implament Commission guidelines into reality.

As a member of the panel of " working Probation Officers" that convened in Washington D.C. in July to work with the proposed set of guidelines, I experienced first hand the complexity and additional responsibility that will be thrust upon the U.S. Probation Service upon adoption of the guidelines. I realize that U.S. District Court Judges will be relying heavily, if not solely, upon the calculations and interpretations of the guidelines formulated by the U.S. Probation Officer. As a result of these additional responsibilities and duties assigned to the Probation system, there needs to be a concommitent increase in the resources available to the Probation Division, as well as a review of the workload formula and staffing patterns to assess the impact of these guidelines on the personnel staffing.

We urge that the Commission use its considerable power and influence with the Congress to ensure that funds are available to the Probation Division, Administrative Office, and the Federal Judicial Center to enable Probation Officers to perform their vital role in this process. Additionally, we urge the Commission to consider, and if deemed appropriate, recommend to the Congress, that the U.S. Probation System be allowed to retain a certain percentage of the fines collected by our agency, and specifically

earmark those funds for the training and resources needed for implementation of the sentencing guidelines. Certain proposals of the Commission, such as the Home Detention concept, can most appropriately be performed through the use of electronic monitoring equipment, which will require the purchase or lease of expensive hardware and software. In view of the fact that Probation Officers are responsible in most cases for the collection of fines, we see that it is appropriate for a percent of those funds to be allocated for the use of the Probation system.

With respect to our specific comments and recommendations, these are primarily concerning the Probation and Post Release Supervision sections of your Draft. While realizing that the Commission has primarily addressed the categorizing of crimes, and assigning numerical sanction units to them in this draft, the comments regarding Probation and Supervised Release leave the reader uncertain as to the Commissions expectations as to what are the purposes and philosophy of both Probation and Post release supervision? This uncertainty lends itself to certain perceived problems in the implementation of the proposed concepts regarding supervision conditions, methods and manner of formulating and filing violations, sanctions for violations of Probation and Post Release supervision, and other concepts proposed in the Draft such as Home Detention.

As an example, nowhere in Chapter Three is the need for cooperation with the U.S. Probation Office by the

defendant, ever mentioned. There needs to be built into the process a mechanism for mitigating or aggrevating adjustments provided for the cooperation, attitude and responsiveness of the defendant with the Probation Officer. Otherwise, it is not in the defendant's best interest to cooperate with the officer assigned to conduct the Presentence Investigation. The defendant's cooperation can only hurt him/her by disclosure of such things as prior record, financial and employment irregularities and other demaging information that may result in the the aggravating of his scoring. Conversely, without his cooperation, the job of of the USPO becomes much more difficult We recommend that cooperation with the U.S. Probation Officer be included in section Part B- Post Offense Conduct (page 122). Furthermore, we recommend that perjured statements to a USPO and attempts to destroy or conceal information or material evidence, should be considered a aggravating factor and scored appropriately.

With respect to the conversion of sanction units into sentences, we favor a combination of Option 1 & 3. In order for the guideline system to work effeciently, in our view, there needs to be a requirement that the Judge use all the sanction units accumulated by the defendant, including a minimal range required as a term of imprisonment. The balance of the sanction units should then be satisfied with non-imprisonment sanctions such as Probation, Post

Release Supervision Terms, and other appropriate considerations.

With respect to the conditions of supervision (page 146), we recommend that certain vague, unenforceable terms and descriptions be clarified or avoided. The word " promptly" in Condition G should be changed to a more specific time frame such as two days or within 72 hours, which we believe is clearer, and less likely to lead to misunderstanding or inability to be clearly enforced by the Courts. Additionally, in Condition H, we submit that " maintain reasonable hours " and " associate with law abiding persons " is vague and unenforceable. We recommend that that condition read " the offender shall not associate with individuals with criminal convictions unless granted permission to do so by the Probation Officer." Furthermore, we recommend that the Commission propose the adoption of wording for the imposition of certain special conditions of supervision. Special Conditions such as financial disclosure for white collar criminals, employment and travel restrictions for the third party risk offender and conspiratorial offender, and search conditions for the narcotics trafficker and violent offenders, should all be worded similarly to avoid misunderstanding and unenforcibility. We have submitted written suggestions as to recommended wording for the Commissions consideration.

The Violations of Probation & Post Release Supervision

section of the Draft is of concern to us. It is speculated that the proposed revocation terms for violators are unacceptably low. Our reading of Chapter Five suggests that if an offender is convicted of an A or B felony, subsequently released to Post Release supervision, and commits a lesser technical violation, revocation will result in service of a six month perion of additional incarceration, following which, there will be no resumption of the up to three years of supervision. In essence, the post release offender can dispense with his three year supervision term by committing a lesser technical violation which will result in service of a six month term and no further supervision. We believe that a number of offenders, in particular the career criminal and organized crime offender, would prefer to serve the six months than to be responsible to a Probation Officer for three years. We believe that this highlights a flaw in the revocation process that needs to be addressed by the Commission. We further suggest that this process needs to be more clearly defined and refined, to ensure that supervision terms are meaningful and provide more control than the historical " paper tiger image " of community supervision.

In conclusion, we thank the Commission for allowing this Association and U.S. Probation Officers individually to have input into the formulation of these sentencing guidelines. We offer to the Commission our continued interest

and availability to continue to work closely with you in your task of clarifying, completing, enlarging and defining the remaining sections of the guidelines and sentencing structures. We remain at your disposal for whatever task you deem appropriate and in the interest of the Federal Probation System.

WE THANK YOU FOR THIS OPPORTUNITY TO PROVIDE COMMENT, AND WE CONGRATULATE YOU ON THE OUTSTANDING JOB THAT YOU HAVE DONE UNDER THE MOST TRYING OF CIRCUMSTANCES.

Mr. Chairman, this completes my prepared remarks. I will be happy to a respond to any questions the Commission may have.

RE: Comments Concerning Sentencing
Commission Guidelines

As per your most recent request, we are submitting for your perusal some comments regarding the above-mentioned subject.

1. The proposed sentencing guidelines will reduce unwarranted disparities in sentences. The new system will be more specific as to how to sentence a given offender based on the severity of the offense, background of the offender, and certain aggravating or mitigating circumstances. By and large, offenders convicted of the same offense will receive the same sentence.

2. The modified real offense approach is not new to the District of New Mexico. Nevertheless, it certainly will be a step forward nation-wide to reduce disparities. We support the idea 100%.

3. Page 34 A251 Psychological Injury
Your past experience as a trial judge would certainly come handy in this issue. What is "extreme" or "significant" psychological

injury? The terms could be reversed and still not have a clear cut differentiation. Is there room for potential victim abuse when monetary reimbursement is a factor? Needless to say, two psychiatrists or psychologists presented with the same information usually reach opposite conclusions depending who is paying for their services. Thus, is this matter to be resolved by the "preponderance of evidence?" Would this delay the sentencing process?

4. Page 123 B322 Acceptance of Responsibility
Under the modified real offense approach, the reward of credit is already considered. As a result of considering aggravating or mitigating circumstances, the defendant already receives credit.

It is noted that repeat offenders know the ropes and they go to great lengths to convince the prosecution, Probation Officers, and Judicial Officers that "they are sorry" for their mistakes and many even "find the Lord" etc.

We do not agree that a reduction of 20% is appropriate. Determining acceptance of responsibility if subject to individual interpretations.

5. Page 125 Cooperation

Although the cooperation issue would be the exception rather than the rule, the fact remains that a sophisticated criminal could receive a 20% reduction through melodramatic antics claiming responsibility and 40% more by the government certifying cooperation. The critical issue is that this rule could result in abuse by prosecutors and defense attorneys in an attempt to reach a "good" plea bargain agreement.

In some cases, defendants would agree (cooperate) to testify at a later date against codefendants or companion cases in return for "a break" from the prosecutors. However, since the defendant's cooperation must be considered at the time of sentencing, is it not unfair to credit a defendant with cooperation when in many instances his codefendant plead guilty? In essence, the defendant's agreement to testify is mute and receives credit for something he did not do.

6. Page 127 Criminal History Score

Since the Commission puts a precedent by relying on McMillan v. Pennsylvania, U. S. 106 St. Ct. 2411 (1986), it would seem appropriate that in considering the criminal history

of a defendant, further Court decisions be incorporated in this section, i.e., U. S. v. Tucker, 404 U. S. 443 (1972), Townsend v. Barker, 334 U. S. 736 (1948), Angersinger v. Hamlin, 407 U. S. 25, 33 (1972).

7. Page 130 Effect of Criminal History Score

We agree that there is a close relationship between a defendant's criminal history and behavior prognosis. Thus, the criminal history score must be considered in the sentencing process. Statistics will show that recidivists make up the larger population of defendants being processed through the Criminal Justice System and in confinement.

8. Page 142 Conversion of Sanction Units

As part of the individualized sentencing approach, which includes the modified real offense, aggravating or mitigating circumstances, the defendant's role in the offense, etc. we believe the third approach, Page 143, is best. This option would dramatically enhance the judicial prerogative in imposing conditions of probation (Page 143) and supervised release (Page 146).

9. Page 148 A415 Home Detention

Section b-1 is somewhat troublesome in that for recidivists who

had gone through the system several times, home detention could become a meaningless condition. The only way to enforce it would be for the Probation Officer to literally "baby-sit" with the probationer or the person on supervised release to make the "condition" valid and meaningful.

Accountability by the defendant appears to be almost nil as the full responsibility of enforcement, and in fact accountability, rest upon the Probation Officer. We feel this is an unenforceful condition.

10. On Page 152, Paragraph 3, a violation of conditional release is treated as a contempt of Court (18 USC 401 (3)). Thus, if a defendant is committed to prison for Contempt of Court, does the remainder of the conditional release period (Page 156, Paragraph 1) satisfy the original sentence imposed? If so, the individual does not have to be under conditional release supervision any longer.

11. We support the idea expressed on Page 155, Paragraph 3 concerning the sanctions to be imposed upon revocation of probation.

In regards as to what are more serious or less serious violations of conditions of probation, it should be noted that "usually" when a condition of probation is violated, the violation is in conjunction or in furtherance of one or more conditions.

It is our position that a "probationer" should not receive credit for any of the issues described on Page 156, Item 4. The Courts have ruled that "probation is a privilege, not a right." Any defendant sentenced to probation has already received great benefits (credits) such as remaining at liberty in the community, continuing to earn a living, thus allowing him and his family to continue with the same standard of living.

12. Page 157 Fines

We support the "proportionate ability to pay" proposal as it is fair, practical, and consistent with the guideline philosophy.

It is obvious that during the sentencing procedure, the Harm - Base Deterrent would have been considered by the Judge, i.e., modified real offense, aggravating or mitigating circumstances, role of the offender and his criminal history, etc.

To impose fines for the sake of impressing the defendant when he will be unable to pay, is meaningless, cumbersome for the Government, and ultimately one more unsuccessful case in the books of criminal justice failure.

13. Page 161-162 Organizational Sanctions

From the practical point of view, the imposition of a fine determined by the injury resulting from the criminal act would be sufficient punishment and deterrence. Probation should not be considered. Experience in this type of situation shows that a convicted president, vice-president, or other high official of a company or organization is usually removed or a resignation is rendered. In the case of lower hierarchy employees, "normally" they are fired. Once the leadership changes, who then should be supervised, a new president or a new board of directors?

Conditions of probation are to be reasonably related to the nature and circumstances of the offense (18USC 3553(a)(2)). Thus, conditions as reflected on Page 163, Paragraph 5 must be carefully evaluated as the Federal Courts have already ruled on some of these issues. (see U. S. v. Clovis Liquor Dealers)

14. Plea Bargain

It is our position that the Sentencing Commission must be very careful in issuing guidelines in this critical area. Plea bargain could become a judge's v. prosecutor's discretion. Instead of hoping for a lenient judge, the defendant may find himself hoping for a lenient or overworked prosecutor.

At all stages of the plea bargain, the prosecutor must inform the defendant that at the time of sentencing:

a. The Court will consider the modified real offense.

b. The prosecution is not engaged in a "sentence bargain."

c. That there are other issues the Court will consider for an appropriate sentence such as harm to the victim, restitution, fines, etc.

For example, in a case where the Grand Jury returns a homicide Indictment and later is reduced to manslaughter through a plea bargain, the defendant should be advised that the Judge would work essentially from the homicide sentencing guidelines.

RECEIVED
NOV 3
U.S. OFFICE
VIRGINIA

TO : Susan Smith, USPO
Richmond, VA

FROM : Chuck Stearns, SUSPO
West Covina, CA

SUBJECT: Preliminary Draft of Sentencing Guidelines

Having just completed the reading of the Guidelines Draft, I can appreciate the time and effort the Commission and their staff has devoted to this very difficult task. Along the way, the Commission has been good enough to keep us apprised of their activities and suggestions have been made. However, the full impact is never realized until the finished product, such as this, is seen in totality. I must say, however, whether it was the legislative intent of Congress or the unique bias of the Commission, I find myself diametrically opposed to the approach and the underlying philosophical orientation.

As the Commission aptly stated in the conclusion on Page 169, it is immensely difficult to capture in a single set of guidelines the vast range of human conduct likely to be relevant to a sentencing decision. The work only is beginning. An iterative process will refine, modify and improve the guidelines. What I perceive as folly is the belief on the part of the Commission that these guidelines will meet the enunciated purposes. I believe that what we have captured here is an elaborate Sentencing Guideline scheme that will be neither cost effective nor impact significantly on the reduction of crime. Instead, we have standardized penalties to remove unwarranted disparity and opted for custody as the punishment of choice. Lip services is given to the concept of rehabilitation, but there really is no substantial belief in the capacity of people to change. In an artificial way, we have ascribed a measure of seriousness of offense, afforded adequate deterrence, but it is unlikely that we have protected the public from further crime other than that provided by a respite while the offender is incarcerated. It is unlikely that these guidelines will lead to advancement of knowledge of human behavior. Instead, we are thrusting forward to place individuals in numerical cubbyholes with little discretion accorded the courts for individual differences.

Having verbalized my general disenchantment with the entire guidelines process and recognizing that I must be in a small minority by believing still that people can change and that custodial sanction should not be the first or primary choice of disposition, I will devote the remainder of this critique to concerns raised by the Commission and how the guidelines impact on the probation service.

First, although the guidelines direct the Court in the appropriate sentence to impose, it is unlikely that our overburdened judges are going to take the time to do the scoring. It is obvious that this responsibility will be delegated to the Probation Officer. As such, there is a critical need for training to meet effectively the challenge of equitably administering the guidelines. It is incumbent upon the Commission to bring such pressure to bear as is necessary for the Congress to allocate adequate funds to provide necessary training. Similarly, it is important that this new, complex and different function be recognized in a pecuniary way by increasing the salaries of probation personnel charge with implementing the system.

Real Offense Sentencing

Regarding standard of proof and real offense sentencing, I agree with the Commission that the standard of proof should be a preponderance of the evidence. Also, real offense sentencing takes into account and more accurately reflects offense behavior. It does appear, however, that in offenses like multiple robberies in which the defendant is permitted to plead guilty to one count, there would be no weighting in the sentence for the additional unadjudicated counts. Explicit cross-references would meet better the test of parity of sentence since judges would be using the same standards. Procedural issues might best be resolved by a conference process between prosecution and defense with the Probation Officer serving as arbitrator. This would reduce the substantial costs inherent in open court resolution of issues. Only in those cases where agreement cannot be achieved should the court be intimately involved. There is a concern, however, that by utilizing a real offense sentencing standard, there might be fewer guilty pleas leading to substantial increases in costs and the need for more judges to timely administer a growing criminal calendar. I doubt also that the Commission is realistic in expecting that factual disputes will be readily resolved by juries or the court.

Offense Conduct

It is unclear from the Preliminary Draft how offense values were established since the Commission indicates it will consider from nine principal resources final offense values. It is surmised that the present offense values were derived from an historical perspective on past sentencing practices. Such a reliance has no validity base to it. Although I am in no favored position to evaluate the values attached to the offenses, nor is the Commission, some of the cross-references will be difficult to determine by the time of sentencing. For example, the issue of psychological injury to a victim may not yet be present by the time of sentencing. Similarly, the distinction between extreme psychological injury and significant psychological injury would be difficult to ascertain. Finally, the Commission has attempted to quantify criminal behavior and its affects resulting in a prescription for precise weighting of issues previously never measured in any quantifiable way. I am sure that courts have considered items such as psychological injury and aggravation of sentence but without specific values for gradation of injury. It is incredible to me that the Commission believes it is in a position to affix accurate or meaningful standards to offense conduct. What the Commission has created is a complex scoring device that will result in more offenders serving longer sentences thereby exacerbating an already costly and overcrowded prison system. I have offered before and say again that as a national strategy we need to develop appropriate sanctions that are not steeped in a "lock them up" philosophy. Instead, they should be strategies that will impact on the offender, protect the community and reduce the incidence of crime. There just has to be a better way than warehousing people. The Commission in its perception of the legislative mandate has adopted a philosophy that incarceration is the best answer. I heartily disagree.

Offender Characteristics

Although it is commendable that discretion be built into the system to differentiate among offenders for factors in aggravation or mitigation, it is interesting that the Commission departed from a numerical weighting to one of percentage of offense value. It would seem that if there is an offense value and the guidelines provide for discretion within the guideline limits, such an elaborate

scoring device is confusing and confounding and opens the door for challenge and costly court time. It would be better to leave to the total discretion of the judge the panoply of choices within the guideline range. The judge then takes into consideration the role of the offender in the offense, past offense conduct and cooperation. Under the proposed guidelines there are provisions allowing the judge the discretionary responsibility to reduce the sentence by a sum not exceeding 20 percent. It provides also for the prosecutor to certify credit amounting to a 40 percent reduction. Combined, there is the possibility of a 60 percent reduction which can only defeat the Commission's interest in reducing disparity. Under the examples of acceptance of responsibility there appears to be a class distinction bias which will serve to the benefit of the "have's" and to the detriment of the "have not's." Additionally, plea negotiations already will impact on the bottom line time to serve.

So far as criminal history is concerned, what is primarily measured is incarceration history. It would appear more appropriate to consider convictions and affix sanction units based on the grade of felony and in an effort to simplify the process, exempt misdemeanor convictions from consideration. I still argue against the utilization of a decay factor. An argument could be made that having been through the criminal justice system previously, the choice to commit crime was a more informed one. Also, offenses for which dismissals are entered upon satisfaction of certain conditions should be counted as prior convictions. In considering the impact of criminal history score, I prefer the alternative approach although in both indexes, the base offense value is the significant measure. So far as other offender characteristics are concerned, it makes sense to allow the court the discretion to consider these characteristics and to utilize the 25 percent range to accommodate sentencing thereby adjusting for offender characteristics.

Determining the Sentence

It seems that the Commission is wed inextricably to the concept that incarceration is the option of choice. As a system, the need for incarceration for 14 or more sanction units will prove costly both in dollars and human waste. What is obvious is that more people are going to be locked up for longer periods of time. Already, we incarcerate at a level higher than most

civilized countries. Incarceration has not worked, and in all probability, will not work. We need to think of sanctions not necessarily focused on jail but, rather, on punishing equitably in ways that bring offenders to feel a sense of responsibility, to dissuade them from their self-centered orientation and to compensate the victim for their losses. Incarceration needs to be reserved for the offenders who pose a serious threat to the welfare of the community or whose persistent behavior demonstrates that they need to be isolated from that community. 18 USC 3553(c) which requires the judge to explain specific reasons for imposing a sentence at a particular point in the guideline range negates true discretion to sentences within the guidelines and will result in expensive challenges to the mental gymnastics of the judge in deciding an appropriate sentence. I would prefer to see a sanction system that applied only if incarceration is ordered and would thus allow a judge, for whatever reasons deemed appropriate, to grant probation except where specifically statutorily prohibited. It would preferable not to consider converting sanction units into sentences other than imprisonment. I know that it is comforting to have a handy-dandy numerical equivalent for everything, but I think to attach sanction units to nonimprisonment conditions will be burdensome, time consuming and confusing. It is better that we calculate a range of imprisonment and leave the imposition of other sanctions to the total discretion of the judge.

Probation

In reviewing this section, there appeared to be too many conditions enumerated as general conditions of probation and terms like promptly and immediately need operational clarity attached to them. Certainly the requirements on the Probation Officer are such that substantial training needs to be provided. It is obvious that the major responsibility for computing guidelines determination will rest with the Probation Officer. Such a vital responsibility argues for compensation commensurate with that level of responsibility. The Commission is employed to bring about such budgetary adjustments as are necessary to meet this new challenge. The issue of community confinement and home detention might be appropriate sanctions for those offenders not requiring closed facilities. Again, however, funds need to be allocated to provide the hardware and software necessary for program implementation and enrichment of staff to meet the mandate.

Imposition of a condition of supervised release sets forth general concepts in the code but deals ineffectively with the implementation. Many questions remain unanswered but undoubtedly will grow out of the experiences of implementing the program.

Violations

The Commission's approach to the handling of violations tries to prescribe the nature of the action to be taken by the court. Again, the mind set is custody oriented. Jail is not always the best solution. In response to the Commission's request for comment on issues related to violation of probation and supervised release, the grading of less serious and more serious violations vary based on the eye of the beholder. It seems that all violations should be reported to the judge as the final decision maker. The proposed sentences for application to revocation of supervision focuses on punishing the violation rather than the original offense. Credit should not be afforded offenders for time spent on supervision or compliance with conditions if in the final analysis, they fail to meet their responsibilities and violated their psychological contract with the court. Since custody sanctions do not apply to organizations, failure to meet the condition should result in action that forecloses the organization from being in business or in establishing new businesses in an effort to evade responsibility.

Fines

I am not sure where the Commission got the idea that judges avoided fines because they were not in an amount sufficient to punish or deter. That certainly has not been my experience. Regarding whether the proportionate approach or the harm based approach is best is difficult to determine since there are aspects of both that make sense. It seems to me that we need to weave into the decision making process elements both of ability to pay and that of a harm based deterrent. If part of the fine purpose is to offset the system expenses, consideration might be given to allocating a portion of the revenue collected by the Probation Service to offset training and implementation expenses. So far as organizations are concerned, fines ought to be imposed in relation to the harm done or the difficulty of discovering the crime. It may well be that offender organization should be forced out of business. Yet on the other hand, organizational fines should relate to the income or wealth of the organization so that the fines would not be viewed simply as cost of doing business.

Susan, I don't know how you are going to weave this into your ultimate presentation, but I hope that it is of some value in understanding some of the short falls of the proposal.

CS:de

COMMENTS ON CHAPTER 1 & 2 OF the SENTENCING GUIDELINES.

The proposed method of calculation for implamentation of the guidelines is unduly complex. It is too complex for the USPOS, the Cour and the Defense Bar to all arrive at the same score and same conclusion Therefore if it is that complex that everyone is not going to be able t arrive at the same conclusions, there will be massive challanges and the Courts rulings will be subject to challanges based upon what lawyer will say is erroneous calculation of the scoring, which will put the USPO in a bad position.

The other major concern is the scoring for white collar offenders. The major white collar offenders will be scored on a par with the least serious drug trafficker. The white collar criminal who commits an offense involving less than $ 1 million, is a candidate for probation, whereas drug traffickers of minor significance are facing substantial time for a kilo of cocaine, which is an everyday occurance in South Florida. The offense scoring for white collar criminals needs to be significantly increased to have any deterrent effect, particularly in a high white collar crime area such as South Florida.

Comments on Chapter 3 -

Nowhere in the draft is cooperation with the U.S. Probation Office mentioned. There needs to be built into the draft aggravating and/or mitigating adjustments provided for the attitude and response of the defendant to the Probation Department conducting the PSI. If an offende cooperates with the US Probation office that should be factored into Part B - Post Offense Conduct (page 122). Perjured statements to a USPO, attempts to destroy, or conceal information or material evidence, should be considered an aggravating factor, and scored accordingly.

Under section B321 & B322, I concur with the Commission's consider ion of an offenders acceptance of responsibility for wrongdoing; a defe dant who takes affirmative action toward disaccociation from past crimin conduct and attempts to rectify harms done to others. I believe that the USPO conducting the PSI is in a good position to determine the offender remorese and acceptance of responsibility, in particular, in regard to hie Version of the Offense.

Comments on Chapter 4 -

With respect to conversion of sanction units into sentences, I favor Option 1 proposed by the Commission wherein the Court is required manditorily satisfy all santions units in imposing sentence.

With respect to the Conditions of Probation, I recommend that Condi ion G be reworded to read; the offender shall notify the probation offic within 72 hours if arrested or questioned by a law enforcement officer;

Comments on Chapter 4 - (continued)

Condition H should be ammended to read; the offender shall maintain reasonable hours, and shall not associate with individuals with prior criminal convictions unless granted permission in writing to do so by t probation officer.

I believe that the wording for certain Special Conditions of Supervision should be included; such as,

For white collar criminals; - You shall submit to an audit of your personal and business financial records by your probation officer on a quarterly (semi-annual, yearly) basis or as deemed appropriate and necessary.

For the third party risk offender; - Employment restrictions
You are prohibited from entering into employment involving _____ during the term of probation (post release supervision).

For the narcotics and violent offender; - Search Condition
You shall submit to a search of your person or property conducted in a reasonable manner and at a reasonable time by your probation officer.

For any conspiratorial offender; - Travel Restriction
You shall not leave _____ County without the permission of your probation officer.

Comments on Chapter 5 -

Violations of Probation & Post Release Supervision

Question 5 Issues for Comment; Which Conditions should be considered les seriously when non-compliance - B,F,G (when the offense not reported is a non serious offense i.e. Violations and simple misdemeanors), H,J (Dr ing alcohol to access periodically) & M.

More serious Conditions - A,C(Lying to conceal material facts from USPO D(Refusal to allow USPO into residence),E,G(Failure to inform PO of a felony arrest or assaylt of any type),H,I,J,K,L.

Additionally, other than violations of conditions A,G,I,J,& K, which sho require immediate notification to the sentencing Court, violation of the remainder of the conditions can be dealt with by the USPO in accorda with policy established within the District.

3) The proposed revocation terms for Probation Violators is suitable; however, the proposed terms for Post release supervision violators is unacceptably low. 1/6 of three years or less is not a substantial period of incarceration when considering that these are the more serious offenders than probationers, and yet the sanctions are less severe that those faced by the probationers. Revocation terms for the post release offenders must be significant in order for the supervision of these hard core offenders to be meaningful. Studies demonstrate that the offenders eased from prison are more likely to recidivate than probationers, so th

period of incarceration must be lengthy to impress upon them the need for compliance with the supervision conditions. Thereby the USPO can attempt to deter new criminal conduct. In most cases, if the offender is not in compliance with the supervision conditions, they usually are involved in new criminal activity.

4) No credit for time served, it defeats the purpose of supervision othe wise.

Additional Comments for this Chapter; Ther should be some additional consideration for allowing the Court and the Probation Department flexibility for using Home detention and Community Confinement as the first steps to resolving Violations before the Court.Intervention of a m extreme nature can always be considered for serious violations.

Comments on Chapter 6 -

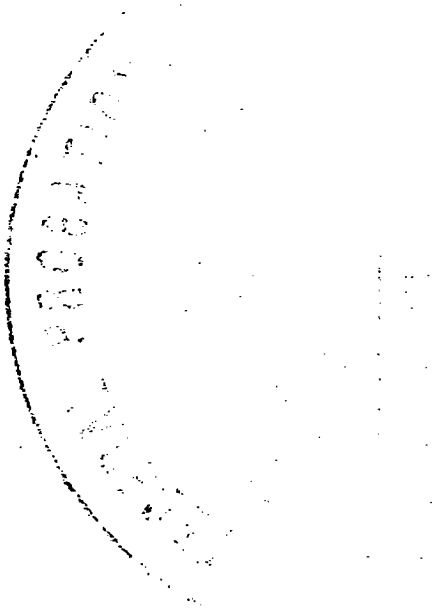
Part C - It must be stressed that there should be no attempt on the part of the prosecutor to undermine the intent and spirit of the Sentencing Guidelines. Therefore, there should be no " charge bargaining:, "sentenc bargaining", prosecutorial stipulation to underlying fact or any other attempt to provide the Probation Department or the Sentencing Court with anything other than the entire fact of the case obtained by the gov't. during the course of the investigation, indictment and prosecution of ea defendant.

Part D - The Commission can most appropriately use Community Confinement Home Detention as appropriate conditions of supervision when the offende is placed on probation but is in need of more structure, and stricter supervision than ordinarily received without the imposition of special conditions. When it is determined that the offender poses a marginal risl but the Court is uncertain if his remaining in the Community will pose a threat to that community, and when the Court needs to use the balance of sanction units in a case, the Court should impose special conditions such as community confinement and home detention.

In the case of supervised releasees, community confinement and home detention should be used as half-way measures. Offenders convicted of serious crimes can be released through community confinement prior to Post release to monitor them more closely so that if they represent a threat to the community, their acting out behavior will be easily identifiable in the close scrutiny of the community confinement and/or home.detention, thus they can be returned to custody before commiting substantial new offenses.

Additionally, it can be used as a half-way back into custody measure for those offenders who have committed minor technical violations

they can be placed in community confinement or home detention to more closely scrutinize their behavior. If they act out more, than they can b returned to custody. Otherwise, they can be returned to the community. In essence, both of these measures can be used as a means of getting the offenders attention, without having to provide the expense of incarceration.



00067
11-25-86

Stephen A. Brown
Executive Vice President

November 25, 1986

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004
Attn: Guideline Comments

Re: 18 U.S.C. Section 1365
Tampering with Consumer Products

Ladies and Gentlemen:

This letter sets out the comments of the Grocery Manufacturers of America concerning preliminary sentencing guidelines with respect to 18 U. S. C. Section 1365, the Federal Anti-Tampering Act of 1983. The Grocery Manufacturers of America (GMA) is the trade association of the leading manufacturers of food and other grocery products sold in retail outlets throughout the nation. Our members account for approximately 85% of the packaged food products sold in the United States.

As Commission staff have been advised, the preliminary guidelines do not cover 18 U. S. C. Section 1365, the Federal Anti-Tampering Act, although they do cover 18 U. S. C. Section 1365, Destruction of an Energy Facility. The omission of the anti-tampering act may have occurred because of an inadvertent overlap in codification. In any event, our comments assume that this omission will be remedied and that guidelines for tampering sentences will be proposed by the Commission.

Summary and Rationale

Unlike most other crimes, tampering tends to victimize not just individuals, groups, or communities, but society as a whole. The outbreak of tampering and attendant threats occurring throughout the country since the Tylenol tragedy in 1982 has threatened to destroy public confidence in the nation's distribution system for food, drugs, cosmetics, and other consumer products. Tampering reports to the Food & Drug Administration (FDA) as well as confirmed tampering incidents are at an all-time high. Tampering can result in injury and death. It also has enormous social and economic consequences.

Given the extremely serious consequences that flow from tampering and threats of tampering, there is obviously a compelling need for sentences that will help deter such conduct in the future. The Commission has a unique opportunity to establish a sentencing pattern

that will accomplish this purpose especially since relatively few sentences have been imposed to date under the 1983 Act. Those sentences that have been imposed have generally reflected the seriousness with which the courts have viewed this offense.[1]

Most of the sentences imposed under the Federal Anti-Tampering Act thus far have been at or near the statutory maximum. GMA urges that similar recommended sentences be incorporated in the guidelines. So much is at stake here, that judges desirous of imposing lesser sentences should have to explain them as would be required under the sentencing guidelines.

Background and Scope of the Problem

GMA and its member companies are vitally interested in the integrity of the market place for food and other grocery products. Currently, that market place involves 350 billion food packages distributed to, and sold in, grocery stores throughout the nation annually. In addition, the drug industry distributes and sells about 2 billion packages. While drug tampering has received more publicity, recent FDA figures show that tampering threats for food products outnumbered those for drugs by a ratio of 5 to 1.

In the fall of 1982, seven innocent persons in the greater Chicago metropolitan area died from cyanide poisoning after taking Extra Strength Tylenol capsules. Just as our society was forever changed when the first commercial aircraft hijackings occurred in the 1950s, so too in the aftermath of the Tylenol tragedy have the 1980s presented us with new and arguably even more heinous offenses -- tampering with consumer products and false communication of information concerning allegedly contaminated consumer products. So concerned was Congress with the seriousness of these developments that the following year it made tampering and certain related offenses a federal crime for the first time. The resulting Federal Anti-Tampering Act provided for fines and maximum imprisonment of five years to life, depending on the circumstances and consequences of the offense.

Since 1983, the continuing growth in the number of tampering incidents has threatened to destroy public confidence in the national system for the distribution and sale of food, drugs, cosmetics, and other consumer products. For example, in fiscal year 1986, over 1800 incidents (including foreign object complaints) in 32 states were reported to the FDA, a figure that included the greatest number of confirmed incidents, 190, that has occurred in any year since the FDA

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[1]See attached list.

first began compiling statistics. Each incident must be thoroughly investigated, and, whether or not it turns out to be false, it shakes public confidence and imposes heavy costs.

Costs Involved

The first Tylenol incident took seven lives. We do not presume to place an economic value on those seven lives or the suffering caused to their loved ones. Tylenol I also involved product recalls which cost the manufacturer, Johnson & Johnson, $100 million, a cost not covered by insurance. FDA Commissioner Frank E. Young has estimated that $1 billion worth of products have been destroyed just since February 1986 as a result of tampering threats and hoaxes. The FDA has spent $16.7 million so far this year and utilized 200 full-time employees in responding to tampering incidents.

There are many other costs associated with tampering incidents. The most serious, and difficult to measure in dollars and cents, is the undermining of public confidence in the safety of the food everyone must eat. Tampering and threats of tampering impose heavy burdens on the budgets of state and local health and law enforcement agencies. Consumers must pay higher prices for the products they buy, and they are forced to change their buying habits.

Sentences to Date

GMA is aware of only ten cases in which convicted tamperers have been sentenced under the anti-tampering act. As the attachment shows, the heaviest sentence was imposed on Edward Arlen Marks who attempted to manipulate the stock market by contaminating cold capsules with rat poison. He received a sentence of twenty seven years after pleading guilty to nine of twenty seven counts. U.S. District Judge Patricia Fawsett told Marks that, "This is a serious offense that warrants a substantial time of imprisonment." She noted that Marks actions had an "impact on the entire consumer confidence in the drug industry" and that this "type of internal terrorism can't be condoned." U.S. v. Edward Arlen Marks, 86-116-CR-Orl-18. (1986)

The nine other convictions we know of where sentence has been imposed involve the communication of false information, threats of tampering and conspiracy to tamper. Offenders in six of these cases received the maximum sentence. Reflecting our strong support for sentences that will act as effective deterrents, GMA filed statements with the court under the Victim and Witness Protection Act in a total of five cases, including the Marks case. In those cases, the maximum sentence was given in three out of the four which have been decided.[2]

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[2] An example of such a filing is attached.

GMA believes that significant sentences are important evidence that judges in most of these cases shared a belief in the need for strong deterrents to prevent product tampering or threats of tampering. We strongly urge the Commission to adopt sentencing guidelines for tampering and related offenses that will continue this pattern.

GMA appreciates the opportunity to submit these comments. If the Commissioner desires additional informaton, we would be pleased to provide it.

Sincerely,

Stephen A. Brown

Enclosures 2

CHART OF TAMPERING CONVICTIONS

NAME & LOCATION	VIOLATION	DATE & SENTENCE	
1. John Scott Wilson Idaho Falls, ID	Comm. False Info.	6/4/86	5 years*
2. DeWitt Gilmore, Jr. New Rochelle, NY	Threat	6/23/86	2 1/2 years
3. Ma Anand Sheela Portland, OR	Tamp. & Conspiracy	7/22/86	4 1/2 years
4. Ma Anand Puja Portland, OR	Tamp. & Conspiracy	7/22/86	4 1/2 years
5. William G. Einzel New York	Threat	--	5 years*
6. Norman M. Allen Honesdale, PA	Threat	9/2/86	5 years*
7. Charles William Tackett Lexington, KY	Threat	9/26/86	5 years*
8. David Paul Peak Sacramento, CA	Threat	10/15/86	5 years*
9. Edward Arlen Marks Orlando, FL	Tampering	10/30/86	27 years
10. Dennis Clinton Mayfield Gainesville, FL	Comm. False Info. & Consp.	11/18/86	10 years*

*Maximum sentence imposed.

George W. Koch
President/Chief Executive Officer

OFFICERS AND BOARD OF DIRECTORS
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Hershey Foods Corporation

November 4, 1986

Mr. Randolph Amos
U.S. Probation Office
401 South East First Avenue
Room 306
Gainesville, Florida 32602

Re: U.S. v. Dennis Clinton Mayfield
Case No. GCR 86-00025

Dear Mr. Amos:

We are writing to provide you with additional input respecting the presentence report which we understand you are now preparing on Dennis Clinton Mayfield, who is scheduled for sentencing on November 18, 1986, before Judge Maurice Paul. Mr. Mayfield, in conjunction with David Kunkel, phoned a 911 Emergency number on July 11, 1986, informing the operator that cyanide had been placed in bottles of Pepsi-Cola in a Gainesville area Winn-Dixie supermarket. (GMA has filed a similar letter in the case of David Kunkel.) We are advised that Mr. Mayfield was subsequently found guilty of communicating false information about tampering and conspiracy to communicate such information in violation of 18 U.S.C. Section 1365, the Federal Anti-Tampering Act, on October 8, 1986. As you know, he faces a ten-year prison sentence and a $35,000 fine.[1]

Basis for this Letter

Rule 32(c)(2) of the Federal Rules of Criminal Procedure specifically mandates that the presentence report, among other things, "shall contain"

* * *

> (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.

[1] It is our understanding that the maximum fine for all felony offenses was raised to $250,000 in 1984 when Congress passed the Criminal Fine Enforcement Act, Pub. L. 98-586, 98 Stat. 3134. This is codified in the "Alternative Fines" provision, 18 U.S.C. Section 3623.

Grocery Manufacturers of America, Inc., (GMA) is the leading trade association of manufacturers and processors of food and nonfood products sold in grocery stores throughout the United States. PepsiCo, Inc. is a member of GMA and its Chairman serves on our Board of Directors. GMA members play a significant role in the food supply and consumer product distribution system throughout the country; our members account for approximately 85% of the packaged food products sold in this country. Our association and all its members are vitally interested in the integrity of the market place encompassing the sale and distribution of the over 350 billion food packages available last year in the grocery stores of our country. We, and the consuming public, are victims of assaults on the integrity of products through tamperings and threats to tamper.

Recent FDA figures show that tampering complaints for food products outnumber complaints for drug products by a ratio of 5 to 1. This year the first death resulting from food product tampering was reported. In brief, if violators of the anti-tampering statute are not sentenced appropriately and enjoined from further action, the effect on the food industry will be catastrophic.

The Harm Done

Mr. Mayfield stands convicted of a serious criminal offense. In his defense, one might assert that there was little, if any, actual harm done since apparently no one was directly injured by his wrongful acts. Such an argument does not withstand scrutiny because at issue here is extraordinarily dangerous conduct which has serious consequences not only in Florida but throughout the United States.

In response to an earlier tampering incident, a concerned Congress in 1983 passed, and an equally concerned President promptly signed into law, the much needed Federal Anti-Tampering Act establishing stiff criminal penalties for tampering or false threats of tampering. This legislation came to fruition in the aftermath of the still unsolved Tylenol tragedy in which seven innocent persons in the greater Chicago metropolitan area died in the fall of 1982 from cyanide poisoning shortly after taking Extra-Strength Tylenol capsules. Just as our society was forever changed when the first commercial aircraft hijackings occurred in the 1950s, so too in the aftermath of the Tylenol tragedy have the 1980s presented us with new and arguably even more heinous offenses -- tampering with consumer products and false communication of information concerning allegedly contaminated consumer products.

After the Tylenol incidents in 1982, fear of tampering reached such epidemic proportions that dozens of communities felt compelled to ban or otherwise restrict Halloween activities out of fear for the integrity of various food products that normally would be provided to children in the course of their trick or treat activities. As we approach the holiday season, government agencies, grocery manufacturers and families are again working to protect individuals and prevent tampering incidents.

The outbreak of tampering and associated threats of tampering occurring throughout the country since the Tylenol tragedy, moreover, has threatened to destroy public confidence in our nation's distribution system for food, drug, cosmetic, and other consumer products. In FY 1986 alone, there have been over 1800 tampering incidents (including foreign object complaints) in thirty-two states reported to the Food and Drug Administration ("FDA"). Indeed, manufacturers and retailers can take no comfort in the fact that most tampering scares are false alarms, for each and every such incident must be taken seriously. FDA statistics show that 15% of all tampering reports are actually confirmed tampering incidents.

There have been more confirmed tamperings since the beginning of fiscal year 1986 than in any year since 1982 when the FDA began collecting such data. When recognizing the fact that the 190 confirmed tamperings reported so far this year represent less than a full year's worth of incidents, the number becomes quite frightening, especially when it is further recognized that in some 20 of these 190 confirmed tamperings, injuries or illnesses to consumers could have resulted.

The Costs Involved

The cost of recalls due to product tampering scares has been extraordinarily high. FDA Commissioner Frank E. Young has estimated that $1 billion worth of products have been destroyed as a result of tampering, threats and hoaxes since February 1986. The agency has spent $16.7 million so far this year and utilized 200 full-time employees in responding to reports of tampering incidents.[2] This figure excludes costs incurred by local health and law enforcement agencies. Additional monies are urgently needed to restore FDA's emergency fund in order to continue to combat the problem.

The 1982 recall of Extra-Strength Tylenol by Johnson & Johnson cost $100 million, which the company had to bear itself because a federal court recently decided that the recall was not covered by its insurance policy. Not long ago in San Francisco, two grocery stores were compelled to destroy $16,000 worth of produce because of a

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[2] Molotsky, I., Weaver, Jr., W. "Briefing" The New York Times, October 18, 1986.

single phone call reporting that strychnine and cyanide had been injected into the produce. The widespread problem of product tampering threats and incidents increases that figure many times over. While there are many costs associated with such incidents which inevitably are reflected in the price of the food products, the far greater cost is the loss of public confidence in the safety of the food we consume. This loss of public confidence is reflected in changed consumer buying habits and in the ever-increasing number of consumer complaints reported to the FDA.

The totality of these incidents, including the "copy cat" epidemics these situations often spawn, demonstrates dramatically the necessity that each and every such incident be treated with the utmost seriousness. A tampering claim in Florida can spark a "copy cat" incident in Los Angeles, or a consumer panic in Seattle; and in the process, the attendant loss of confidence in the food supply and distribution system of our country is inestimable.

Imposition of Sentence

It is not the role and certainly not the intent of GMA to propose a specific sentence for Mr. Mayfield in the instant situation. We do, however, believe that a significant sentence is absolutely essential in order to reflect "the seriousness of the offense" and "to afford adequate deterrence to criminal conduct."[3] The word simply must go out that the courts of this country will not tolerate product tampering and threats of product tampering in any form or fashion.

We appreciate very much the opportunity to communicate with you on this matter, and we urge your inclusion of our comments in your presentence report. If we can provide you with any additional information or clarify our position further, please do not hesitate to contact us.

Sincerely

George W. Koch

cc: R. Gail London, Victim/Witness Coordinator
Ross A. Nabatoff, Assistant U.S. Attorney

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[3] 18 U.S.C. Section 3553 specifically states that each of these factors is among those to be considered by the Court before imposing sentence. See instructions (a)(2)(A) and (B) of Section 3553 in this regard.

11-27-86

ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR & KOLKER

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November 26, 1986

BY HAND

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

Attention: Mary Ellen Abrecht, Esq.
Special Counsel

Dear Mr. Chairman and Members of the Commission:

In response to the Commission's invitation, I submit the following written comments in conjunction with my testimony to be received at the Commission's public hearing in Washington, D.C. on December 3, 1986. I have confined my discussion and analyses to two topics that are covered, or necessarily implicated, in the Commission's preliminary draft sentencing guidelines.

1. Organizational Sanctions and Voluntary Disclosure of Corporate Misconduct

Under the guidelines, an offender's total offense value may be reduced by mitigating offender characteristics such as "acceptance of responsibility" and "cooperation". These mitigating factors are defined in Sections B321-322 and Sections B331-333, respectively. None of these offender characteristics covers the situation in which an organizational offender voluntarily discloses its misconduct to the government. Actively encouraged by a number of federal agencies, including the Department of Defense, "voluntary disclosure" of corporate misconduct is rapidly becoming one of the most important issues in federal law enforcement policy. */

The philosophy of voluntary disclosure is straightforward. It rests on the premise that corporations should voluntarily report criminal conduct of their employees in order to avoid the harsh consequences that result from application of the rules imposing vicarious criminal liability on organizations. Voluntary disclosure usually arises in one of two contexts. First, the corporation learns of undisclosed misconduct before it is detected by a government agency. The discovery of wrongdoing may be inadvertant or may arise from ongoing internal monitoring of employees' activities. Second, the corporation may uncover the criminality in the course of an internal investigation generated by a government probe. Often the wrongdoing detected by the company far exceeds that known to the government at the time the government's investigation begins. Once acquired, the company's knowledge of wrongdoing forces its counsel to make an exceedingly difficult choice: whether to (1) voluntarily disclose the wrongdoing to the government in the hope of avoiding prosecution or punishment, or (2) simply remain silent in the hope that the criminality will escape the government's attention.

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*/ See, e.g., 46 F.C.R. 273-274, 292-294 (BNA, August 11, 1986); 46 F.C.R. 900-902 (BNA, November 24, 1986). Both reports are provided as attachments to this letter.

In the areas of government contracting and banking where federal regulation and audit are commonplace, the corporation's decision is particularly difficult. Silence may achieve nothing because the misconduct may eventually be uncovered anyway. On the other hand, voluntary disclosure of the misconduct may not be rewarded or may be so inadequately rewarded that there is no incentive in making the disclosure. In my judgment, the Commission's sentencing guidelines must speak to this issue in a precise and comprehensive manner. Reliance on the residual authority granted by 18 U.S.C. § 3553(b), to justify special treatment for the corporate defendant that voluntarily discloses misconduct is not adequate to assure the organizational offender that its self-incrimination will produce significant benefits at sentencing.

I recommend that the Commission create a separate category in Part B (Post-Offense Conduct) of Chapter Three (Offender Chracteristics) entitled "Voluntary Disclosure". This mitigating circumstance should be available only to organizational offenders. Two forms of voluntary disclose must be recognized, namely (1) that emanating from disclosure before governmental detection; and (2) that emanating from disclosure following governmental detection. In the first situation, applicable to corporations that reveal their own misconduct before it is discovered by the government, a maximum discretionary sentence reduction of 50% should be permitted. (Alternatively, a reduction in offense value of 50% could be provided by allowing the offense value to be multiplied by .5.) In the case of voluntary disclosure which follows detection by law enforcement officials, the sentence reduction or offense value multiplier should be smaller. Because I am speaking here of organizational offenders, the sentence reduction would apply primarily to the monetary fine otherwise dictated by application of the guidelines.

Voluntary disclosure of corporate misconduct by an organizational offender is fundamentally different from "cooperation" or "acceptance of responsibility", and, for that reason, deserves separate treatment in the guidelines. First, unlike the situation generally applicable to individuals, an organization may be criminally liable for the acts of its agents even if the agent is acting outside the scope of his authority. The decided cases are uniform in holding that where a corporate employee commits a crime which benefits the corporation, the corporation is criminally liable even if the agent's conduct violated internal policy or was beyond the scope of employment. Second, as a matter of sound law enforcement policy, the Commission should encourage organizational offenders to undertake

compliance and prevention programs designed to prevent crimes within the corporation. A significant reward at sentencing is consistent with this policy. Third, voluntary disclosure produces enormous savings in investigative costs which would otherwise be entailed if the corporation remained silent. As a practical matter, most government agencies lack the time and resources to fully investigate the industries under their regulation and are forced, therefore, to rely in significant measure on self-regulation. Rewarding a corporation for voluntary disclosure furthers this goal of self-regulation. Fourth, since corporate self-incrimination runs counter to other pressures within a corporation, a significant incentive should be built into the guidelines to encourage it. The modern corporation is probably more likely than the average individual to make decisions based on clear-cut cost-benefit considerations. A significant reward for such disclosure presumably will produce more such disclosure.

In summary, I believe that it would be a mistake to omit recognition of voluntary disclose as a significant mitigating factor in the sentencing of organizational offenders. The guidelines should confront this issue directly and provide reasonable incentives to a corporation that is considering whether to disclose or bury knowledge of wrongdoing.

2. Plea Bargaining

The Commission has invited comment on the role of plea bargaining under the sentencing guidelines. Let me first observe one point concerning application of the draft guidelines to the typical guilty plea. Under the Commission's proposal, a convicted offender would be entitled to a discretionary reduction of as much as 20% for the "acceptance of responsibility" inherent in his guilty plea. In my opinion, this does not provide a sufficient incentive to induce offenders to tender pleas of guilty.

For better or worse, the guilty plea is a central component of the federal criminal justice system. Resources do not exist to try any more than a fraction of the indicted criminal cases. Under current practice, most offenders who plead guilty do so in the hope of lenient treatment at sentencing. When weighed against the risks of a trial followed by conviction and incarceration, the guilty plea is often attractive because it offers the possibility of a significant sentence reduction. I would

urge, therefore, that the Commission consider increasing the discretionary sentence reduction to 25% or more for those offenders whose "acceptance of responsibility" consists of pleading guilty.

Next, I submit that the role of plea bargaining under the new guidelines should be no different than under the current practice. A prosecutor, for example, will be permitted to offer a plea of guilty to a single count in return for dismissal of the remaining counts on a multi-count indictment. In this case, the guidelines will invoke the offense value for the count to which the offender pleaded guilty as augmented by consideration of harms and conduct "related to" or "in furtherance of" the charge of conviction.

However, two other circumstances are often presented in plea bargaining. The first situation arises when the prosecutor and defense counsel wish to strike a plea bargain which calls for a specific sentence to be imposed by the court, regardless of the sentence otherwise dictated by application of the guidelines. The second circumstance occurs when the parties to the plea negotiation wish to stipulate facts which, if applied strictly by the court without regard to other information, would effectively dictate the sentence required by the guidelines. In my judgment, both of these practices should be permitted to continue because neither is inherently inconsistent with the Congressional policy reflected in the guidelines.

As the governmental branch charged with law enforcement responsibilities, the Executive must be given flexibility in applying the laws enacted by Congress. Frequently the prosecutor is better equipped than others to balance the competing values presented in a plea bargaining situation. One such consideration is the strength of the government's case. Although the guidelines do not speak directly to this issue, it can be a dominant consideration in the negotiations between prosecutor and defense counsel. A prosecutor burdened with an exceedingly weak case needs the flexibility to bargain, not only as to the charge of conviction, but also as to the likely sentence to be imposed. Whether the bargain focuses on the specific sentence to be imposed or on a "stipulation of facts" which effectively dictates the sentence, the need for flexibility remains. Under Rules 11(e)(1)(C) and 11(e)(4), Federal Rules of Criminal Procedure, the sentencing court retains the power to reject a plea bargain calling for a specific sentence if the bargain is not in the interest of justice. Enactment of the guidelines should not change this rule nor its application in practice. Similarly, I

believe that Rule 11(e)(4) should be amended as part of the guideline enactment process to permit plea bargains containing a stipulation of facts by which the court is bound in applying the sentencing guidelines. This minor modification to Rule 11 would permit judicial oversight of those plea bargains which effectively dictate a specific sentence, without depriving the prosecutor of the right to strike such a bargain when, in his judgment, the circumstances warrant it. With this safeguard, I believe it unlikely that the Congressional policy manifest in the guidelines would be undermined by the plea bargaining process. For a defendant to plead guilty under a bargain that effectively sets the sentence (whether by express agreement or by stipulation of facts), the court would have to be satisfied that the disposition is in the interest of justice.

Very truly yours,

Roger C. Spaeder

RCS/jke

area of disagreement is the restructuring of headquarters staffs in the services and military departments. While both versions call for a reduction in the size of the staffs by eliminating duplicative functions, only the House version would actually combine them.

Another difference between the two bills is the authority and independence given to the unified commanders; the House version goes further than the Senate version in that it would give the CINCs full command of the forces assigned to them, as well as give them their own operating budget.

Text of the Mavroules amendment to HR 4428 appears in the text section.

Text of the Traficant amendment regarding priority for domestic firms follows:

SEC. 935. PRIORITY FOR DOMESTIC FIRMS WITH RESPECT TO DEFENSE CONTRACTS.

(a) Establishment of Priority. —

(1) In general. — Chapter 141 of title 10, United States Code, is amended by adding at the end the following new section:

"§2408. Contracts: priority for domestic firms

"(a) In General. — The Secretary concerned shall award a contract to a domestic firm that, under the use of competitive procedures, would be awarded to a foreign firm if —

"(1) when completely assembed, not less than 50 percent of the final product of the domestic firm would be domestically produced; and

"(2) the difference between the bids submitted by the foreign and domestic firms is not more than five percent.

"(b) Waiver. — This section does not apply to the extent to which the Secretary of Defense determines that —

" (1) such application would not be in the public interest; or

"(2) compelling national security considerations require otherwise.".

(2) Clerical amendment. — The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

(b) Effective Date. — Section 2408 of title 10, United States Code (as added by subsection (a)), shall apply to contracts for which solicitations for bids are issued after the date of the enactment of this Act.

Fraud

TAFT URGES CONTRACTORS TO VOLUNTARILY DISCLOSE WRONGDOING

Deputy Defense Secretary William Taft has called on defense contractors to voluntarily disclose evidence of fraud or other wrongdoing, and in return promised that DOD will look favorably on such disclosures in deciding on the appropriate administrative action.

In a letter sent to 87 defense contractors, Taft said, "I encourage you to consider adopting a policy of voluntary disclosure as a central part of your corporate integrity program." The letter was dated July 24 but was not released by the Pentagon until Aug. 1.

The letter states that "early voluntary disclosure, coupled with full cooperation and complete access to necessary records, are strong indications of an attitude of contractor integrity even in the wake of disclosures of potential criminal liability. We will consider such cooperation as an important factor in any decisions that the Department takes in the matter."

The 87 contractors were selected because they were among the 100 largest dollar recipients of DOD contract dollars in FY 1985. A DOD official told FCR Aug. 5 that letters were not sent to the remaining 13 contractors because they are educational institutions.

While the policy does not guarantee that a contractor who comes forward with evidence of wrongdoing will escape suspension or debarment by DOD or prosecution by the Justice Department, it is intended to encourage contractors to undertake to police themselves better, and to provide DOD with the results of their findings. From DOD's point of view, better internal controls by contractors will save both time and money, as well as cut down on the incidence of wrongdoing, since contractors who undertake voluntary disclosure and corrective actions are less likely to repeat their improper activities.

An official in the Inspector General's office told FCR that contractors "should not expect to get off scot-free" simply because they admit they have been overcharging the government for years. He added, however, that voluntary disclosure will work to a contractor's advantage when DOD evaluates a contractors's present responsibility to perform a contract in determining whether or not to suspend or debar the contractor.

The IG official admitted that there are "considerable risks and uncertainties" involved in a contractor's disclosing wrongdoing, since the Taft policy affords no guarantees that disclosure will enable the contractor to avoid debarment, suspension, or civil or criminal liability.

Actually, the policy announced by Taft regarding voluntary disclosure is not new. A number of contractors have already undertaken voluntary disclosures, and DOD has dealt with them under essentially the same ground rules outlined in the letter, albeit on an informal basis.

Even with the inherent risks, the concept of voluntary disclosure has a certain appeal to contractors, and for some time they have been pressing DOD to formally establish ground rules and points of contact for voluntary disclosure. Also, the Packard Commission recently recommended that defense contractors adopt a voluntary disclosure program, and that DOD institute a policy governing such a program.

Taft's letter, then, puts DOD's seal of approval on an ongoing practice and seeks to expand the use of that practice among the defense industry.

The letter directs contractors to refer matters involving potential criminal or civil fraud to DOD Deputy Inspector General Derek Vander Schaaf; matters not involving potential criminal issues are to be referred to the appropriate contracting officer or Defense Contract Audit Agency auditor. The focal point in the IG's office will be Michael Eberhardt, the Assistant IG for Criminal Investigations Policy and Oversight.

The details of the voluntary disclosure policy are contained in accompanying material to the letter. Among other things, the material indicates that DOD, through the IG's office, "will seek to expedite the completion of any investigation and audit conducted in response to a voluntary disclosure, thereby minimiz-

ing the period of time necessary for identification or remedies deemed appropriate by the Government."

However, the material states that DOD will recognize a contractor's voluntary disclosure only if it meets four conditions:

1) The disclosure must not be prompted by a contractor's realization that the underlying facts are about to be discovered by the government or reported to the government by third parties.

2) The disclosure must be on behalf of the business entity rather than an admission by individual officers or employees.

3) The disclosure must be accompanied by prompt and complete corrective action on the part of the contractor.

4) After disclosure, the contractor must cooperate fully with the government in any investigation or audit.

The IG's office has prepared a list of "key elements" of the information and cooperation it expects contractors to provide when making a voluntary disclosure.

Taft's letter to contractors regarding the voluntary disclosure policy, together with accompanying material and a list of the contractors to whom the letter was sent, appears in the text section.

Contract Policy

CODSIA SEEKS BAN ON 'PREMATURE' FIXED PRICE CONTRACTS

A major defense industry group has asked Deputy Defense Secretary William Taft to "restore the prohibition against premature fixed price type contracting to DOD Directive 5000.1."

The Council of Defense and Space Industry Associations (CODSIA), in an Aug. 1 letter to Taft, protested the services' demands for fixed-price type contracts for full-scale engineering development (FSED) coupled with priced production options for new defense systems. In CODSIA's view, there are too many inherent risks and uncertainties in new programs to employ the use of fixed price contracts.

The letter notes that the services' insistence on fixed price contracts for FSED, coupled with priced production options, marks a return to the so-called Total Package Procurement concept. DOD experimented with the concept in the 1960s, but rejected it in 1970, when then-Deputy Defense Secretary David Packard issued DOD Directive 5000.1, stating that cost-plus incentive contracts are the preferred approach for both advanced development and full-scale development of major systems.

The subsequent removal from the directive of the policy prohibition against early fixed-price contracts has had the effect of "opening the door for the Navy and the other Services to reinstate such practice, and thus to act as de facto [sic] DoD policy makers on a course which disregards the lessons of past mistakes," the letter reads.

The Navy has led the way in the practice, with its issuance last November of an Instruction that precludes a program from entering into full-scale development until the risks have been sufficiently reduced to enable contractors to commit to a fixed price contract that includes a not-to-exceed price (45 FCR 359).

The CODSIA letter quotes the Packard Commission as stating that "fixed price contracts effectively can enshrine overstated requirements and understated costs in a legal arrangement that allows little or no flexibility for needed trade-offs between cost and performance."

The letter points out that the fact that companies have made individual business decisions to accept early commitment to a fixed price contract "should not be construed as endorsing such practice as a prudent modern-day acquisition policy for DoD. In most cases, these contractors have *not* agreed that the risk has been sufficiently reduced, but have recognized that the Government's superior bargaining position affords no other choice."

"The history of major defense programs is full of examples where competitive pressures have forced companies to commit prematurely to fixed-price type development contracts resulting in significant overruns, huge financial losses, delays, claims and long drawn-out legal battles," the letter reads.

Accordingly, CODSIA urges Taft "to act quickly to restore the prohibition against premature fixed price type contracting to DoD Directive 5000.1 and ensure its implementation by all of the Services."

Concern over Navy Spare Parts Policy

In an Aug. 4 letter to Taft, CODSIA expresses concern over the Navy's recent issuance of a spare parts refund policy and contract clause. CODSIA maintains that the Navy policy, which requires a contractor to agree in advance to a refund whenever the price of a part exceeds its intrinsic value after considering the impact of delivery terms and quantity, "appears to go far beyond" the policy promulgated by Defense Secretary Caspar Weinberger in November, 1985.

That policy (44 FCR 885) states that DOD will seek a refund from contractors whenever it believes a price paid is unreasonable.

CODSIA maintains that "the concept of reasonableness is broader and more equitable than intrinsic value and includes consideration of the circumstances, such as additional inspection, testing or design modifications, under which particular parts were produced."

CODSIA asks Taft to have the Navy's final rule and the DAR Council approved deviation withdrawn and recommends that a standard DOD-wide policy on spare parts refunds that conforms to the Weinberger policy be adopted.

Space Program

SENATE RESTORES $556 MILLION IN DOD FUNDS FOR NASA

The Senate Aug. 7 voted 58-40 to restore more than $500 million in Defense Department payments to the National Aeronautics and Space Administration for defense missions launched from the Space Shuttle.

The Senate Armed Services Committee had eliminated $556.3 million in Air Force funding for fiscal 1988 defense shuttle payloads from the S 2638, the FY 1987 Defense Authorization bill (46 FCR 117). NASA

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DEPUTY SECRETARY OF DEFENSE WILLIAM TAFT'S LETTER TO 87 DEFENSE CONTRACTORS URGING VOLUNTARY DISCLOSURE OF POSSIBLE FRAUD, AND RELATED MATERIALS

24 Jul 1986

Dear

During the past few years, public and congressional interest in the Department of Defense management of its programs and operations has remained intense. This is nowhere more true than in the acquisition area. These issues continue to command our personal attention and involvement. Many of the problems in the acquisition area came to light because of audits and investigations conducted by the Department of Defense. We are committed to detecting and eliminating inefficiency and improper practices in our acquisition process; we believe that most Defense contractors have institutional commitments to these same goals.

To demonstrate this commitment, a number of major Defense contractors have adopted a policy of voluntarily disclosing problems affecting their corporate contractual relationship with the Department of Defense. These disclosures are made by the contractor, without an advance agreement regarding possible Department of Defense resolution of the matter. The contractors understand the Department's view that early voluntary disclosure, coupled with full cooperation and complete access to necessary records, are strong indications of an attitude of contractor integrity even in the wake of disclosures of potential criminal liability. We will consider such cooperation as an important factor in any decisions that the Department takes in the matter.

I encourage you to consider adopting a policy of voluntary disclosure as a central part of your corporate integrity program. Matters not involving potential criminal issues should be presented to the appropriate contracting officer or Defense Contract Audit Agency auditor. Matters involving potential criminal or civil fraud issues should be directed to the Deputy Inspector General, Department of Defense.

A description of the Department of Defense program for voluntary disclosures is enclosed herewith for your consideration.

I believe that your corporate commitment to complete and timely disclosures of irregularities, regardless of their magnitude, is essential to increasing confidence in our ability to provide for the national defense effectively and efficiently.

Sincerely,
William H. Taft, IV

Enclosure

Department of Defense Program for Voluntary Disclosures of Possible Fraud by Defense Contractors

Background

Officials within the Department of Defense (DoD) have been approached by a number of contractors to determine the conditions and agreements that might be structured with the Government if a contractor sought to disclose voluntarily information that might expose the contactor to liability under Federal statutes relating to criminal and civil fraud. From the Department's perspective, the voluntary disclosure of information otherwise unknown to the Government, and contractor cooperation in an ensuing investigation, offers a number of significant advantages:

- the Government is likely to recoup losses of which it might otherwise be unaware
- limited detection assets within the Government are augmented by contractor resources;
- consideration of appropriate remedies can be expedited by both DoD and Department of Justice when adversarial tensions are relaxed;
- voluntary disclosure and cooperation are indicators of contractor integrity; and
- contractors engaging in voluntary disclosure are more likely to institute corrective actions to prevent recurrence of disclosed problems.

Requirements on Contractors

Department of Defense recognition of a contractor as a "volunteer" will depend on four key factors:

1. The disclosure must not be triggered by the contractor's recognition that the underlying facts are about to be discovered by the Government through audit, investigation, or contract administration efforts or reported to the Government by third parties.

2. The disclosure must be on behalf of the business entity, in contrast to admissions by individual officials or employees.

3. Prompt and complete corrective action, including disciplinary action and restitution to the Government where appropriate, must be taken by the contractor in response to the matters disclosed.

4. After disclosure, the contractor must cooperate fully with the Government in any ensuing investigation or audit.

Defining DoD expectations of "cooperation" in any situation will depend on the individual facts or circumstances underlying the disclosure. However, DoD may enter into a written agreement with any contractor seeking to make a voluntary disclosure where such an agreement will facilitate follow-on action without improperly limiting the responsibilities of the Government. This agreement, which may be coordinated with the Department of Justice, will describe the types of documents and evidence to be provided to DoD and will resolve any issues related to interviews, privileges, or other legal concerns which may affect the DoD ability to obtain all relevant facts in a timely manner.

Department of Defense Actions

If a contractor is recognized as a "volunteer" based on the

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preceding criteria, the DoD is prepared to undertake the following:

1. Identify one of the Military Departments of the Defense Logistics Agency as the cognizant DoD component to represent DoD for suspension/debarment purposes, i.e., to assess contractor integrity in light of the disclosures. Early identification of the appropriate DoD component will permit the contractor, from the outset of its cooperation, to provide relevant information relating to contractor integrity and management controls, e.g., internal controls, corrective measures, or disciplinary action taken as a result of the information disclosed.

2. The DoD, through the Office of the Inspector General and in cooperation with the Department of Justice, will seek to expedite the completion of any investigation and audit conducted in response to a voluntary disclosure, thereby minimizing the period of time necessary for identification of remedies deemed appropriate by the Government.

3. Advise the Department of Justice of the complete nature of the voluntary disclosure, the extent of the contractor cooperation and the types of corrective action instituted by the contractor. As always, any determinations of appropriate criminal and civil fraud sanctions will be the ultimate prerogative of the Department of Justice.

Commencing a Voluntary Disclosure

Since initial judgments as to appropriate investigative and audit resources will be necessary in any voluntary disclosure involving possible fraud, the initial contact with the DoD on fraud-related disclosures should be with the Office of the Inspector General.

While the Office of the Inspector General will be the initial point of contact for fraud-related disclosures, other DoD components are expected to be advised or involved as circumstances warrant. Besides the Office of General Counsel, DoD, and the appropriate suspension/debarment authority, other DoD components that expectedly would be advised, or involved, in voluntary disclosures are the Office of The Assistant Secretary of Defense (Acquisition and Logistics) and the Defense Contract Audit Agency.

The Office of the Inspector General that will serve as the initial point of contact is:

Assistant Inspector General for Criminal Investigations
Policy and Oversight
400 Army Navy Drive
Room 1037
Arlington, Virginia 22202

— I B M
— Rockwell
— ITT Corp
— Dylalectron
— Grumman
— Burroughs
— Sanders Assoc
— Harris Corp
— G T E
— A T & T
— No Am Phillips Trust
— G A I Corp
— Lear Siegler Inc
— Eastman Kodak
— Marine Trans Lines Inc
— Atl Richfield
— ICI American Holdings Inc
— Western Electric
— United Technologies Corp
— Eastern Corp
— E-Systems Inc
— Textron Inc
— Duchosscis Ind Inc
— Draper Charles Stark Lab
— Sundstrand Corp
— United Ind Corp
— Figgie Intnl Holdings Inc
— The Singer Co
— R C A Corp
— Fairchild Ind Inc.
— Todd Shipyards
— Motorola
— Exxon
— Hercules Inc
— Phibro-Salomon Inc
— Pace Ind Inc
— Ashland Oil Inc
— The LTV Corp
— Allied-Signal Inc
— Computer Sciences Corp
— E I du Pont
— Northrop
— Texas Instr Inc
— Chevron
— Tenneco Inc
— Lockheed
— Emerson Electric
— Amerada Hess Corp
— Ogden Corp
— Morton Thiokol Inc
— F M C Corp
— Tracor Inc
— Sun Co Inc
— Mitre
— Mcdonnell Douglas
— Texaco
— Goodyear Tire
— T R W Inc
— Amoco
— Oshkosh Truck Corp
— Control Dat
— Litton
— Gemcorp
— Gen Dynamics
— Ford Motor
— Raytheon
— Martin Marietta
— Sperry
— Congoleum
— Loral Corp
— Aerospace Corp
— Teledyne
— Rolls-Royce
— General Motors
— Honeywell
— Mason & Hanger-Silas Mason Co
— Penn Central
— Mobil Corp
— General Electric
— B D M Intnl Inc
— Boeing
— Logicen Inc

— Coastal Corp
— Caltex Petroleum
— Gould Inc
— Day & Zimmerman Inc
— Hewlett-Packard

KEY ELEMENTS IN CONTRACTOR VOLUNTARY DISCLOSURES RELATED TO FRAUD

In order for a voluntary disclosure of improper or illegal practices to be truly effective, and in order for the contractor and DoD to be completely assured that these practices have been fully identified and rectified, it is essential that any internal examination undertaken by the contractor addresses certain important issues. The contractor should be prepared to share information regarding its resolution of these issues as part of its disclosure to DoD.

A. *Nature of the Improper or Illegal Practice*

A full examination of the practice should be conducted to include:

1. Source of the practice (e.g., lack of internal controls; circumvention of corporate procedures or Government regulations).
2. Description of the practice, to include:
   a. Corporate divisions affected.
   b. Government contracts affected.
   c. Detailed description as to how the practice arose and continued.
3. Identification of any potential fraud issues raised by the practice and relevant documentation.
4. Time period when the practice existed.
5. Identification of corporate officials and employees who knew of, encouraged or participated in the practice.
6. Estimate of the dollar impact of the practice on DoD and other Government agencies.

B. *Contractor Response to the Improper or Illegal Practice*

1. Description of how the practice was identified.
2. Description of contractor efforts to investigate and document the practice (e.g., use of internal or external legal and/or audit resources).
3. Description of actions by the contractor to halt the practice.
4. Description of contractor efforts to prevent a reoccurrence of the practice, (e.g., new accounting or internal control procedures, increased internal audit efforts, increase supervision by higher management, training).
5. Description of disciplinary action taken against corporate officials and employees who were viewed as culpable or negligent in the matter, or who were viewed as not having exercised proper management responsibility.
6. Description of appropriate notices, if applicable, provided to other Government agencies, (e.g., Securities and Exchange Commission and Internal Revenue Service).

C. *Conclusion*

1. List and description of supporting investigative, audit and legal information to be provided to the Government as part of voluntary disclosure, including reports of interviews, audits and audit working papers.
2. Assurance that contractor is willing to reimburse Government for any damages suffered, including restitution and payment of Government costs to resolve the matters disclosed.
3. Assurance of contractor's full cooperation with Government audit/investigative efforts to resolve contractor's voluntary disclosure information, to include access to corporate records, premises and personnel.

AMENDMENT OFFERED BY REP. NICHOLAS MAVROULES TO HR 4438, THE FY 1987 DEFENSE AUTHORIZATION ACT

Amendment offered by Mr. MAVROULES: Page 182, strike out lines 16 through 22 and insert in lieu thereof the following:

"(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c)), and a certification required to be submitted under paragraph (2), shall be submitted—

"(A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a representative of the contracting officer designated by the contracting officer for the purposes of the negotiation of the contract); or

"(B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

Page 208, after line 4, insert the following new subsection (and redesignate the succeeding subsection accordingly):

"(e) JUDICIAL REVIEW.—

"(1) RIGHT OF REVIEW.—(A) A member of an armed force aggrieved by a final order of the Board may obtain judicial review of the order by filing a petition for review before the end of the 60-day period beginning on the later of—

"(i) the date the member received notice of the order of the Board; or

"(ii) the date on which the member was deemed to have exhausted administrative remedies under subsection (d)(3).

"(B) A petition for review under subparagraph (A) shall be filed with the United States Court of Appeals—

"(i) for the circuit in which the member resides;

"(ii) for the circuit in which the member is stationed; or

"(iii) in the Court of Appeals for the District of Columbia.

"(2) REVIEW OF RECORD.—With respect to any case for which a petition for review is filed under paragraph (1)(A), the court—

"(A) shall review the record; and

"(B) in any case in which it determines that the record fails to resolve significant issues of fact, may refer the case to the appropriate United States district court for a hearing de novo.

"(3) STANDARD OF REVIEW.—The court shall set aside any order of the Board that, upon completion of a review under paragraph (2), is determined to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or

"(B) not supported by substantial evidence.

"(4) ATTORNEYS FEES.—If, upon completion of a review under paragraph (2), the court finds that the claim of the member is meritorious, the court shall award such member reasonable attorneys fees and costs.

Strike out section 923 (page 212, lines 14 through 19) and redesignate the following sections accordingly.

At the end of title IX of division A (page 214, after line 18), insert the following new sections:

SEC. 925. CONFLICT-OF-INTEREST IN DEFENSE PROCUREMENT.

(a) IN GENERAL.—(1) Chapter 141 of title 10, United States Code, is amended by inserting after section 2397a the following new sections:

"§ 2397b. Certain former Department of Defense procurement officials: limitations on employment by contractors

"(a)(1) Any person—

"(A) who is a former officer or employee of the Department of Defense or a former or retired member of the armed forces; and

"(B) who, during the two-year period preceding the person's separation from service in the Department of Defense, participated personally and substantially, and in a manner involving decisionmaking responsibilities, in a procurement function with respect to a contract through contact with the contractor,

Helm said DOD supports the concept of a two-year budget and said he is "optimistic" that Congress will go along with the idea.

The main advantage of a biennial budget is to increase program stability for major systems, Helm said.

He conceded that "accuracy is going to be affected somewhat" by having to forecast inflation three years in advance—the budget is prepared nine months to a year before the start of the year in which it takes effect—but said, "I don't see it as a problem."

Helm said that it is in the operations and maintenance area where the greatest uncertainties are and it is in this area where adjustments may have to be made after the two-year budget is in place.

Helm noted that putting DOD on a two-year cycle will require the cooperation of both the Armed Services and Appropriations Committees. Otherwise, a situation could arise in which there would be a two-year authorization but a one-year appropriation, or vice versa.

The expectation is that the first year of the two-year cycle would be devoted to drafting a budget, leaving the second year for committee oversight hearings.

Helm would not reveal what the budget request for FY 1988 and 1989 is, although he did say that it calls for a 3 percent after inflation increase in each of those years.

Neither did he indicate whether DOD had decided to base the FY 1988 budget request on the Administration's revised FY 1987 request of $299 billion in budget authority or on the congressionally-approved level of $289.6 billion. Using the revised budget forecasts recently issued by OMB, a 3 percent increase would translate into $318.4 billion for the national defense function in FY 1988 and $338.8 billion in FY 1989.

Apart from mapping out a committee structure and agenda, Nunn said he will be devoting time over the next few weeks to deciding whether to seek the Democratic nomination for President. Nunn has been frequently mentioned as a possible presidential or vice presidential candidate.

Nunn, 48, told reporters he is "not leaning toward that direction now," but added that he will make his decision within the next few weeks. In deciding whether to run for President, Nunn said a person ought to consider whether he can make "a unique contribution" to the country.

The three-term senator was elected to the Senate in 1972. His current term expires in January 1991. Nunn received his law degree from Emory University in 1962. The following year, he served as counsel to the House Armed Services Committee and, after that, he was in private law practice. From 1968 until 1972, he was a Georgia state representative.

Fraud

JUSTICE DEPT. DECIDING ITS POLICY ON DOD'S VOLUNTARY DISCLOSURE PROGRAM

The Department of Justice is reviewing the Defense Department's policy encouraging contractors to voluntarily disclose procurement improprieties, and expects to decide by the end of the year what Justice's approach should be in implementing it, FCR has learned.

Deputy Secretary of Defense William Taft, who last July urged defense contractors to voluntarily disclose evidence of possible wrongdoing (46 FCR 801, 807; 46 FCR 273, 292), has asked for Justice's views, senior Justice officials told FCR.

The Department's comments will focus on how the prosecutors should respond to contractors' voluntary disclosures, a Justice Department spokesman said Nov. 14.

"We support the program," another Justice official said, but added that DOD's voluntary disclosure program "is not an amnesty program."

Meanwhile, Defense Procurement Fraud Unit chief Morris Silverstein, speaking at a Nov. 12 seminar in Washington D.C., stated that from a prosecutor's perspective, voluntary disclosure by a contractor should be only one factor in deciding whether a fraud indictment should be pursued.

Scope of DOJ's Review

DOD's voluntary disclosure policy was set forth in a letter from Taft to 87 major defense contractors earlier this year (46 FCR 273, 292). Voluntary disclosure, full cooperation, and complete access to necessary records are strong indications of contractor integrity even in the wake of disclosures of potential criminal liability, the Deputy Secretary observed, adding that DOD would consider cooperation as an important factor in "any decision that the Department takes in the matter."

Speaking at a National Security Industrial Association seminar last month (46 FCR 807), Taft concluded that the voluntary disclosure policy was needed to assure that contractor-discovered problems are "dealt with properly—consistent with the law and our interest in a speedy return to the high standards essential to public trust." It is not meant to be a system for excusing contractors from responsibility for past improprieties," he declared. In addition, he pointed out that voluntary disclosure would be made known to the Justice Department for their use in deciding "what actions would be necessary."

Justice Department sources confirmed last week that Taft had requested the department's comments on the voluntary disclosure policy and DOJ's role in implementing it. "The matter is presently under review in the Criminal Division," one senior official told FCR Nov. 14.

There has been informal discussion about the policy between DOJ staffers and the Defense Inspector General's Office, according to another Justice spokesman. DOJ is serious about the program and intends to make it work, he stated. However, it is the Defense Department's program, the official emphasized, adding that Justice's comments would focus on implementation by DOJ.

Consequently, DOJ will likely not comment on debarment and suspension, and other issues which can be viewed as a Defense Department matters, he explained. Rather, DOJ will comment on such issues as what the prosecutor's response should be to voluntary disclosure by government contractors, he said.

Excerpts from the comments, which may be forwarded to DOD by the end of the year, will likely be made available to contractors, a DOJ source ob-

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served, adding that the agency wanted to provide guidance to the defense industry. "Our comments are not going to be perfunctory."

Prosecutor's Perspective

Speaking at an American Corporate Counsel Association seminar Nov. 12, Defense Procurement Fraud Unit chief Morris Silverstein discussed the impact of the DOD voluntary disclosure policy from the prosecutor's perspective.

Noting that he was expressing his personal views, Silverstein said that voluntary disclosure should be only one of the factors in determining whether to prosecute a procurement fraud case. He then listed some of the other factors to be considered.

- The extent of the fraud, measured by dollar loss to the government or other indicia.
- Pervasiveness of the fraud, measured by the employees/departments involved: Was the fraud an isolated occurrence?
- Level of employees involved: Were senior corporate officials involved or was the impropriety the work of a sole, lower level manager?
- The existence of a corporate compliance program, with stringent procedures to prevent the conduct, that was implemented in good faith.
- The amount of discretion delegated to employees: There ought to be a mechanism for supervisors to ask how to charge particular questionable costs, he explained.
- The extent to which the contractor cooperated during the government investigation.
- The extent to which remedial action was taken: "Did the company discipline the violators or give them a bonus?" Silverstein also included restitution efforts and strengthened internal controls in this category.

A compliance program is "not just coming forth, it is prevention," Silverstein told the conferees.

Debarment Is a DOD Matter

Silverstein also told the gathering that DOJ would not act as "broker" in global settlements involving Justice, DOD and a contractor.

Contractors that wish to plead guilty in procurement fraud cases are going to have to independently resolve debarment and suspension issues with DOD, Silverstein explained after the conference. DOJ is not going to "go to DOD" for the contractor and recommend against debarment or suspension in order to preserve a plea agreement, he explained. "We are going to make the decision to prosecute—and will prosecute—even if the contractor may not resolve the [debarment/suspension] matter with DOD."

Consequently, a contractor who is considering a plea agreement will want to make sure that it will not be debarred or suspended *before* it enters into such an agreement, he added.

The Defense Procurement Fraud Unit, though part of DOJ, has been assigned attorneys, investigators and auditors from the Defense Department.

Guidelines for Voluntary Disclosure

Deputy Defense Inspector General Derek Vander Schaaf provided guidelines for voluntary disclosure. If the allegation is significant, the contractor should come first to the Inspector General's Office, he said. "We'll inform the Defense Procurement Fraud Unit and put you in touch with the debarment and suspension line of authority so that you can establish present responsibility," Vander Schaaf said, adding that his office could not "protect" contractors from debarment without knowledge of the improper conduct.

Mere "administrative snafus," however, should be disclosed to the contracting officer, he added.

It is difficult to establish a voluntary disclosure policy in advance, McDonnell Douglas Corp. Vice President and General Counsel John Sant observed. McDonnell Douglas looks at a number of criteria in making disclosure determinations, including amount of money and number of employees involved, he noted.

Sant agreed with Vander Schaaf that matters involving potential criminal charges should be referred to the IG, and that the U.S. Attorney should be advised in special circumstances. For example, if the improper conduct involved kickbacks paid to subcontractors in southern California, the contractor should consider disclosure to the U.S. Attorney for the Central District of California, who has been conducting a major investigation in that area.

Creating Corporate Compliance Programs

The panelists also discussed the essential ingredients of a good compliance program. "I think that what has to be there is more than a 15-page standards of conduct," Silverstein commented. The good compliance program explains to employees what constitutes labor mischarging and defective pricing, he noted, adding that the contractor's program should provide a mechanism that allows employees to ask how to charge a questionable cost.

Vander Schaaf cited the ten-point compliance approach that has been developed by the National Security Industrial Association (46 FCR 807):

- Develop a code of corporate philosophy, i.e. that the company builds a good product at a fair price.
- Develop a code of conduct for employees.
- Update written policies and procedures.
- Improve the oversight function.
- Involve the employees; get their input, make sure they read the code of conduct.
- Increase training and education efforts; contractors may wish to target specific groups of employees or possible problem areas.
- Improve the internal audit function, by increasing the staff and instituting training in government contract accounting.
- Establish a corporate policy on access to records. Contractors should be aware that fewer types of documents can be withheld, and thus may want to generate documents with a view as to their possible disclosure to DOD.
- Establish a corporate policy on disclosure.
- Devote more resources to compliance reviews, which determine which policies are in need of improvement.

"If you have all ten of those, you'll be in good shape," Vander Schaaf commented.

Compliance remains the responsibility of the chief executive officer of each operating unit, United Technologies Corp. General Counsel Irving Yoskowitz observed. At United Technologies, each operating unit has a compliance officer, who reports to both the chief

executive officer and the corporate vice president for government contract compliance. Each unit also has a compliance audit team that performs audits on a continuing basis. The company also has updated its employee code of conduct, and has had a major accounting firm review the compliance controls in place at each operating unit.

Joseph Handros, Vice President and Deputy General Counsel for General Electric Co., sought to dispel the notion that a voluntary disclosure program is a "policeman operation."

It is important, he said, that employees "know the rules" and are educated as to their compliance obligations. Getting the message out to the GE employees has taken numerous forms, he said. The company has used plant newspapers, employee newsletters, memoranda from senior managers to lower-level supervisors, videotapes, training sessions, and even notes on vouchers and timecards to get the importance of compliance across, he emphasized.

Attorneys' Fees

PROTESTER ENTITLED TO FEES INCURRED IN RECONSIDERATION, PETITIONING FOR COSTS

The General Services Administration Board of Contract Appeals has authority to award attorneys' fees incurred by a protester in seeking reconsideration of a board decision or in connection with a petition for the costs of filing and pursuing the protest, the GSBCA rules.

However, the board declines to award proposal preparation costs to the protester, which had withdrawn its offer from consideration for reasons unrelated to the government's failure to maximize competition (Computer Consoles, Inc., GSBCA No. 8450-C (8134-P), 11/6/86).

The Department of Energy issued a solicitation for a major automated data processing system. The agency evaluated revised proposals, and chose one offeror—IBM Corp.—for final negotiations leading to an award. CPT Corp., one of the competing offerors, filed a protest with the board. Computer Consoles intervened in that protest.

In ruling on the protest, the board concluded that DOE's selection of one offeror for final negotiations violated the regulations (44 FCR 714).

DOE requested reconsideration, arguing that the board's decision had the effect of invalidating the Defense Department's four-step source selection process and the National Aeronautics and Space Administration's source evaluation board procedures (44 FCR 714). DOE contended that the selection procedure was consistent with the FAR's requirement for maximum competition.

Nevertheless, the board on reconsideration decided that DOE's alternative source selection procedure was "conspicuously bad" as applied to fixed price general purpose ADP contracts (45 FCR 370).

The board also noted that DOE's source selection official had discounted Computer Consoles' technical superiority without explanation, emphasizing that offerors had not competed on an equal basis. Accordingly, the board revised DOE's delegation of procurement authority, directing the agency to redetermine the competitive range to include those proposals to include those proposals with a reasonable chance of being selected for award.

The GSBCA also instructed DOE to ensure that the original solicitation properly reflected its needs.

DOE then amended the solicitation to reflect its needs. Computer Consoles objected, charging that the amendment merely accepted a series of changes proposed by IBM. In dismissing this second protest, Administrative Judge LaBella concluded that issuance of the amendments was valid (45 FCR 827).

Meanwhile, DOE and Computer Consoles had filed to recover their attorneys' fees and costs in the *CPT* proceedings. The board denied DOE's request for fees and costs, chiding the agency for a lack of candor in presenting the facts to support its request (45 FCR 981).

Attorneys' Fees Awarded

However, the board now concludes, Computer Consoles is entitled to recover its attorneys' fees incurred in the *CPT* proceedings.

The Competition in Contracting Act authorizes the GSBCA to award fees and costs, once it determines that the challenged award violated statute, regulations, or the terms of a delegation of procurement authority, Administrative Judge LaBella notes.

Computer Consoles, as a successful intervenor, prevailed in the *CPT* protest, the board states. DOE had violated the applicable statute, regulations, and its delegation of procurement authority, the GSBCA points out, adding that Computer Consoles was prejudiced by these violations.

DOE conceded that the hourly rates charged by Computer Consoles' attorneys—which varied between $60 to $175 per hour—were reasonable. In addition, the agency generally did not object to award of those fees incurred before Oct. 3, 1985, when the reconsideration proceedings in *CPT* began.

However, DOE contended that fees incurred after that date were not allowable. The GSBCA's statutory authority to award the costs of filing and pursuing a protest is a waiver of sovereign immunity, and thus must be strictly construed, the government emphasized. Accordingly, fees and costs incurred during reconsideration of protest decisions and in connection with petitions for costs may not be awarded because neither action constitutes a "protest," the government maintained.

The board disagrees. DOE and CPT both requested reconsideration of the board's initial protest decision, Administrative Judge LaBella points out.

"In granting reconsideration, the board recognized that the abbreviated protest process under which the original decision was rendered was too restrictive, and the board therefore reopened the record to take in new evidence in order to adequately consider the issues on reconsideration," he states. These actions were not under Computer Consoles' control, the board stresses. Computer Consoles could not have ignored the reconsideration proceedings without risking a reversal of the initial ruling in its favor, the GSBCA emphasizes.

Citing Schuenemeyer v. U.S., 776 F.2d 329 (CAFC, 1985), the board says that expenses incurred in preparing and filing a motion for award of attorneys' fees are reimbursable.

"We are not insensitive to the fact that the statute

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National Association of Criminal Defense Lawyers

STATEMENT OF

ALAN ELLIS

VICE PRESIDENT

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PRELIMINARY DRAFT, SENTENCING GUIDELINES

DECEMBER 2, 1986

WASHINGTON, D.C.

SUITE 550 • 1815 H STREET NORTHWEST • WASHINGTON, DC 20006
(202) 872-8688

Mr. Chairman and distinguished members of the Commission, I very much appreciate this opportunity to appear on behalf of NACDL present our views on the Commission's Preliminary Draft of the sentencing guidelines.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, voluntary bar association comprised of almost 5,000 lawyers and law professors, most of whom are actively engaged in defending criminal prosecutions and individual rights. It was founded 26 years ago to promote study and research in the field of criminal defense law, and to encourage the integrity, independence and expertise of criminal defense lawyers. Throughout our history, we have worked to protect the rights and liberties of those accused of criminal offenses, and to promote the proper administration of justice. We have pursued these goals through a variety of educational and public service activities, including national training programs, publications, committee activities, legislative action, and by appearing as amicus curiae in significant criminal justice cases.

My name is Alan Ellis, and I am Chairperson of NACDL's Liaison Committee to the Sentencing Commission. Our committee has met and discussed the Preliminary Draft, and frankly, we are deeply concerned and disturbed by its contents.

Sentence Severity

NACDL is strongly of the view that the proposed guideline ranges for length of imprisonment are excessive. Based on our collective experience with current federal sentencing practices, we perceive that the guideline ranges are quite significantly higher than the average sentence lengths currently considered appropriate by the Federal courts.

In this regard, however, we note that our ability to provide informed comment on the rationality of the relationship between the proposed guidelines and current practice is severely limited by the absence from the Preliminary Draft of the current sentencing data and methodological assumptions upon which the guidelines are based. In order to fully and effectively evaluate the appropriateness of the proposed guideline ranges, both the public and the Congress will require access to any such information relied upon by the Commission to support, justify, and provide an empirical basis for the proposed guideline ranges.

In the interest of an informed discussion on these important issues, we strongly urge the Commission to make this information publicly available forthwith.

We are also deeply concerned that there is inadequate provision in the Preliminary Draft for sentences other than imprisonment. To conclude that Congress intended that imprisonment be imposed in virtually all cases prosecuted in the Federal system is to effectively eliminate probation for all but a few offenders, who probably should not be in the Federal system at all. Yet

under the Commission's authorizing legislation, probation and custody are treated as alternate sanctions, and the question of whether or not to incarcerate is separate from the decision of how long to incarcerate. See 28 U.S.C. 994(a)(1)(A), (B).

One effect of this move toward more rigid and severe incarceration practices will be to drastically reduce the incentive to plead guilty. With fewer guilty pleas, many more cases will go to trial, and an already overburdened Federal court system will become even further congested, perhaps to the point of meritorious cases being dismissed for lack of sufficient resources to prosecute them in a timely manner (as has recently happened with numerous drug cases here in Washington). The losers will be the system itself, and the strong public interest--a guiding principle of NACDL as well as, I am sure, of this Commission--in the prompt and fair administration of justice.

Mr. Chairman, we are particularly concerned about the effect of these dramatically stiffer sentences on overcrowding rates in the Federal prison system. The Congress has mandated, in 28 U.S.C. 994(g), that the Commission must formulate its guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." And yet, nowhere in the Preliminary Draft is the issue of overcrowding addressed. Indeed, Mr. Chairman, you yourself have stated, in an interview in the Fall 1986 issue of Criminal Justice magazine, that the Commission is "not considering overcrowding as a factor in sentencing;" the plan is only "to work with the Bureau of

Prisons," after the Commission issues its final guidelines, "in coming up with a definitive statement about the impact the guidelines will have on our prison system." Id. at 11 (emphasis in the original), 47.

We would respectfully suggest that this approach is not adequate to satisfy the congressional mandate. Congress clearly directed that prison overcrowding must be actively addressed in the guidelines, not passively studied after the fact. In fact, the obvious and inevitable effect of the Preliminary Draft's stiffer sentences can only be to increase the current rate of Federal prison overcrowding. With that rate currently standing at more than 40 percent, and with actual sentence lengths likely to triple under the guidelines, there is no hope--and clearly no intention--of "minimizing the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."

This is a most fundamental question in the formulation of these guidelines. The severity of sentences under the Preliminary Draft is on a collision course with Federal prison overcrowding. At issue is nothing less than the complete breakdown of the Federal Prison System, as well as these guidelines and the effective operation of the entire criminal justice system. If overcrowding soars, as may be expected, to 80 or 100 percent or more, the prisons will explode. It will be an open invitation to Attica-style uprisings, rioting and bloodshed.

Certainly, the courts cannot be expected to stand idly by while the Eighth Amendment is trampled in the dust. Just

as surely as the overcrowding problem has caught up with the states--with some 38 states currently under court order or consent decree to reduce overcrowding--it will put the brakes on Federal incarceration as well, and the result will be widespread court-ordered early releases, and the frustration and short-circuiting of the guidelines.

But the Commission need not abdicate its responsibility regarding overcrowding to the courts in this way. The Commission has brakes of its own--in the form of broader use of probation and a range of sentencing alternatives, as well as through less severe sentence ranges--and the Congress clearly contemplated their use, in a rational and consistent manner, and in appropriate cases (such as non-violent first offenders, under 28 U.S.C. 994(j)), to minimize overcrowding.

Compounding this problem--and a factor which this Commission absolutely cannot ignore--is the Congress's institutional inability to fund the kind of massive prison-building initiative which will be necessary to match prison capacity to demand. Just this Fall, for example, when the Congress acted to broaden Federal drug laws and provide longer sentences, in title I of P.L. 99-570, it emphatically declined to fund enough new prison space to house the influx it was creating. In passing its original drug penalty enhancement provisions, the House authorized almost $1 billion over a three-year period for new Federal prison construction. But the Senate position, which ultimately prevailed, due to overwhelming budgetary constraints and deficit concerns,

was to provide less than one-tenth of that amount--$96.5 million.

This is the practical reality that the Commission must deal with. It cannot fashion its vision of justice in a vacuum. There simply may not be enough money to pay for it. The deficit is a reality. Gramm-Rudman is a reality. And it will grow increasingly unappealing for elected representatives to risk violating their deficit-reduction targets for the sake of correctional housing which costs some $70,000 per prisoner to build, and $50,000 per year to operate, while equally effective and less costly alternatives exist.

Modified real offense sentencing

NACDL is concerned about the application of "modified real offense sentencing" whereby a judge would be permitted to take into consideration not only all unlawful acts or omissions that were done in furtherance of the crime of conviction, but also any consequent harm, whether threatened, attempted, or completed, which has been proven by a preponderance of the evidence.

We are concerned that the suggested definition of "modified real offense behavior" will punish conduct that was neither intended nor reasonably foreseen, and that the breadth of this approach will, as I have already pointed out with regard to the issue of sentence severity, unnecessarily clog courts' dockets by discouraging guilty pleas. Such an approach will also undoubtedly lead to considerable sentencing litigation (exploring issues comparable to consequential damages issues in a civil trial)

that might take up as much time as a trial itself. We urge instead a charge of conviction offense system under which the sentencing court would be confined to examining the crime of conviction plus any other misconduct "in furtherance" thereof.

On the issue of burden of proof, we are strongly opposed to the imposition of punishment for conduct which has not been proven beyond a reasonable doubt. At the very least, sentencing determinations should be based upon a "clear and convincing evidence" standard. We would also emphasize the importance of applying the procedural protections of the Federal Rules of Evidence at sentencing hearings (the Preliminary Draft seems to contemplate this, by indicating that the judge may admit all evidence that is relevant and reliable except for evidence that is barred by evidentiary rules).

Offender characteristics

NACDL supports the Commission's view that the age and nature of prior convictions should be given varying weight. Unlike the Preliminary Draft, however, we would limit such consideration to prior adult criminal convictions and--at worst--recent serious juvenile adjudications. Under no circumstances should cases which have been "diverted" from the criminal justice system be counted. Practitioners often advise clients to accept "diversions" rather than bear the expense of going to trial in cases where the prosecution's evidence is insufficient to prove guilt beyond a reasonable doubt. These offenders should not now be

penalized for having foregone their day in court due to financial or other practical considerations. To do so would only serve to increase the caseload of already overburdened state and local courts dealing with these minor cases.

We also strongly feel that the Commission should avoid any reference to variables such as drug abuse. The Preliminary Draft would penalize any offender who had been determined to have been a drug abuser within ten years of the current conviction. Quite aside from the questionable logic of this proposal, it would clearly violate the Constitution's ex post facto clause, by punishing behavior (simple drug use) now which was not necessarily criminal when committed. Moreover, such a rule would deter drug abusers from seeking treatment out of a fear that it might be used against them in future brushes with the criminal justice system.

Cooperation and acceptance of responsibility

NACDL has previously gone on record before the Commission as opposing a discount for a guilty plea. We oppose the notion that a defendant should be penalized for exercising his or her right to a jury trial. And the dilution of this vital constitutional right is not significantly lessened by the Preliminary Draft's suggestion that variations from a strict discount-for-plea rule may sometimes be permitted (i.e., that "an offender may qualify for a sentence reduction without regard to whether the offender's conviction is based upon a guilty plea or a finding of guilty

by a court or a jury," and that "an offender who enters a guilty plea is not automatically entitled to a reduction").

We would suggest that if a discount process is to be established, the discount rates proposed for cooperation (ranging from a multiplier of .8 to .6) are inadequate to serve as an incentive for such conduct. We are also concerned that the sentencing judge not be limited to granting cooperation discounts upon the certification of the U.S. Attorney. Indeed, it is well established that an offender's willingness to cooperate with the authorities is a valid consideration in sentencing. Limiting such consideration to instances where the U.S. Attorney requests it may very well be unconstitutional.

Other offender characteristics

The Preliminary Draft enumerates without change the eleven offender characteristics specified in 28 U.S.C. 994(d). It omits, however, the statute's directive that this list is not exclusive.

NACDL recommends that this list be broken down into aggravating and mitigating factors; that--consistent with death penalty caselaw in this area, and in order to afford defendants maximum notice of the factors which a sentencing court is likely to consider--the list of aggravating factors be made exclusive, and the list of mitigating factors be expanded to specify all other foreseeable, relevant factors, and be made non-exclusive; and that the court's finding of aggravating or mitigating factors

be grounds for imposing a sentence below or above the guideline ranges.

Role in the offense

While NACDL is pleased that the Commission has recognized that the U.S. Parole Commission's approach utilizes far too few categories based upon the offender's role and level of relative involvement, we are concerned that the categories proposed in the Preliminary Draft are somewhat confusing, vague, and in some instances, incomplete or inadequate. For example, what is meant by a person who has a "comparable" role in the offense? What if the offender's role is "comparable" to that of a minor participant? In drug offenses, how is a "broker" (i.e., one who brings the buyer and seller together) to be treated? How is a passive participant--someone who allows his property, such as an off-load site or boat, to be used in the offense--to be treated?

Offense conduct

We offer the following comments on specific offender conduct issues addressed in the Preliminary Draft:

Consecutive sentences in RICO cases: The proposed base value for RICO offenses are too high, given the fact that they are to be aggregated with the sentences for the predicate offenses. In making the RICO sentence consecutive to the sentence for the underlying racketeering activity and then adding the offense

value applicable to the underlying racketeering activity to the base offense value of parole for the RICO offense itself, the Draft proposes to punish the offender twice for the same offense.

Drug quantities: In drug cases, two kilos or more of a mixture containing any detectable amount of cocaine would be given the highest base offense value. Quantities below that level are broken down into seven levels, as low as 10 grams or less. In practice, however, few cases prosecuted in the Federal system involve less that the two kilogram amount; most involve significantly higher quantities. Indeed, the Parole Commission recognizes this reality by pegging its highest offense severity rating at a level of 15 kilograms or more. We are concerned that a great many relatively inexperienced and marginal drug defendants are "sucked" into offenses involving two kilograms of highly diluted cocaine. We recommend that the guidelines make a distinction between such defendants and more culpable individuals.

We also recommend that the focus in drug cases be upon the purity of the drug involved rather than upon the gross weight mixture.

Extortion multiplier: It is our view that section E221, which utilizes an arbitrary multiplier of five times the amount of money loaned through an extortionate scheme, is too severe.

Property tables--fraud: It is not clear why the property tables for "fraud" are lower than the property tables for other

"theft" offenses. And how is the "monetary value" in both sets of offenses to be determined? Should it be the gross amount handled by the defendant? The net profit? The loss to the victim? The gain to the defendant? Should there be an offset for amounts repaid?

Attempt: Attempt should be treated less seriously than the completed crime if the actual harm caused is less. (Such a rule could of course incorporate a distinction between criminal efforts which are voluntarily abandoned and those which are thwarted by law enforcement.)

Trespass: We are concerned that the Draft would treat trespass too seriously. Many crimes involving legitimate forms of protest or civil disobedience would be included under this harsh sanction.

Psychological injuries: NACDL opposes the proposed guideline for "psychological injuries." As I have stated, the modified real offense behavior system, if used, should not take into consideration consequential damages, but should be limited to acts done in furtherance of the offense of conviction. Psychological injury to the victim should be counted as a sentencing factor only where it was intended.

Furthermore, the term "psychological injury" intrinsically defies precise definition, and is likely to lead to the "unwarranted sentencing disparity" that the Congress was so eager to avoid. Indeed, the notion of imposing punishment for unintended resultant psychological injury incurred by a victim is unprecedented in

American criminal law. It is not within the Commission's mandate or authority to be legislating criminal behavior.

Unreported income: We oppose the Draft's proposed presumption that all unreported income has been obtained unlawfully. This has never been the law. Indeed, common experience tells us that in the vast majority of cases, unreported income is not obtained unlawfully; rather, it represents simply the "underground economy" of unreported transactions involving ordinary, lawful goods and services--from the waiter who reports no tips, to the home remodeling contractor who asks to be paid in cash. Nor does the Draft put forward any statistical basis for such a presumption. As in the area of psychological injuries, this proposal is a legislative one, inappropriate for inclusion in these guidelines.

Plea negotiations

NACDL has previously gone on record as strongly supporting the continuation of charge bargaining, sentence bargaining, and fact bargaining. (See September 22, 1986 letter from Judy Clarke, Esq., on behalf of NACDL, to the Commission, endorsing the Federal Defender Position Paper on Plea Agreements, Guilty Pleas and Cooperation, September 16, 1986.)

It is also our view that judges should be authorized to involve themselves in plea negotiations. This is currently barred by Rule 11(e)(1), although it often occurs in practice, by agreement of the parties. It is very helpful and conducive

to guilty pleas for a defendant to have some reliable indication of the sentence that will result from a guilty plea. The reason for not permitting sentencing judges to become involved in plea negotiations has historically been to prevent defendants from being coerced into pleading guilty (i.e., the defendant would be reluctant to go to trial out of fear of antagonizing the sentencing judge and receiving a harsher penalty). Practicing lawyers will tell you that this problem seldom arises, and that the system works better when all parties know what can be expected upon a plea of guilty. To the extent that the modified real offense behavior system does not clearly indicate to a pleading defendant what sentence he or she will receive--because of different views held by the prosecutor and the defense lawyer as to what will be considered by the sentencing judge--allowing the judge to be involved in the plea negotiations will make the system more efficient.

Alternatively, if the Commission does decide to retain the modified real offense behavior system, a defendant should not be permitted to plead guilty unless the Government gives written notice as to what it calculates the defendant's guidelines to be.

Fines and restitution

We would suggest that the Draft would impose an impossible burden upon offenders, virtually all of whom will suffer incarceration, by requiring them to pay the increased fines as well

as restitution, while facing the added reality of supporting their families while they are imprisoned.

Alternatives to incarceration

NACDL recommends that an offender with 42 sanction points or less should be eligible for probation. There is no realistic probation option offered at all in the Draft. Even where Congress has specifically mandated that the Commission give consideration to a sentence not involving incarceration for first offenders involved in non-serious, non-violent offenses (in 28 U.S.C. 994(j)), the Draft does not provide for probation.

We strongly suggest an approach whereby sanction units can be converted into a non-imprisonment sentence such as probation and/or community service. Community service should be used to enable an offender to discharge up to 75 percent of his or her sanction units. For example, if an offender has 48 sanction units (calling for 36 to 44 months of imprisonment), why not provide for a sentencing judge to allow the offender to discharge 32-33 months of the sentence by performing appropriate community service, together with 8-11 months of imprisonment?

Miscellaneous matters

NACDL urges the Commission to recommend to Congress that Federal Rule of Criminal Procedure 35(b) be continued in its present form. As proposed, only the Government will be able to move for a reduction of sentence, and then only within one

year following conviction. Thus, offenders who appeal their conviction will be ineligible for reduction of sentence even if they subsequently cooperate and the Government wishes to reward their cooperation by moving for a reduction of thei sentence. Such a limited possibility for reduction of sentences will impede effective law enforcement.

More importantly, however, there are numerous cases where circumstances change in an offender's case calling for a reduction in sentence. Judges should be permitted to act accordingly in such cases for reasons other than an offender's cooperation.

Finally, on another matter, it is the experience of many practitioners that in cases in which judges hold pre-sentencing conferences, far less time is taken up over disputed matters at the sentencing hearing itself. In light of the newness of the sentencing guidelines, it will be very helpful to provide for a pre-sentencing conference. The criteria which the judge intends to employ in determining the sentence can be discussed with the parties so that objections can be made and needless errors and subsequent appeals can thus be avoided.

Conclusion

Mr. Chairman, NACDL deeply appreciates the opportunity to be involved in this process. The Commission has a herculean task before it. We will continue to welcome any occasion to assist the Commission in its important efforts.

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11-28-86

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO, TEXAS 78040

CHAMBERS OF
JUDGE GEORGE P. KAZEN

November 26, 1986

Mr. Paul Martin
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 440
Washington, D. C. 20004

Dear Mr. Martin:

Enclosed is our written submission of comments concerning the proposed sentencing guidelines. This paper will supplement our oral presentation on December 3. Thank you for your consideration.

Sincerely yours,

George P. Kazen

GPK/gsh

STATEMENT TO UNITED STATES SENTENCING COMMISSION

HEARING ON PRELIMINARY DRAFT SENTENCING GUIDELINES

WASHINGTON, D. C., DECEMBER 3, 1986

Submitted by

Hon. George P. Kazen
United States District Judge
Southern District of Texas
President, Fifth Circuit
District Judges Association

and

Hon. Robert M. Hill
Judge, United States Court
of Appeals for the Fifth Circuit

Overview. These comments reflect the personal views and experiences of the author, but were shared with and endorsed by the District Judges of the Fifth Circuit at a November workshop during which the guidelines were discussed at length.

We are impressed with the scope of the guidelines and the issues which the Commission has attempted to address. We also appreciate your willingness to listen to all views with an open mind. We strongly believe, however, that the guidelines -- at least in their present form -- inappropriately attempt to resolve an issue as complex and varied as human life by an arbitrary, mechanical, mathematical exercise. We endorse these words of Professor Norval Morris, written in the Summer, 1979 issue of "The Judges' Journal" (ABA):

> "Does the judge add up the numbers and say, within these numbers the sentencing commission tells me this is the right sentence? Many people are advocating this. I think it is a grave mistake. It gives a false precision of that which by its nature can never be precise. I much prefer the form of guidelines which are in the traditional common law form -- an effort, gradually over time, to define principle and purpose.

> ...This numerical system leads us into a false certainty that will in the long run skew the system. I observed this in a prison where the parole release date is done on a numerical system known to the prisoners, and they talk incessantly about these numbers, and the fact of the matter is that the numbers come out the same for very different people, and it would be much better if we did not pretend to that precision. In a difficult world, a squalid world, we cannot do good work, we can only do better work, and that is an important point as yet not understood."

The present guidelines attempt to quantify factors that cannot fairly be quantified with any real precision. Preliminary attempts to apply the guidelines to real pending cases have yielded quite severe prison sentences and have apparently made probation a rarity. Moreover, the sentences are especially severe when the lack of parole is considered. While the commentaries proclaim that only "serious offenders" are barred from probation, the determination of who is a "serious offender" does not turn on a careful evaluation of the defendant and the peculiar facts of the case, but rather upon the adding and subtracting of arbitrary numbers.

For example, in the offense of transporting undocumented aliens, an epidemic on the Mexican border and of growing national concern, the overwhelming majority of the persons caught driving the vehicles are themselves aliens who have entered this country illegally. They deny receiving direct monetary compensation and insist that they were attempting to "go north" to look for employment along with their fellow travelers. They allege to have volunteered to drive the vehicle in return for a free ride. While this story is probably not always true, it is often true. Under the guidelines, such an individual is receiving something "of value."

This automatically doubles the offense value. Then a series of completely arbitrary numbers are to be applied depending upon the number of aliens in the vehicle. Ten aliens equals 16, while 11 equals 20. In fact, however, the driver of the vehicle rarely has any say or control over the number of aliens that are placed into the vehicle with him.

The same problem exists in the drug guidelines. Again, completely arbitrary numbers are assigned entirely on the basis of the amount of the drug involved. Moreover these values are doubled for any prior drug conviction, apparently no matter its vintage.

Along the international border, the defendant is often not acting independently. Even if he is charged alone, he is frequently part of an international conspiracy trafficking between nations in whatever commodity is lucrative, be it drugs, people, clothing, jewelry, automobiles, etc. Typically a defendant is the classic "mule," a poorly educated, extremely poor male or female, often an alien, being used by others to haul something or someone at high personal risk with little compensation. Extremely lengthy prison sentences are frequently not the proper disposition for these types of cases. Many other illustrations can be given of the harshness of the present numbers. Undoubtedly you have heard this from many other witnesses.

We urge you to reconsider and considerably broaden the unrealistically precise numerical categories. In the property table (§B251), the tax evasion table (§C211), the fraud table (§F211) and similar areas, expand and overlap the categories and provide for a range of points for each category. In other areas, let us not

pretend that we can numerically assess with precision the difference between an "extreme" injury and a "significant" injury or that all injuries fall within those two definitions. (§A251). It would also be more realistic to provide a percentage range for the general aggravating factor of psychological injury. The same comment applies to the attribution of a single, distinct numerical value to "severe," "permanent," and "serious" bodily injuries. (§§A222-224).

Application Instructions. The proposed method of arriving at the sentence is wooden and unnatural. While Chapter Three undoubtedly identifies many of the factors that a conscientious judge will consider in arriving at a sentence, no judge considers them in a lockstep fashion, taking each separate factor sequentially while adding or subtracting precise numbers for each factor.

It is imperative that the Commission mentally place itself in a real courtroom setting to evalute this procedure. The defendant and his attorney stands before the tribunal of justice in a most profound and dramatic moment. The press and the public are frequently present. Sobbing relatives await the outcome with apprehension. Possibly a victim is present.

While the presiding judge has undoubtedly read the presentence report before entering the courtroom and has therefore been given the Probation Officer's views as to the various factors and how they should be scored, this is only one side of the picture. Even if the defense attorney has stated his objections in advance, the court only knows where the areas of dispute will be. Absent a binding plea bargain, there will clearly be areas of disagreement that can only be resolved in open court at the sentencing hearing.

We certainly have no objection to the judge's having to state clearly what conclusions he has drawn. Good judges should be doing this already. Thus it is entirely appropriate and beneficial to the defendant, the victim, the public, and the system for the judge to announce that the defendant is to be sentenced for the precise offense(s) contained in the count(s) to which he has been convicted by a jury or pled guilty. The judge would then announce that the basic offense has been aggravated by certain defined factors, such as use of violence, injury to the victim, amount or value of property or contraband involved, and that therefore the guidelines indicate a certain sentence for that offense. In effect, this would be the fixing of a suggested sentencing range at the conclusion of Chapter Two. The judge would then address the infinitely varied factors in Chapter Three in general terms, finding whichever aggravating and mitigating factors exist. The judge would then conclude that the sentence should be either within, above, or below the guidelines, specifying which of the varied Chapter Three factors were deemed to be more significant than the others.

The procedure dictated by the present guidelines, however, would be intolerable and a disgrace to the criminal justice system. Because there are so many distinct factors which apprently not only must be considered but must be quantified and factored into the formula, the court would be forced to make a whole series of detailed mathematical calculations, adding, subtracting and multipying by fractions. Moreover as will be illustrated hereafter, while the steps are sequential, the starting point for any given calculation is sometimes the cumulative total but sometimes is a

figure derived several steps earlier. This raises the unseemly spectacle of the court, prosecutor, and defense attorneys, with calculators and scratch pads in hands, juggling various totally arbitrary numbers to reach a conclusion. Like a bookkeeper, or even a quiz show host, the judge finally reaches the grand total, looks up the guideline table, and out pops the sentence. This must not be allowed to happen. This proposed cure is far worse than the perceived problem.

In addition to this philosophical objection to the application instructions, we offer the following specific comments. When a defendant is actually convicted of more than one count, the manner of calculating his sentence on each count is most confusing. On pages 9-10, the application instructions indicate that once an offense value is established for a given offense, the steps are repeated "for each offense of conviction." Then when "all offenses have been scored," you total the offense value.

What is done then? Is the resulting sentence applied to one count or to all counts? If to one count, how then is the sentence calculated for the other counts? Are they concurrent or consecutive? What of the typical narcotics case where the defendant is found guilty of importation, possession, and distribution arising out of the same underlying fact situation? Are the values for each still added?

The instructions are also confusing as to the application of the criminal history. By the time the judge has reached Step 10, the base offense value has already been increased or decreased by the cross references and by the factors in Parts A & B of Chapter

Three. Then in Step 10, the judge is directed to make an adjustment for criminal history. At that point, however, the table on page 131 refers back to the offense value from Chapter 2, apparently without whatever modifications were already made under Chapter 3.

Is the discount in §A314 mandatory? The commentary explains that this section applies to an individual who has a limited role in an offense that is planned, directed and controlled by another person or persons. What if this defendant, notwithstanding his subservient role, is privy to vital information which could unlock the door to a major conspiracy, but he refuses to divulge any information? Must he be given a discount? Can he even be given an enhanced sentence under these facts?

In §B311, the court may increase the total offense value if the defendant has "knowingly and intentionally offered untruthful testimony concerning a material fact." If a defendant never formally testifies under oath but gives his version of the offense to the probation officer prior to sentencing and/or gives a similar version to the court at the time of sentencing, can the court increase the sentence upon a determination that the defendant's version is not thought to be truthful?

Section §B321 first speaks in terms of reducing the sentence, as distinguished from reducing the sanction units, but then provides for a cap phrased in terms of "total offense value from Chapter 2." Both the reduction and the cap should be based on the same reference point. Also while the cap is phrased in terms of the offense value from Chapter 2, the court by that point may have already applied a modification of that value, as for example in §A314.

The discounts provided for cooperation (page 125) are too inflexible. Generally, at least in these days, most cases involving exceptional cooperation under life threatening circumstances are narcotics cases. Defendants who offer this assistance have usually been caught in sizeable transactions and often have criminal records. Under the current guidelines, their offense values would be extremely high. It is not realistic to believe, certainly not in our experience, that such individuals would risk their lives for the government and still face 10 to 15 years in prison without parole.

At least in drug cases, prior drug convictions cause the base offense value to double. The same prior convictions then are used in Chapter Three to further enhance the sentence. An extreme range of circumstances lies beneath every drug conviction. It would be unnecessarily harsh in many cases to use the same prior conviction to enhance the sentence at both ends.

At page 129, it is stated that there is no decay factor for crimes involving "the distribution of drugs." Assuming this exception should apply, which is debatable, why is it limited only to the distribution of drugs? Why not possession or possession with intent to distribute? What about a prior drug case reduced to a charge of using a communications device to facilitate a drug transaction?

Criminal History. Calculating the effect of the criminal history score further illustrates the vice of the present guidelines. The Commission is entirely correct in stating at page 130 that "no formula exists for determining how much a criminal record should matter when fixing blame." The Commission

nevertheless proceeds to create formulas for doing so. The proposed formulas provide sharp enhancements in high base offense cases, even when the criminal history score is modest. In Texas, for example, the offense of driving while intoxicated carries a maximum sentence of more than a year. Assume an offender with a prior DWI, given three days to serve. If he is before the court as a "mule" in a case involving 25 grams of cocaine, his score is boosted by 14 points, netting a substantial increase in hard jail time. A false notion of mathematical precision thus yields an unfairly harsh result in the name of consistency.

A criminal history score for "drug abuse" should be eliminated. It may be true that drugs are more likely to be used by people who commit crimes. It may be true that people who abuse drugs commit crimes at a higher rate than others. It may be true that past drug use predicts future criminal behavior. Nevertheless you punish the crime, not the fact of being a drug abuser. Statisticians could probably also show that more crimes are committed by persons from certain minority groups, certain income levels, children of broken homes, victims of child abuse, etc. Nevertheless you would not punish the offender for having that background. Moreover, what is an "abuser"? Is it someone who has been in a methadone program? Someone who has voluntarily sought rehabilitation? Someone who has ever used a substance?

With respect to the decay factor, it is much more preferable to focus on a designated continuous period prior to the offense in question rather than focusing on intervals between prior convictions.

Juvenile sentences should also be counted if they are for essentially the same crime for which the offender is now being sentenced, especially if a reasonable decay factor is employed.

Modified Real Offense Sentencing. This approach is clearly superior to the pure charge-of-conviction method for the reasons discussed in the commentaries. However, some of the distinctions made in the examples on pages 15-17 are problematical.

Example number 3, for instance, indicates that if a defendant has gone on a bank robbing spree in several counties, is indicted for each bank robbery, but strikes a plea bargain to plead to one count, all the other bank robberies should be disregarded if they are "not in furtherance of a conspiracy" and if they are "unrelated." Whether the defendant worked alone or conspired with others is a curious basis for determining whether or not to count the other robberies. Further, if it is clearly established that the same defendant robbed several banks over a short period of time, what else is needed to make these incidents "related"? Similarly, is an offender sells a quantity of narcotics to undercover agents on several occasions over a period of time, the total facts should be considered, even if they are the subject of separate counts and the defendant pleads to only one of them.

The example of the cocaine dealer having an illegal weapon is also curious. The commentary says that the weapon will be disregarded if no indictment or conviction results from the seizure of the weapon. What if, as is much more likely the case, the indictment does charge possession of the illegal weapon in a separate count but then, like the bank robber, the defendant pleads

to one cocaine count and the weapons charge is dismissed? Can the weapon then be considered by the court? If so, the result seems inconsistent with the case of the bank robber? If not, however, it is clearly an unrealistic result. The combination of dealing in hard narcotics and possessing illegal weapons is definitely significant. Would it make any difference if the weapon were in the defendant's automobile instead of in his apartment? Would it matter if it were in the trunk of the automobile rather than resting beside him in the front seat?

In example 8 on page 17, the Commission would allow consideration of 20 stolen, forged checks when the defendant pleads guilty to conspiracy to steal and forge only one check. The commentary suggests that this is true because of the conspiracy element. What difference does that make? Assume an identical case where the defendant has clearly stolen, forged and cashed 20 checks but pleads guilty to only one. If this defendant were acting alone and not in conspiracy with another, would the trial judge then disregard the other 19 checks? The logic of this is questionable.

In the typical embezzelment case, an employee engages in a series of transaction over a period of time wherein the books and records of the employer are manipulated. Assume these transactions are the subject of several counts in an indictment and the defendant ultimately pleads guilty to one count. Some interpret the guidelines to mean that the offense values would not be aggregated for each count but that the sums of money involved in each count would be aggregated in order to determine the dollar value for use of the property table on page 78. Others, however, read the

guidelines to mean that the amounts cannot be aggregated unless the defendant is convicted of the other counts. At the least, the matter is confusing. There is again the issue of consistency. Why would we aggregate the total number of illegal transactions committed by the embezzeler but not do so for he who steals checks or robs banks?

In summary, it is essential that the trial court be able to consider all pertinent facts in the case. Whether or not these facts are actually used to calculate the basic offense value is not as important as whether it is clear that they can be used to go above or below the guidelines. The arguments against the real criminal conduct method are not impressive. The main argument is that of the "problem of proof." Unless these guidelines are drastically modified, trial judges are doomed to a mini-trial for each sentencing hearing anyway. The hearing might as well determine the whole truth without artificial limitations. The other argument is the potential increase in not guilty pleas, but this result will likely occur anyway without a liberal approach to plea bargaining. Conversely, if full plea bargaining continues, the defendant can significantly limit his exposure through charge bargaining. He should not have the further advantage of requiring the court to ignore the true facts in the case.

Plea Bargaining. At least in any jurisdiction with a substantial criminal docket, the system would cease to function without plea bargaining. Regardless of one's personal philosophy on that subject, it is a fact of life as certain as death and taxes. Consider these statistics from three divisions in the Southern

District of Texas. From Janaury 1986 through October 1986, only ten months, the cases of 420 defendants have been concluded in Laredo with one judge, 733 in Brownsville with two judges, and 260 in Corpus Christi with one judge. If each of these defendants, or even a substantial number of them, had invoked all of their available procedural rights, including a not guilty plea and a jury trial, the criminal justice system would become paralyzed. There would not be enough judges, prosecutors, marshals, courtrooms or funds to prosecute these cases. Realistically, not all cases are equal in the quantity and quality of proof available. Not all cases are of equal importance in the overall administration of the criminal justice system. Effective plea bargaining can help insure that limited resources are utilized for the greatest effect.

When plea bargaining is an available option from the outset, the current rules provide a healthy system of checks and balances between the court and the parties. When rigidity enters in, the system goes askew. An incident occurring ten years ago in the Corpus Christi Division, documented by the attached newspaper articles, illustrates the point. The resident judge shunned plea bargains and generally refused to grant probation. He thus accumulated a backlog of almost 300 pending jury trials. During a week that he was on vacation, a colleague was assigned to his court and disposed of over 100 cases in three days through plea bargaining. That solution was hardly ideal. It illustrates, however, what measures become necessary when the criminal justice system finds itself collapsing under its own weight.

Similar problems resulted during the era of the statute which provided for a minimum, mandatory five-year prison term for marihuana offenses regardless of the circumstances or quantities involved. The general inappropriateness of this statute was so clear to prosecutors, judges and defense counsel that it was uniformly circumvented. Time and again defendants pled guilty to the so-called "tax count" in return for dismissal of the mandatory counts. Even when the United States Supreme Court indicated that the marihuana tax statute could not be constitutionally applied, defendants continued to bargain for that count and simply waived their Fifth Amendment rights. The defendants receiving the minimum mandatory sentence were generally those whose attorneys could not negotiate a better plea bargain or, more likely, those who truly believed themselves innocent and insisted upon a jury trial. Thus the rigidity of the system itself created sentence disparities of monumental proportions.

Without plea bargaining as a safety valve, the present guidelines are destined to straitjacket the system. With a reasonably competent attorney, a future defendant could predict his sentence with some accuracy before he enters a plea. The sentence would, more than likely than not, involve a substantial prison sentence without parole. The defendant would be more likely to take his chances with a jury trial. At the same time, as more and more defendants do this, they will radically increase the pressure on the prosecutor and the court. A prosecutor facing 20 or more jury trials, realizing that similar numbers will be added each month, will rather quickly find the need to plea bargain extensively. If

no other option is available, the prosecutor would turn to charge bargaining. At least in the Fifth Circuit, the prosecutor has been held to have almost plenary control over what charges are initially filed and what charges are prosecuted, dismissed or reduced.

If the sentencing guidelines would attempt to strip the prosecutor of the power to reduce charges once filed, the bargaining process would shift from post-indictment to pre-indictment stage. Clearly no sentencing guidelines could tell the prosecutor what charges to file in the first place. If the prosecutor realizes that once he files the charges they somehow become chiseled in granite, and he will then be locked into a rigid system with which the resources of his office cannot cope, he will simply make the necessary adjustments before the charges are filed.

We strongly urge the Commission not to attempt to disallow or restrict the ability of the parties to enter into a plea bargaining. The present procedure, particularly as in Rule 11(e)(1)(A) and (B), Fed. R. Crim. P., contains a prudent system of checks and balances among the prosecutor, defense attorney, and the court. The court could be directed to ask the parties to explain what motivated the particular bargain, and the court could then state whether those reasons were deemed satisfactory. More importantly, the court could be asked to find whether the particular bargain was an "unwarranted" decision from the guidelines, thus satisfying the Congressional concern that no such deviations be allowed.

Probation. The proposed option 1 on page 142 further illustrates how this mechanical, numerical system has distorted the true goal of fair sentencing. To even propose "mandatory

satisfaction of all sanction units" really means that there is no sentencing range. Instead sanction units would be converted into a maximum sentence that must be served in one form or another. This comes after a series of totally arbitrary numbers have been added, subtracted and multipied and then applied to an equally arbitrary mathematical table.

The permissive satisfaction option is obviously an improvement but not much. Instead why not assign sanction values to non-imprisonment techniques and then allow these to be used in lieu of custodial imprisonment? What ever happened to probation? We have spent years developing a highly professional probation office, refining techniques such as community service, halfway house confinement, home curfew, restitution, substance abuse counseling, etc. Now the Commission speaks only of probation "in addition" to other sanctions and allows outright probation only for the rare offender whose sanction units total less than 14. We urge you to reconsider. We submit that Congress never intended this wholesale abandonment of probation. Granted the enabling legislation is internally inconsistent in many respects, nevertheless it provides that the guidelines shall be formulated "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." 28 U.S.C. §994(g). The Congress also specifically provided that a defendant may be sentenced to a term of probation unless the offense is a Class A or B felony or unless probation is otherwise expressly precluded. 18 U.S.C. §3561(a). Further, the Congress specifically directed that a series of factors be considered to determine whether to impose a term of imprisonment. §3582.

We submit that it is not inconsistent with the congressional intent to provide that if the court decides an offender must be imprisoned, a suggested range of imprisonment is appropriate, but that the court may alternatively decide not to imprison the defendant at all. The court is then provided a wide range of non-custodial restrictive conditions that it may impose and, of course, if these provisions are violated subsequently, the defendant will then serve the guideline sentence.

§C324. This provision is confusing. The first part apparently contemplates a situation where the offender fails to appear at some time during the proceedings, but presumably is apprehended prior to sentencing. In that circumstance, it is obviously reasonable to allow enhancement of the sentence for such conduct. The second portion, however, is less clear. It apparently refers to post-sentence conduct, presumably a defendant granted permission to voluntarily surrender to the penal institution and who fails to do so. The section states that this individual shall be "sentenced to a mandatory consecutive sentence which may exceed the guideline range." For what offense? For the offense to which he has already been sentenced? What is the mechanism for amending and enhancing a prior sentence? Do you contemplate the filing of a new charge with a new conviction for failing to report? If so, what are the guidelines for that offense? In that connection, I do not see any guidelines for the offense of escaping from custody, 18 U.S.C. §751, a not uncommon occurrence.

The Cost. Has anyone endeavored to realistically evaluate the costs of implementing this system? Is the Congress prepared to build many new prisons and quickly? These guidelines not only

dictate far more prison terms, but also lengthier terms. Surely the plight of the Texas prison system is well known and probably not unique. The prisons were horrendously overcrowded and a federal court ordered drastic changes. Everyone wanted lengthy prison sentences but few proposed spending tax money to build prisons and even fewer were willing to vote for it. The result is a revolving door process where prisoners with lengthy judicial sentences are sent out the back door shortly after they come through the front door.

Absent effective plea bargaining, far more defendants will plead not guilty and those that plead guilty will necessarily demand evidentiary hearings to challenge every arguable interpretation of the guidelines and the calculation of every factor in the formula. Can we seriously expect the Congress to provide additional judgeships anytime soon to meet this situation? What about prosecutors? At least in the Southern District of Texas, with an exploding criminal docket, the United States Attorney's Office is still under a hiring freeze and unable to fill several vacancies. Appeals will mushroom. Will anyone calculate the effect on court reporters having to transcribe a greater number of records? What of the appellate dockets? Appeals will not be limited to sentences imposed outside the guidelines, but will include appeals on the question of whether the guidelines were correctly interpreted and whether there was sufficient evidence to support the findings underlying the application of the guidelines. This is clearly true if various separate factors will directly cause an increase in jail time. The recent case of State v. Bianco, 511 A.2d 600 (1986) reflects that in the State of New Jersey, appeals from allegedly

excessive sentences have created such an appellate backlog that the Supreme Court was forced to initiate a pilot program eliminating all written briefs. We are told that in five years, a guideline system has generated over 300 appellate decisions in the State of Minnesota. What provisions will be made for these developments?

Miscellaneous. We realize that the sentencing reform legislation is binding on the Commission and cannot be modified by guidelines. Nevertheless there are a few features of the legislation that merit comment, in the event future amendments are contemplated. First, it is truly lamentable that the new legislation eliminates the "split sentence" provisions of 18 U.S.C. §3651. This is a widely used technique that allowed the defendant to sample prison life and then remain under the threat of a lengthier return if he did not stay out of the trouble for several years. The judiciary will lose a valuable tool.

The provisions of §3553(c) are simply ludicrous. Once the judge goes through the various mathematical gyrations to reach the result on page 140, he has presumably considered most everything there is to consider. He then finds that he must impose a prison term of, for example, not less than 120 months and not more than 150 months. What possible further reasons could he articulate for selecting 124 versus 128 versus 132 versus 136 months? It makes a mockery of the system to require judges at this point to incant ritualistic phrases pretending that there is some precise objective reason to choose one numerical figure over another.

It is also unfortunate that in a case of multiple counts, a defendant can no longer be sentenced to confinement on one count

followed by a period of probation on another count. This too has proved an effective tool in the past. However, the supervised release provisions of §A413 might be the same procedure under a different title.

Summary. The concept of sentencing guidelines in federal court is a revolutionary one. The legislation dictating these guidelines sends mixed signals. It calls for much certainty and also much discretion. There may be some science to sentencing but there is unquestionably much art. The statute was promulgated to remedy a perception that criminal sentencings were disparate and therefore unfair. Let us not substitute that perception for the far more sinister perception that the sentencing of a human being can be simplified into a mathematical exercise as easily performable by a clerk as by a judge. Will the system really be improved by a perception that the judge was not actually sentencing this defendant for these facts but was instead being controlled by tables and calculators?

We submit that the abolishing of parole, the availability of appeals from sentences, and the requirement that specific articulable reasons for every sentence be stated in open court would alone be a significant development. Let us proceed carefully from that point. We find the effort to place numerical weights on the offense itself less objectionable than quantifying the personal factors under Chapter Three, although even under Chapter Two we urge broadening of the tables and the methodology of calculating enhancement factors. We then urge that the Chapter Three factors be stated in true guideline form, spelling out those factors which

could be deemed aggravating and those which could be deemed mitigating. At sentencing the judge would be expected to tell the defendant which of the factors has caused the court to either stay within the guidelines or go outside them.

Finally, probation should be considered a sentence in itself, again with specific reasons being given for its use and with a variety of restrictive, but non-custodial, conditions being encouraged.

Judge runs 'bargain days' at courthouse

THU MAY 12 1977 II

"Welcome to bargain days," one person told a visitor today as he entered the federal court house. What he was referring to was probably the largest number of federal cases ever disposed of here in a three-day period, most of them on probationary terms.

U.S. Dist. Judge Robert O'Connor of Laredo has been sitting on the federal bench usually occupied by Federal Judge Owen Cox for the past three days. He has been here since Tuesday and leaves today.

In that time period, O'Connor has disposed of more than 100 cases, about a third of Cox's pending case workload. All have been guilty pleas. Cox had 297 cases at the end of April.

"He's a great judge," a defense attorney said. "We've had clients coming down from Nebraska, Alabama, Georgia."

One observer said the defendants being sentenced today were those who couldn't get down here earlier.

"The word has been out on the grapevine," another attorney said two days ago. "Lawyers have been telling their clients to come on down while the getting is good."

Cox and O'Connor have radically divergent philosophies on sentencing. Cox, who is the resident judge, does not agree to



plea bargaining involving sentencing. No one knows what the sentence will be until Cox pronounces it.

O'Connor, however, will agree to certain sentences as part of a bargaining agreement between defense attorneys and the government prosecutor.

In two days, Tuesday and yesterday, O'Connor disposed of 106 cases. Only 15 of those cases involved any prison time; the rest, 91 cases, received probation. He also assessed more than $30,000 in fines, a procedure rarely used by Cox.

"He's in the avant-garde," a knowledgeable observer said of O'Conner's method of handling cases.

There has been some grumbling from the regular members of the courthouse staff, feeling perhaps that O'Connor's bushelload disposal of cases is making their own boss look bad in comparison.

Most other federal judges in the Southern District, one observer said, don't agree with O'Connor's sentencing procedures.

The observer pointed out that there is a provision in the federal rules for a judge to either accept or deny a proposed sentence agreed on by the defense and the prosecution. "Most of the other judges act like it (the rule) doesn't exist."

"People are afraid of the unknown and will not plead guilty if they don't know what they're going to get," one attorney said.

Each federal judge usually has his own entourage when he visits other courts but O'Connor has had a special government prosecutor here from the Rio Grande Valley. Some observers say the special prosecutor is here so that the resident U.S. attorney won't be compromised" in dealing with defendants later who also want the seemingly light sentences and quick disposal.

One attorney said that of the 115 cases sentenced as of noon today, "98 percent were fair and just sentences."

Cox has been on vacation and recently attended a judicial conference out-of-state.

Some visiting members of the courthouse today said they are "stunned and "overwhelmed" by the rapid-fire disposal of cases.

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Visiting judge gives probation to 60

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By BARRY BOESCH
Staff Writer

A visiting judge engaged in a little spring cleaning in federal court yesterday, accepting guilty pleas from 68 defendants and assessing more than $82,000 in fines.

U.S. Dist. Judge Robert O'Conor of Laredo gave 60 defendants probation ranging from two to five years in mostly drug-related cases.

Most of the defendants receiving probation were persons caught at the U.S. Border Patrol checkpoints carrying marijuana.

O'Conor is presiding in federal court here this week while U.S. Dist. Judge Owen Cox is on vacation.

Included in the parade of guilty pleas were a former Duval County official charged with tax evasion and a Starr County truck owner charged with two counts of marijuana smuggling.

Former Duval County Assistant Treasurer Silvestre Gonzalez received three years probation after pleading guilty to tax evasion. He was charged with not reporting income he allegedly embezzled from the county.

Reynaldo Alvarez pleaded guilty to marijuana smuggling and received probation and a $15,000 fine, the largest fine O'Conor assessed yesterday.

Convicted South Texas drug czar Fred Brulloths Jr. was scheduled to testify against Alvarez in Brulloth's last case as a government witness.

Alvarez got a better deal from O'Conor than he did from Cox.

He pleaded guilty earlier before Cox with the understanding he could withdraw his plea if Cox did not grant probation.

After reading a pre-sentencing investigation, Cox said he could not give Alvarez probation. Trial had been set for June 1.

Though O'Conor granted probation to most of the marijuana defendants, two received six-month prison terms.

O'Conor also gave two-year prison terms to two bond jumpers, but made the sentence in one case concurrent to a prison term already being served.

Defendants in two heroin cases received prison terms of five and four years. Another heroin defendant received six months imprisonment.

Several courthouse observers marvelled at the swift dispatch of the large number of cases.

O'Conor's judicial style is decidedly different from Cox's.

Cox requires pre-sentence investigations before he sentences any defendant.

O'Conor allows defendants to waive their pre-sentence investigations.

Cox assesses few probation terms and even fewer fines in marijuana cases.

The courtroom atmosphere is decidedly looser under O'Conor. Cox runs a serious, no-nonsense courtroom.

O'Conor even volleys an occasional joke.

After most of the cases were cleared late yesterday afternoon, O'Conor stood and said, "Anyone for a seventh inning stretch?"

O'Conor will preside here the rest of the week.

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December 19, 1986

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

Dear Chairman Wilkins:

Professor Luckasson and I greatly appreciated the opportunity to appear before the Commission at your recent hearing in Washington to discuss the relevance of mental retardation to the sentencing process. We will be happy to work with the Commission's staff as you continue to work on this issue.

Sincerely,

James W. Ellis
Professor of Law

P.S. The written testimony that we presented to the Commission contained several erroneously numbered footnotes. To avoid any confusion by Commissioners or staff members consulting that document, I enclose a corrected copy.

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING, DECEMBER 2, 1986

TESTIMONY OF AMERICAN ASSOCIATION ON MENTAL DEFICIENCY AND ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES

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SUMMARY OF TESTIMONY

Mental retardation is a form of disability that is relevant to the sentencing process in several ways. The Commission's Preliminary Draft includes commendable measures to take into account the special vulnerability of mentally disabled victims of crimes. We urge the Commission to consider extending these provisions to similar offenses in which disabled people may be especially vulnerable to victimization.

The disability of offenders with mental retardation also presents important and unique issues to sentencing courts. It has long been universally recognized that mental retardation often reduces the extent of culpability, and therefore should always be considered as a potentially mitigating factor in determining a sentence. It is never appropriate to consider mental retardation as an aggravating factor in the sentencing process. We urge the Commission to adopt guidelines that require the consideration of mental retardation as a mitigating factor.

THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY

The American Association on Mental Deficiency (AAMD) is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, it now has nearly ten thousand professionals as members.

AAMD's members include physicians, educators, psychologists, social workers, nurses, physical and occupational therapists, specialists in communication disorders, administrators, lawyers, and other professionals who serve people with mental retardation. AAMD publishes two leading professional journals in the mental retardation field (Mental Retardation and the American Journal of Mental Deficiency) as well as numerous monographs and the manual on terminology and classification, Classification in Mental Retardation (H. Grossman, ed. 1983).

ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES

The Association for Retarded Citizens of the United States (ARC/US) is the nation's largest voluntary organization devoted to securing the rights of, and effective services for, the approximately six million citizens with mental retardation. Its national membership includes over 160,000 people, more than half of whom are parents of mentally retarded children and adults, and includes people who are mentally retarded themselves. ARC/US has chapters in 49 of the 50 states and 1,300 local chapters in cities, counties, and towns across the country. In recent years, ARC/US has become particularly concerned about the manner in which citizens with mental retardation are treated during the criminal justice process, including the determination of sentence, and has officially adopted policy calling for the fair treatment of these offenders based on complete and accurate understanding of the condition of mental retardation.

RELEVANT FACTS ABOUT MENTAL RETARDATION

The American Association on Mental Deficiency defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."[1] This definition has been universally accepted by professionals, courts, and legislatures. "General intellectual functioning" is a concept measured, and thus defined, by intelligence tests. It is therefore quantifiable in an IQ score. The AAMD definition of "significantly subaverage intellectual functioning" sets the upper boundary of mental retardation as an IQ of approximately 70, which is roughly two standard deviations from the mean score of 100.[2]

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[1] American Association on Mental Deficiency, Classification in Mental Retardation 1 (H. Grossman, ed. 1983) (hereinafter cited as "AAMD, Classification"). For discussion of related terms such as "developmental disabilities," see Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 George Washington L. Rev. 414, 421 n. 38 (1985) (hereinafter cited as "Ellis & Luckasson").

[2] AAMD, Classification, supra at 23. For a discussion of the adaptive behavior and developmental period requirements in the AAMD definition, see Ellis & Luckasson, supra, at 422-23.

This means that an individual must be very substantially disabled to come within the definition of mental retardation. (Previously, persons with IQ scores between 70 and 85 were labeled "borderline retarded." This classification has been abandoned by professionals, and these individuals are no longer within the definition of mental retardation.) The generally accepted estimate is that less than three percent of the population is mentally retarded.

Mental retardation is subdivided into four groups, defined by the severity of disability: mild, moderate, severe, and profound. Nearly 90 percent of mentally retarded people fall within the "mildly mentally retarded" category. As we have noted elsewhere, "[m]ildly retarded people have IQ scores in the range between 50 to 55 and approximately 70, and thus have a substantial disability. Judges and other criminal justice personnel unfamiliar with this classification scheme may find the labels of 'mild' and 'moderate' to be euphemistic descriptions of individuals at those levels of disability."[3]

Mental retardation is sometimes confused with mental illness by nonprofessionals. The latter is a widely varying array of disabilities of thought and emotions. By contrast, mental

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[3] Ellis & Luckasson, supra, at 423.

retardation is not an illness, but rather a severe limitation on the disabled individual's ability to learn.[4] For purposes of sentencing and the criminal justice system, there are some similarities between these two forms of disability that warrant similar treatment, but there are also substantial relevant differences.

In the early years of this century, it was widely believed that there was a causal relationship between mental retardation and crime. This view has long since been disproven.[5] Nevertheless, there are several characteristics that are common to many people with mental retardation which are relevant to their culpability for criminal conduct. These include disabilities in the areas of communication, memory, impulsivity, attention, moral

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[4] For a fuller discussion of the differences between mental illness and mental retardation, see Ellis & Luckasson, supra, at 423-25.

[5] See e.g. Biklen & Mlinarcik, Criminal Justice, Mental Retardation and Criminality: A Causal Link?, 10 Mental Retardation and Developmental Disabilities 172 (J. Wortis ed. 1978); Ellis & Luckasson, supra, at 425-26.

development, knowledge, experience, and motivation.[6]

A major development in the field of mental retardation in the last two decades is the development of successful community programs of habilitation which allow mentally retarded citizens to live with their families and in community residences such as group homes.[7] The abandonment of widespread segregation in isolated institutions has probably produced some increase in the number of mentally retarded people who will come into contact with the criminal justice system, both as victims and as defendants.

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[6] See Ellis & Luckasson, supra, at 427-44 for fuller discussion of these characteristics and their relationship to criminal responsibility.

[7] See generally S. Herr, Rights and Advocacy for Retarded People (1983). The previous view that some mentally retarded people are so disabled that they cannot live outside institutions has been disproven. See, e.g., J. Conroy & V. Bradley, Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis (1985); Ellis & Luckasson, supra at 476-77 nn. 351-52.

MENTALLY RETARDED VICTIMS OF CRIMES

Because of their disability, people with mental retardation may be especially vulnerable to victimization by criminal offenders. Criminals who prey upon extraordinarily vulnerable individuals raise distinctive issues at sentencing, whether the victims' vulnerability results from mental disability, physical handicap, age, or similar factors. Such predatory offenses are especially outrageous, and considering this category of crimes as aggravated offenses at sentencing comports with both a deserts theory of punishment and the need to promote deterrence.[8]

The Commission's preliminary draft of sentencing guidelines admirably recognizes these principles. This recognition takes two forms, one relating to the victim and the other relating to the victim's relationship with the offender. For some offenses, penalties are enhanced when the "victim was vulnerable due to

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[8] Cf. A.B.A. Standards for Criminal Justice 18-3.2(b)(ii)(B) (2d ed. 1980).

age or mental or physical condition."[9] For other offenses, punishment is increased if the "victim was in the custody, care, or control of the offender."[10] In this latter group, the draft guidelines recognize that a custodial relationship may create an additional vulnerability in the victim, and involves a form of fiduciary responsibility in the offender. Betrayal of such a trust by subjecting vulnerable individuals to criminal behavior warrants extraordinary punishment.

We agree with the inclusion of enhancement for penalties in each of these categories for each of the offenses the Preliminary Draft has selected. **In addition, we request the Commission to consider extending these principles to other comparable situations.** For example, the enhancement in custodial relation-

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[9] E.g. §A212(a)(2). Commentary to the provisions regarding fraud makes clear that "[t]he offense value reflects the higher degree of moral culpability involved. This factor applies only if the characteristic rendered a victim vulnerable to the specific offense," and offers as an example a "salesperson [who] sells multiple insurance policies to victims who are not able to understand the terms of their policies." §F211(a)(4), Commentary at 81.

[10] E.g. §A231(a)(2).

ships could appropriately be applied to offenses involving fraud and deception [§F211(a)], homicide [§§A212(a), A213(a)], and assault and battery [§A221(a)]. It may also be worth considering whether such enhancement is appropriate for interfering with civil rights [§H211(a)] and obstructing correspondence [§H234]. In each of these situations, the offender's control over (and responsibility for) the victim renders the criminal conduct even more objectionable, and makes the deterrence of enhanced penalties especially important.

MENTALLY RETARDED OFFENDERS

More difficult sentencing issues arise when it is the offender who is mentally retarded. The Commission has specifically invited public comment on the relationship between mental disability and the sentencing process.[11]

Mental Retardation as a Mitigating Factor. It has long been recognized that mental disability, including mental retardation, should be considered as a possibly mitigating factor in selecting an appropriate punishment for criminal

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[11] Preliminary Draft, Chapter 3, Overview at 120; Chapter 6, Part F at 169.

behavior.[12] The United States Supreme Court has held that mental condition cannot be excluded from consideration as a mitigating factor in capital cases.[13] The drafters of the Model Penal Code took the same position.[14] The American Bar Association's Criminal Justice Mental Health Standards provide that in all cases "[e]vidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender."[15] Congress has directed the Commission to consider the relevance of "mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition

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[12] For a fuller discussion of the justifications for treating mental retardation as a mitigating factor, see Ellis & Luckasson, supra, at 471-73.

[13] Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

[14] American Law Institute, Model Penal Code §210.6(4)(g) (1980).

[15] ABA Standards for Criminal Justice 7-9.3 (1984 Supp.). This provision elaborates on the earlier provision that included mental impairment as a mitigating consideration. ABA Standard 18-3.2(b)(i)(D) (2d ed. 1980).

is otherwise plainly relevant."[16] Even a noted scholar who believes that mental disability should not constitute a separate defense to criminal charges agrees that "[m]ental retardation may well be important in the determination of the suitable

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[16] 28 U.S.C.A. §994(d)(4). Congress also listed at least two other facts that may be sufficiently related to mental retardation to support the view that mental disability is an appropriate mitigating consideration. One such factor is education, which suggests that an offender who has limited education (as will generally be true for mentally retarded offenders) may be less culpable in some circumstances than his better-educated counterpart. To the extent that the factor of "age" includes relatively youthful offenders, an analogy (albeit imperfect) can be drawn to mentally retarded individuals with a "mental age" lower than their chronological age. For fuller discussion of the concept of "mental age," see Ellis & Luckasson, supra at 434-35.

punishment."[17]

This consensus about the relevance of mental retardation to the sentencing process has a sound theoretical and practical basis. Mental retardation may decrease an offender's appreciation of the wrongfulness of the conduct without rising to the level of a successful defense under federal law.[18] Even more significant, in light of the new federal statute's abandonment of the volitional prong of the defense, is the fact that impulsivity and other characteristics that may be associated with mental retardation may substantially impair a defendant's

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[17] N. Morris, Special Doctrinal Treatment in Criminal Law, in The Mentally Retarded Citizen and the Law 681, 684 (M. Kindred et al. eds. 1976).

[18] "It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense." 18 U.S.C.A. 20(a). This section clearly makes the "insanity" defense available to people with mental retardation, but the effect of the modifier "severe" to mentally retarded defendants is unclear. See Ellis & Luckasson, supra at 473 n. 331.

ability to conform his conduct to the law's requirements. Although this factor no longer constitutes a complete defense, it remains relevant to the defendant's degree of culpability, and therefore should be considered carefully as a mitigating factor in selecting an appropriate penalty.

Implementing the Mitigation Factor. The practical implementation of this principle in the context of the proposed sentencing guidelines raises some difficult questions. The Commission has invited public comment on the methodology to be employed by the sentencing judge. (Page 137.) Three alternatives were mentioned: allowing consideration within the 25 percent range; citation as a mitigating factor; and applying a multiplier factor.

Several features of mental retardation may help inform this choice. One is that it will arise in the sentencing context only rarely. In Pennsylvania, the equivalent factor ("limited intelligence") was cited less frequently than any other factor in mitigation for departing from the sentencing guidelines (40 citations out of a total of 5,641).[19] The unusual pattern of

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[19] Pennsylvania Commission on Sentencing, 1985 Annual Report at 22. Minnesota has had similar experience. See N. Morris, Madness and the Criminal Law 174 (1982) ("mental impairment,"

federal criminal offenses (e.g. the exclusion of most minor property crimes from federal jurisdiction) suggests that it will arise at the federal level even less frequently than it does in state courts. (Mental disability from limited intelligence that is not sufficiently severe to constitute mental retardation might be raised more frequently, but that need not be treated identically with actual mental retardation.)

It is also noteworthy that mental retardation is not a monolithic disability, with every retarded individual affected identically. The differences between an offender whose disability is classified as "mild" and one whose retardation is "severe" or "profound" are substantial. In addition, within the same degree of mental retardation, the disability may be related to the offender's criminal conduct to a greater or lesser extent, depending upon individual circumstances. These factors militate against the use of a uniform formula such as a multiplier.

Finally, mental retardation is a condition that is measurable by relatively objective standards and does not fluctuate

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combined with "psychological problem" -- which presumably included mental illness -- accounted for only 6.9 percent of all mitigations).

greatly in any individual over time. Therefore it may be distinguishable for these purposes from mental illness.[20] As a result, sentencing courts would not frequently encounter the type of full-fledged "battle of the experts" that often accompanies litigation on issues involving mental illness.

With these considerations in mind, we request that the Commission consider a two-pronged approach to the issue of mitigation resulting from diminished intelligence. Subaverage intelligence that does not constitute mental retardation could be considered by the sentencing court as a factor in mitigation, where demonstrated to be relevant, within the 25 percent range. Mental retardation, by comparison, could warrant mitigation, upon a proper showing of relevance, below the guideline range. This policy could be expressed in a Policy Statement on Special

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[20] There is also a definitional difference. As noted above, individuals whose impairment from low intelligence is not substantial are no longer classified as mentally retarded (the previously recognized category of "borderline"). By contrast, the universe of mental illness includes cases in which the disability is relatively minor. We do not mean to suggest that mental illness should not be considered as a mitigating factor; however the details of implementation may differ for the two forms of mental disability.

Conditions (roughly parallel to the aggravation factor in C322):

> **If the offender can establish by a preponderance of the evidence that he was mentally retarded at the time of the offense and that his mental retardation significantly reduced his culpability, mitigation beyond the guideline range shall be warranted. Limited intelligence that does not constitute mental retardation but that is demonstrated by preponderance of the evidence to have significantly reduced culpability shall be considered in mitigation within the guideline range.**

This approach places the burden of persuasion on the offender to demonstrate both his disability and its relevance to the offense. It permits the sentencing judge to weigh the effect of the disability on the offender's culpability, and to mitigate punishment below the guideline range in appropriate cases. Cases in which a factual dispute arises can be resolved in an informal sentencing hearing, with such expert testimony from mental retardation professionals as may be appropriate, as described in the Commentary at pages 17-18 of the Commission's Preliminary Draft.

Punishment Other Than Imprisonment. As Congress noted, the potential relevance of mental disability to the sentencing process extends to questions beyond the duration of the sentence imposed. Mental retardation may also be relevant to the "place

of service [and] other incidents of an appropriate sentence."[21] Two facts about mentally retarded offenders are of particular importance. The first is that they are uniquely vulnerable to predation by their fellow prisoners in integrated correctional facilities.[22] The second is that states that have experimented with community correctional programs for mentally retarded offenders have achieved substantial success.[23] These facts have several implications for the sentencing process.

Mentally retarded offenders should be considered for sentencing to appropriate penalties other than imprisonment. For some individuals, probation or supervised release (§§A412 and A413) will be appropriate. In such cases, judicial imposition of conditions requiring the offender to participate in habilita-

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[21] 28 U.S.C.A. §994(d).

[22] "Mentally retarded persons meet with unremitting hardships in prison." Ruiz v. Estelle, 503 F.Supp. 1265, 1344 (S.D. Tex. 1980), aff'd in part and rev'd in part on other grounds, 679 F.2d 1115 (5th Cir. 1982), cert. denied 460 U.S. 1042 (1983). The problems of mentally retarded prisoners are discussed in greater detail in Ellis & Luckasson, supra at 479-84.

[23] See Ellis & Luckasson, supra at 477 nn. 353-54.

tion programs will frequently be warranted. Community confinement or home detention (§§A414 and A415) will be appropriate in other cases. **But the Preliminary Guidelines' limitation of such programs to a period no longer than six months (§§A414(c) and A415(c)) may be inappropriate for mentally retarded offenders.** Habilitation of mentally retarded persons frequently takes longer than this, and the sentencing court should have flexibility to order longer periods of community confinement or home detention, especially upon the recommendation of mental retardation professionals who may conclude that a longer course of habilitation is necessary in the case of a particular offender.

Mental Retardation as an Aggravating Factor. There have been some suggestions that in unusual cases, mental illness can be considered as an aggravating factor in selecting an appropriate penalty.[24] Whatever the merits of this controversy as it relates to mental illness, there is no support in the empirical literature regarding the dangerousness of individuals with

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[24] Compare N. Morris, Madness and the Criminal Law 171-72 (1982) ("very few cases indeed" where an increase of punishment can be justified), with A.B.A Criminal Justice Mental Health Standards 7-9.3 Commentary ("should not be considered to be an aggravating factor").

mental retardation that would justify including it as a possibly aggravating factor. **Mental retardation should never be considered as an aggravating factor in selecting an appropriate criminal sentence.**

Plea Agreements. Mentally retarded defendants present unique and difficult issues in the process of plea bargaining. Because the Commission's Preliminary Draft contains no detailed discussion concerning plea agreements (page 166), we have no direct comments to offer at this time. However, the Commission may wish to review the discussion of this issue in Ellis & Luckasson, supra, at 460-66, on the subject of competence to enter a plea and the appropriate role of judicial scrutiny of plea bargains involving mentally retarded defendants.

Conclusion. We commend the Commission for the thoughtful and capable Preliminary Draft which it has promulgated. We appreciate the Commission's willingness to consider our views on these matters. We will be glad to offer any further assistance that the Commission or its staff may request.

Mentally Retarded Criminal Defendants

James W. Ellis*
Ruth A. Luckasson**

Defendants who are mentally retarded present difficult doctrinal and practical issues for the criminal justice system. Given the frequency with which these issues arise, it is surprising that they have received so little systematic attention from courts and commentators.[1] At the practical level, mentally retarded defendants often go unrecognized,[2] and therefore the difficult issues which may be present are overlooked. When the doctrinal issues are dis-

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1. During the eugenics scare in the early decades of this century, retarded defendants received substantial — indeed inordinate — attention. *See infra* Part III. In the last fifty years, however, interest in retarded defendants appears to have subsided dramatically. *But see* Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W.L. REV. 365 (1981); Comment, *The Mentally Retarded Offender in Omaha-Douglas County*, 8 CREIGHTON L. REV. 622 (1975); Person, *The Accused Retardate*, 4 COLUM. HUM. RTS. L. REV. 239 (1972); Pieski, *Subnormal Mentality As a Defense in the Criminal Law*, 15 VAND. L. REV. 769 (1962).

2. *See generally* Allen, *The Retarded Offender: Unrecognized in Court and Untreated in Prison*, 32 FED. PROBATION 22 (Sept. 1968). *See infra* Part II (discussion of the reasons mentally retarded defendants go unrecognized).

cussed, it is frequently in the context of defendants who are mentally ill, and the differences between mental illness and mental retardation are ignored. The legal rules appropriate for mentally retarded defendants have become, at best, an afterthought to the fervent battles involving criminal defendants who are mentally ill.[3]

In a sense, the problems posed by mental retardation were also an afterthought in the promulgation of the new *ABA Criminal Justice Mental Health Standards*.[4] From the beginning they were entitled "Criminal Justice Mental *Health* Standards."[5] Although numerous mental health professionals served on the various interdisciplinary task forces from the outset,[6] mental retardation professionals were appointed only after the first year. Moreover, while the final version of the *Mental Health Standards* explicitly discusses mentally retarded defendants, previous drafts did so inconsistently.[7]

However, the early omission of issues related to mental retardation was remedied and the final *Mental Health Standards* repre-

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3. Many of the most authoritative and helpful studies and treatises on mental disability and the criminal law make little or no mention of mental retardation. *See, e.g.*, H. STEADMAN, BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL (1979); R. ROESCH & S. GOLDING, COMPETENCY TO STAND TRIAL (1980); A. GOLDSTEIN, THE INSANITY DEFENSE (1967); S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME (1971); H. FINGARETTE & A. HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY (1979); MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE (J. Monahan & H. Steadman eds. 1983).

4. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1984) [hereinafter cited as MENTAL HEALTH STANDARDS 7-x.y]. The ABA House of Delegates formally adopted the *Mental Health Standards* as chapter seven of the ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) on August 7, 1984. Nevertheless, when considering each chapter of the *ABA Standards for Criminal Justice*, the House of Delegates votes only upon the black letter standards. Therefore, the commentary accompanying the *Mental Health Standards* does not represent ABA policy; its purpose is to assist practitioners by explaining the *Mental Health Standards'* underlying legal and mental health rationales. All citations to the commentary are to the August 1984 edition of the *Mental Health Standards* submitted to the House of Delegates. Some minor changes should be expected in the final commentary, which will appear in the *ABA Standards for Criminal Justice*, because the Standing Committee on Association Standards for Criminal Justice is presently updating the commentary.

5. Emphasis added. *See* ABA STANDARDS FOR CRIMINAL JUSTICE (1st Tent. Draft 1983) [hereinafter cited as FIRST TENTATIVE DRAFT]. "Mental health" is inappropriate as an umbrella term because people with mental retardation are not ill. *See infra* note 52. A more encompassing and accurate title would be "Mental Disability Standards." The term "disability" is now used to describe both mental illness and mental retardation. *See generally* THE MENTALLY DISABLED AND THE LAW (S. Brakel & R. Rock eds., rev. ed. 1971). The ABA's own journal in the field is similarly entitled the *Mental and Physical Disability Law Reporter*.

6. Although some psychiatrists and a somewhat larger number of psychologists work with people who are mentally retarded, most members of these professions have no experience and little training in the area of retardation. *See infra* parts VI & VII (discussion of mental retardation professionals).

7. *See generally* FIRST TENTATIVE DRAFT.

sent one of the first comprehensive, albeit imperfect, attempts to address the problems of retarded defendants.[8] They provide a useful vehicle for analyzing the current state of the law regarding the impact of mental retardation on both procedural and substantive issues that the criminal courts must address.

This Article attempts to provide a preliminary overview of the issues in the *Mental Health Standards* as they relate to defendants with mental retardation. Part I reviews the history of the treatment of retarded defendants in the criminal justice system. Part II describes the characteristics of people with mental retardation and the consequences of those characteristics. Part III then discusses the extent to which mental retardation should be exculpatory of criminal responsibility. Part IV analyzes the critical importance of competence issues to mentally retarded defendants. Part V elaborates upon dispositional issues including civil commitment and sentencing. Parts VI and VII discuss the role of mental retardation professionals in the criminal justice system. Part VIII concludes with a discussion of specialized training for participants in the criminal justice system in mental retardation.

I. History of Attitudes Toward Mentally Retarded Defendants

The distinction between mental illness and mental retardation has been long recognized, although inconsistently applied, in Anglo-American law. Observations about the difference between "idiots" and "lunatics" can be traced back to at least the thirteenth century, although the legal distinction originally was applied in property law rather than criminal cases.[9] Three centuries later, Fitzherbert[10] provided a definition and a loosely structured test to determine whether an individual was an "idiot":

> [An idiot is] a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool.[11]

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8. *Cf.* MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT [hereinafter cited as MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT], *reprinted in* DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 722-79 (B. Sales, D. Powell, R. Van Duzend et al. eds. 1982). This was one of several earlier model statutes prepared for the ABA Commission on the Mentally Disabled. Unlike the *ABA Standards for Criminal Justice*, the model acts were not presented to the ABA House of Delegates and do not represent official ABA policy.

9. Comment, *Lunacy and Idiocy — The Old Law and its Incubus*, 18 U. CHI. L. REV. 361, 362 (1951). A lunatic is "congenitally insane" and thus potentially treatable — unlike an idiot, who is born "mentally deficient or disturbed." *Id.*

10. *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 544-45 (4th ed. reprinted 1966) (discussing Fitzherbert and his work).

11. S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 128 (1925) (quoting A. FITZHERBERT, NATURA BREVIUM (1534)). The test has been described as a "crude but by no means ridiculous form of intelligence test." 1 N. WALKER, CRIME AND INSANITY

This test became popularized almost immediately as the "counting-twenty-pence test," and is cited, with some variations, by numerous early authorities.[12]

The early definitions commonly required that idiocy be both congenital and permanent.[13] In this, and in their focus on both intellectual impairment and its impact on functional ability, the early definitions are not wholly dissimilar from modern definitions of mental retardation.[14]

The perceived immutability of idiocy fostered a defense to criminal prosecution which some believed to be superior to the defense available to mentally ill defendants.[15] The relative liberality of the defense of idiocy may also have been related to the accepted analogy between the presumed incapacity of children and mentally retarded adults to form criminal intent.[16] People also may have perceived mentally retarded individuals as less dangerous to others than mentally ill persons.[17]

This situation did not survive into the current century. People came to view mentally retarded individuals as a threat to society, and a principal source of criminal and immoral behavior.[18] A

IN ENGLAND: THE HISTORICAL PERSPECTIVE 36 (1968); J. BRYDALL, NON COMPOS MENTIS: OR, THE LAW RELATING TO NATURAL FOOLS, MAD-FOLKS, AND LUNATICK PERSONS 8 (1700).

12. Glueck suggested that users of Fitzherbert's formulation improperly focused only on the first part of his definition and ignored the accompanying limitations. *See* Glueck, *supra* note 11, at 128-29.

13. An early treatise quoted Lord Coke: "An idiot, who from his nativity by a perpetual infirmity is *non compos* . . . ." I. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 13 (1st ed. 1838 reprint 1962). Lord Coke elaborated: "Idiocy, imbecility, and senile dementia admit neither of cure nor amelioration . . . ." *Id.* at 227.

14. *See infra* text accompanying note 40.

15. The authorities were not unanimous on this point: "Ideocy being a defect from birth is generally to be protected from punishment; but lunacy, which is a partial derangement, the senses returning at uncertain intervals, the offender is only protected from punishment for acts done during the prevalence of the disorder . . . ." A. HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 195 (1807). Isaac Ray was of a different view, decrying "[t]he little indulgence shown to imbecility in criminal courts," and observing that "[t]he usual treatment of such offenders, it is to be feared, is prompted more by prejudice and excited feelings than by enlarged views of human nature and of the objects of criminal jurisprudence." I. RAY, *supra* note 13, at 78, 98. *See generally* N. DAIN, CONCEPTS OF INSANITY IN THE UNITED STATES 45 (1964) (evidence of great intellectual deficiency seemed to be enough proof of insanity); N. WALKER, *supra* note 11, at 37 (defendant perceived by jury as lacking normal intelligence was acquitted on grounds of insanity).

16. *See generally* Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426 (1939) (discussing the comparison of children and "feebleminded" persons—mentally retarded persons—in relation to their ability to formulate the intent necessary to be found criminally liable); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 351-53 (1972) (setting forth the common law view of age in relation to criminal responsibility).

17. A. HIGHMORE, *supra* note 15, at vi (1807).

18. This focus upon the supposed criminal propensities of retarded people was

leader in this alarmist movement, Dr. Henry Goddard, declared that mentally retarded people constituted a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems."[19] Retarded people were believed to have a congenital deficit in moral sensibility analogous to color-blindness.[20] Another influential authority of the era, Walter Fernald, observed that "[e]very imbecile, especially the high-grade imbecile, is a potential criminal, needing only the proper environment and opportunity for the development and expression of his criminal tendencies."[21] Many authors recounted (or invented) elaborate and lurid geneological "studies"[22] to illustrate the rela-

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part of the larger pattern of discrimination that accompanied the eugenics scare of the early twentieth century. For general discussions of the treatment of retarded people during this period, see A. DEUTSCH, THE MENTALLY ILL IN AMERICA 332-86 (2d ed. 1949); S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 9-36 (1983); R. SCHEERENBERGER, A HISTORY OF MENTAL RETARDATION 154-75, 189-211 (1983); W. SLOAN & H. STEVENS, A CENTURY OF CONCERN: A HISTORY OF THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY 1876-1976 64-120 (1976); P. TYOR & L. BELL, CARING FOR THE RETARDED IN AMERICA: A HISTORY (1984); W. WOLFENSBERGER, THE ORIGIN AND NATURE OF OUR INSTITUTIONAL MODELS 3, 13, 34-36 (1975). The story of this nation's treatment of mentally retarded people has been described as "grotesque" by five members of the Supreme Court. City of Cleburne v. Cleburne Living Center, Inc., 105 S. Ct. 3249, 3262 (1985) (Stevens, J., concurring, joined by Burger, C.J.); *id.* at 3266 (Marshall, J., concurring in part and dissenting in part, joined by Brennan and Blackmun, JJ.).

19. Goddard, *The Possibilities of Research as Applied to the Prevention of Feeblemindedness*, PROC. OF THE NAT'L CONF. OF CHARITIES AND CORRECTIONS 307 (1915). Goddard was a prolific writer and a respected authority in the field of mental retardation, serving as President of the American Association on Mental Deficiency. *See generally* H. GODDARD, THE CRIMINAL IMBECILE: AN ANALYSIS OF THREE REMARKABLE MURDER CASES (1915); H. GODDARD, FEEBLE-MINDEDNESS: ITS CAUSES AND CONSEQUENCES (1914); H. GODDARD, THE KALLIKAK FAMILY (1912). He ultimately renounced his alarmist views. *See* Goddard, *Feeblemindedness: A Question of Definition*, 33 J. PSYCHO-ASTHENICS 219, 223-27 (1928). For a review of Goddard's work and an evaluation of his influence, see S. GOULD, THE MISMEASURE OF MAN 158-74 (1981).

20. Kerlin, *Moral Imbecility*, in PROCEEDINGS OF THE ASSOCIATION OF MEDICAL OFFICERS OF THE AMERICAN INST. FOR IDIOTIC AND FEEBLE-MINDED PERSONS 32-37 (1899), *reprinted in* 1 THE HISTORY OF MENTAL RETARDATION: COLLECTED PAPERS 303-10 (M. Rosen, C. Clark & M. Kivitz eds. 1976). This view was consistent with the then popular, broader theory that criminality was congenital. *See* S. GOULD, *supra* note 19, at 122-45. *See generally* C. LOMBROSO, CRIME: ITS CAUSES AND REMEDIES 151-74 (H. Horton trans. 1912 reprint 1968).

21. Fernald, *The Imbecile with Criminal Instincts*, 14 J. PSYCHO-ASTHENICS 16 (1909), *reprinted in* 2 THE HISTORY OF MENTAL RETARDATION: COLLECTED PAPERS, *supra* note 20, at 165, 180. One of the original developers of intelligence tests believed the tests should be used to identify mentally retarded individuals, whom he considered potential criminals, for lifelong segregation:

> The feebleminded . . . [are] by definition a burden rather than an asset, not only economically but still more because of their tendencies to become delinquent or criminal. To provide them with costly instruction for a few years, and then turn them loose upon society as soon as they are ripe for reproduction and crime, can hardly be accepted as an ultimate solution of the problem. The only effective way to deal with the hopelessly feebleminded is by permanent custodial care.

L. TERMAN, THE INTELLIGENCE OF SCHOOL CHILDREN 132-33 (1919).

22. For an account of the methodology in one such work, see S. GOULD, *supra* note 19, at 158-74 (1981). Gould documents the discredited methodology of Goddard in his studies including: failure to test an unbiased sample, over-utilization of visual identification and intuition of testers, and the alteration of photographs to demonstrate physical features supposedly identified with mental retardation. *Id.*

tionship between mental deficiency and crime and immorality, and to demonstrate the genetic origin of the disability.[23]

The measures the alarmists thought necessary to prevent the corrosion of society by the presumed criminality of retarded people included the sterilization of all "feeble-minded" people and their permanent segregation from society.[24] These efforts achieved remarkable political success.[25] The link between sterilization and segregation laws and the perception of retarded people as potential criminals appears in the language of Justice Holmes's decision upholding the Virginia eugenic sterilization statute: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough."[26] Given the nature of the claims made by the alarmists, their recommendations included remarkably few suggestions directed at the criminal law's treatment of the supposedly dangerous and immoral "feebleminded."[27]

Many mental retardation professionals came to reject the

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23. *See, e.g.*, R. DUGDALE, "THE JUKES": A STUDY IN CRIME, PAUPERISM, DISEASE AND HEREDITY 41-55 (5th ed. 1895); A. ESTABROOK, THE JUKES IN 1915 63-67 (1916); H. GODDARD, THE KALLIKAK FAMILY 18-19 (1912). These accounts were apparently very influential, and citations to them can be found in many discussions of mental retardation from that era. *See, e.g.*, S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 332 (1925). It is noteworthy that some of these very authors employed the same methodology to demonstrate the necessity for miscegenation laws. *See, e.g.*, A. ESTABROOK & I. MCDOUGLE, MONGREL VIRGINIANS: THE WIN TRIBE (1926).

24. P. TYOR & L. BELL, *supra* note 18, at 105-22.

25. Twenty-nine states enacted eugenic sterilization laws between 1907 and 1931. *See* J. LANDMAN, HUMAN STERILIZATION 302-03 (1932); *see generally* S. SMITH, M. WILKINSON & L. WAGONER, A SUMMARY OF THE LAWS OF THE SEVERAL STATES GOVERNING: I,-MARRIAGE AND DIVORCE OF THE FEEBLEMINDED, THE EPILEPTIC AND THE INSANE, II,-ASEXUALIZATION, III,-INSTITUTIONAL COMMITMENT AND DISCHARGE OF THE FEEBLEMINDED AND THE EPILEPTIC (1914); *cf.* Amicus Curiae Brief for the Association for Retarded Citizens et al. at 7-15, City of Cleburne v. Cleburne Living Center, Inc., 105 S. Ct. 3249 (1985).

26. Buck v. Bell, 274 U.S. 200, 207 (1927). Justice Holmes's factual assertions about the disabilities of Carrie Buck and her daughter were in error. *See* Gould, *Carrie Buck's Daughter*, NAT. HIST., July 1984, at 14, 16-18.

27. Goddard, for example, accepted that many retarded offenders would be entitled to a defense of insanity, concluding that it was

> of the highest probability that persons of a mental age under twelve years, like the normal boys or girls of the same age, do not know and cannot be expected to know the quality of their acts. And this is sufficient, because the law requires no more than a reasonable doubt, and there certainly is a very reasonable doubt as to whether such persons know the quality of an act of murder and know that it is wrong.

H. GODDARD, THE CRIMINAL IMBECILE: THE ANALYSIS OF THREE REMARKABLE CRIMINAL CASES 99 (1915). Nevertheless, Goddard believed that retarded defendants, whether convicted or acquitted on grounds of mental disability, should be incarcerated for life, under the theory that an "imbecile" will "never recover; he will never be free from the danger of following the suggestion of some wicked person or of yielding

theories of the alarmists by the 1930s,[28] and some of the most influential leaders of the eugenics movement eventually recanted their earlier views.[29] By the 1950s, authorities commonly agreed that no significant link existed between mental retardation and criminality.[30]

The abandonment of the alarmist view led to a period of marked decline in the attention paid to issues presented by mentally retarded criminal defendants. The next significant development was the growing recognition in the 1960s and 1970s that the criminal justice system ill-treated retarded defendants. Sporadic proposals for reform accompanied these observations. President Kennedy's Panel on Mental Retardation noted problems in the areas of the insanity defense, confessions, competence to stand trial, and disposition following conviction and acquittal.[31] Other authorities proposed a special court for retarded defendants[32] and separate treatment following conviction.[33] The Supreme Court declared unconstitutional the system of indefinite commitment of retarded defendants found permanently incompetent to stand trial.[34]

These events of the last two decades occurred against the backdrop of a more general movement toward fuller recognition of the rights of retarded people in all areas of American law.[35] Despite isolated exceptions, criminal justice issues have engendered less activity and movement toward reform than other legal problems facing retarded people.[36] The contemporary literature remains sparse and actual improvements in the treatment of mentally retarded defendants are difficult to detect. Although the last ves-

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to his own inborn and uncontrolled impulses. It will never be safe for him to be at large." *Id.* at 102.

One statutory response to this kind of fear was the enactment of defective delinquent and sexual psychopath statutes, aimed at both mentally ill and mentally retarded defendants. The *Mental Health Standards* properly call for the repeal of all such statutes. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-8.1 & commentary at 447-53.

28. *But see* Richmond, *The Criminal Feebleminded*, 21 J. CRIM. L. & CRIMINOLOGY 537, 546-51 (1931) (a strident protest at the abandonment of alarmist views).

29. *See* Fernald, *Thirty Years Progress in the Care of the Feeble-Minded*, 29 J. PSYCHO-ASTHENICS 206, 209 (1924); Goddard, *Feeblemindedness: A Question of Definition*, 33 J. PSYCHO-ASTHENICS 219, 223-27 (1928).

30. *See* H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 385 (1954).

31. PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 31-41 (1963).

32. Allen, *Toward an Exceptional Offenders Court*, in MENTAL RETARDATION 3, 5-6 (Feb. 1966).

33. R. Stephens, *Criminal Justice in America: An Overview*, in THE RETARDED OFFENDER 94, 124-30 (M. Santamour & P. Watson eds. 1982).

34. Jackson v. Indiana, 406 U.S. 715 (1972).

35. The rights of retarded people were greatly enhanced in education, institutional conditions, and deinstitutionalization and community placement. *See generally* S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE (1983); THE MENTALLY RETARDED CITIZEN AND THE LAW (M. Kindred, J. Cohen, D. Penrod & T. Shaffner eds. 1976); D. ROTHMAN & S. ROTHMAN, THE WILLOWBROOK WARS (1984); Turnbull, *Rights for Developmentally Disabled Citizens: A Perspective for the 80s*, 4 U. ARK. LITTLE ROCK L.J. 400 (1981).

36. *See supra* text accompanying notes 31-34.

tiges of alarmist views about the criminality of retarded people have not been eliminated,[37] the greater problem today is inattention and failure to identify the unique needs of retarded defendants in the criminal justice system.

II. Characteristics of Mentally Retarded Defendants

A. The AAMD's Definition and its Meaning

There is general agreement about the definition of mental retardation.[38] The American Association on Mental Deficiency (AAMD), the principal professional organization in the field of mental retardation,[39] has adopted the following definition: "Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."[40]

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37. *See, e.g.*, United States v. Masthers, 539 F.2d 721, 732 (D.C. Cir. 1976) (Robb, J., dissenting). Judge Roger Robb remarked that the majority's decision to require scrutiny of the adequacy of a retarded defendant's guilty plea "licenses every illiterate moron to violate the law with impunity." *Id.*

38. Terminology in this field is somewhat complex. "Mental retardation" is today the accepted term in modern usage, although the archaic "mental deficiency" has not been completely abandoned. Another common term in current usage is "developmental disabilities," a broader concept encompassing a number of handicapping conditions, including mental retardation. *See, e.g.*, Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081 (1982). Previously accepted terminology included "idiots," "imbeciles," "morons," and "feebleminded," all used to describe different degrees of mental retardation. The terminology was used without precise uniformity: "idiot" corresponded roughly with severe and profound retardation, "imbecile" with moderate retardation, and "moron" and "feebleminded" with mild retardation. On occasion each term has been used as an umbrella term to include all levels of disability. In common conversation, of course, these terms have become epithets, but they remain on the books in the statutes of a substantial number of states. *See, e.g.*, S.C. CODE ANN. § 44-47-50(a) (Law. Co-op. 1985); IOWA CONST. art. II, § 5. Their continuing use offends mentally retarded people and their families. *See* A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 119 (1975). Stone remarks that "[p]erhaps there is no other place in the mental health system where labels are more odious and more invidious." *Id.*

39. Founded in 1876 as "The Association of Medical Officers of American Insititutions of Idiotic and Feeble-minded Children," the association changed its name in 1906 to "The American Association for the Study of the Feeble-minded," and in 1933 to its current name. The AAMD now has approximately 10,000 members from a variety of disciplines that serve mentally retarded people. *See generally* W. SLOAN & H. STEVENS, A CENTURY OF CONCERN: A HISTORY OF THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY 1876-1976 (1976).

40. AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 1 (H. Grossman ed. 1983) [hereinafter cited as AAMD, CLASSIFICATION IN MENTAL RETARDATION].

The causes of mental retardation are numerous and complex, including both environmental and genetic factors. *See* D. MACMILLAN, MENTAL RETARDATION IN SCHOOL AND SOCIETY 81-166 (2d ed. 1982); N. ROBINSON & H. ROBINSON, THE MENTALLY RETARDED CHILD 51-133 (2d ed. 1974).

Courts,[41] legislatures,[42] and other professional organizations[43] have accepted this definition.

General intellectual functioning is a phenomenon measured, and thus defined, by intelligence tests. It is, therefore, quantifiable as an intelligence quotient (IQ) score. The AAMD's definition sets the upper boundary of mental retardation at an IQ level of 70, which is approximately two standard deviations from the mean score of 100.[44] For an individual to be classified as mentally retarded, the deficit in intellectual functioning must be accompanied by impairments in adaptive behavior defined as "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales."[45] Thus, adaptive behavior is a term of art, which is not synonymous with maladaptive behavior. The inclusion of adaptive behavior in the definition of mental retardation requires that intellectual impairment, measured by an intelligence test, have some practical impact on the individual's life.[46]

The final requirement of the definition of mental retardation is that the disability must become manifest before the age of eighteen. The origin of this requirement is obscure, and its relevance to criminal justice is limited.[47] If an individual impaired in both intellectual function and behavior would otherwise be classified as

41. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 105 S. Ct. 3249, 3256 n.9 (1985); *In re* Krall, 151 Cal. App. 3d 792, 797, 199 Cal. Rptr. 91, 94 (1984); United States v. Masthers, 539 F.2d 721, 724 n.16 (D.C. Cir. 1976); *In re* Grady, 85 N.J. 235, 240 n.1, 426 A.2d 467, 469 n.1 (1981).

42. *See, e.g.*, OHIO REV. CODE ANN. § 5123.01(k) (Page 1981 & Supp. 1984); FLA. STAT. ANN. § 393.063(23) (West Supp. 1985); OR. REV. STAT. § 427.005(10) (1983).

43. *See, e.g.*, 1 WORLD HEALTH ORGANIZATION, SYSTEM OF INTERNATIONAL CLASSIFICATION OF DISEASES, CLINICAL MODIFICATION (ICD-9-CM) 1098-99; AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 36 (3d ed. 1980) [herinafter cited as DSM-III].

44. AAMD, CLASSIFICATION IN MENTAL RETARDATION, *supra* note 40, at 23. The authors of the current definition caution that "[t]his upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used." *Id.* at 11.

The immediate predecessor to the current edition of the manual explicitly cast the definition in terms of standard deviations, but this definition was modified because of concern that it might suggest a greater precision than current testing instruments can provide. *Id.* at 23.

From 1959 to 1973 the AAMD definition was substantially broader, including all persons with IQ scores more than one standard deviation from the mean (approximately IQ 85). Persons whose scores fell in the range of 70-85 were labeled "borderline retarded." This approach was abandoned in 1973 because professionals recognized that individuals in the so-called "borderline retarded" group frequently did not function as mentally retarded people. This group is no longer labeled retarded by professionals in the field. *Id.* at 6.

45. *Id.* at 11.

46. *See id.* at 203-16 (illustrations of deficits in adaptive behavior at various levels of mental retardation). The most frequently used scales for measuring adaptive behavior are the AAMD Adaptive Behavior Scale and the Vineland Social Maturity Scale.

Three scholars in the field of mental retardation have recently proposed that the adaptive behavior component be omitted from the definition because "the essence of mental retardation involves inefficient cognitive functioning." Zigler, Balla & Hodapp, *On the Definition and Classification of Mental Retardation*, 89 AM. J. MENTAL DEFICIENCY 215, 227 (1984).

47. *See, e.g.*, *Mental Health Standards*, *supra* note 4, 7-9.1 commentary at 459.

mentally retarded, it matters little whether the onset of the problem occurred when the person was a child or an adult. The criminal law generally will be concerned with the manifestations and consequences of the individual's handicap and not the date of its origin.

Mentally retarded people are classified in a system of four categories: mild, moderate, severe, and profound.[48] Approximately eighty-nine percent of the people classified as mentally retarded fall within the "mildly retarded" category.[49] Mildly retarded people have IQ scores in the range between 50 to 55 and approximately 70, and thus have a substantial disability. Judges and other criminal justice personnel unfamiliar with this classification scheme may find the labels of "mild" and "moderate" to be euphemistic descriptions of individuals at those levels of disability.[50]

B. Mental Retardation Contrasted with Mental Illness

Mental retardation is often confused with mental illness. This confusion can have unfortunate consequences in the criminal justice system.

The American Pyschiatric Association defines "mental disorder" as "an illness with psychologic or behavioral manifestations and/or impairment in functioning due to a social, psychologic, genetic, physical/chemical, or biologic disturbance. The disorder is not limited to relations between the person and society. The illness is characterized by symptoms and/or impairment in functioning."[51] While there may be some points of similarity between this definition and the AAMD's definition of mental retardation, the cardinal difference is that mental retardation is not an illness.[52]

"Temporal manifestation of retardation is not germane to the issues confronted within Part IX of these standards." *Id.*

48. AAMD, CLASSIFICATION IN MENTAL RETARDATION, *supra* note 40, at 13. Somewhat different (and arguably archaic and misleading) terminology is occasionally still employed in the context of special education. Mildly retarded people may be characterized as "educable," and moderately retarded people as "trainable. " D. EVANS, THE LIVES OF MENTALLY RETARDED PEOPLE 14 (1983).

49. DSM-III, *supra* note 43, at 40. People who are "mildly retarded" should not be confused with the so-called "borderline retarded," who are no longer considered mentally retarded. *See supra* note 44.

50. *See* AAMD, CLASSIFICATION IN MENTAL RETARDATION, *supra* note 40, at 203-16 (illustrative descriptions of adaptive behaviors at each level of retardation). *See also infra* note 286.

51. AMERICAN PSYCHIATRIC ASSOCIATION, PSYCHIATRIC GLOSSARY 89 (5th ed. 1980). The glossary does not separately define "mental illness," providing only a cross-reference to "mental disorder"; *see* DSM-III, *supra* note 43, at 363.

52. Syndicated columnist George Will has captured this distinction vividly, noting that retarded people are often described as if they suffered from a disease: "Jonathan Will, 10, fourth-grader and Orioles fan (and the best Wiffle-ball hitter in southern Maryland), has Down's syndrome. He does not 'suffer from' (as the newspapers are wont to say) Down's syndrome. He suffers from nothing, except anxiety about the

Mentally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn.[53]

Important consequences for the criminal justice system flow from the difference between mental illness and mental retardation. Many forms of mental illness are temporary, cyclical, or episodic. Mental retardation, by contrast, involves a mental impairment that is permanent.[54] Thus, legal rules which focus upon the prospect of "curing" mentally ill people[55] may not address the condition of retarded people in an appropriate or useful fashion. Similarly, to discuss "restoration" of competence to stand trial presupposes that the individual was previously competent. Since most mentally retarded people became disabled at birth or as young children,[56] this formulation is neither accurate nor meaningful. Perhaps the most significant danger of confusing mental illness and mental retardation in the criminal justice system is the failure to understand that psychiatric treatment appropriate for mentally ill people will do nothing to assist a retarded person who is not mentally ill. If the treatment is being provided to influence the mentally retarded defendant's competence to stand trial or to render the individual nondangerous, the failure to provide habilitative services[57] tailored to the defendant's needs

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Orioles' lousy start." Will, *The Killing Will Not Stop*, Wash. Post, Apr. 22, 1982, at A29, col. 1.

The American Psychiatric Association includes mental retardation in its classification system of mental disorders. DSM-III, *supra* note 43, at 36-41. This does not make mental retardation an illness. The purpose of the American Psychiatric Association's nosology in DSM-III is to allow psychiatrists to classify the symptoms presented by patients. Since some mentally retarded people may also suffer from mental illness, *see infra* note 59 and accompanying text, identification of the fact that a mentally ill patient is mentally retarded may have important consequences for diagnosis and treatment.

53. Thus people of any level of intelligence may be mentally ill. However, most mentally retarded people are free of mental illness. *See infra* note 59 and accompanying text.

54. The consequences of the mental impairment, including deficits in adaptive behavior, may be ameliorated through education and habilitation. Therefore, it is not accurate to state categorically that mental retardation is "permanent" or "incurable." *See* AAMD, CLASSIFICATION IN MENTAL RETARDATION, *supra* note 40, at 15 ("The AAMD definition carries no connotation of chronicity or irreversibility and, on the contrary, applies only to levels of functioning.") (emphasis omitted); CURATIVE ASPECTS OF MENTAL RETARDATION: BIOMEDICAL AND BEHAVIORAL ADVANCES xiii (F. Menolascino, R. Neman, & J. Stark eds. 1983). *But cf.* Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954) (defining "mental defect" as "a condition which is not considered capable of either improving or deteriorating . . .").

55. *See, e.g.*, State v. Krol, 68 N.J. 236, 255, 344 A.2d 289, 299 (1975) (declaring unconstitutional a statute that required confinement of insanity acquittes until they were restored to reason). *But see* Jones v. United States, 463 U.S. 354, 361-70 (1983) (Constitution permits the government, on the basis of an insanity judgment, to confine an acquittee to a mental institution until he has regained his sanity).

56. *See infra* note 245; R. EDGERTON, MENTAL RETARDATION 3-4 (1979).

57. "Habilitation" is the term used by mental retardation professionals to describe the array and combination of services that mentally retarded people need to address their disabilities. The Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons (AC/MRDD) defines habilitation as "the process by which the staff of an agency assists individuals to acquire and maintain those life skills that enable them to cope more effectively with the demands of their

may result in needlessly protracted, possibly lifelong, confinement.[58]

Mental illness and mental retardation are not mutually exclusive conditions; some mentally retarded people are also mentally ill. Dr. Frank Menolascino has estimated that the incidence of mental illness among retarded people is approximately thirty percent.[59] Not only is the combined effect of their disabilities a burden,[60] but our service delivery systems frequently make no allowance for their needs. Mental retardation facilities often refuse to serve persons with the behavioral disorders these individuals may manifest, and mental illness facilities often lack any expertise or programming for the habilitation of mentally retarded persons.[61]

C. *The Incidence of Mental Retardation Among Criminal Defendants*

The mental retardation literature has addressed no other subject in criminal law as extensively as the incidence of retardation among criminal defendants and prisoners, and its implications regarding the "criminality" of mentally retarded people.[62] The pub-

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own persons and of their environments and to raise the levels of their physical, mental, and social functioning. Habilitation includes, but is not limited to, programs of formal, structured education and treatment." ACCREDITATION COUNCIL FOR SERVICES FOR MENTALLY RETARDED AND OTHER DEVELOPMENTALLY DISABLED PERSONS, STANDARDS FOR SERVICES FOR DEVELOPMENTALLY DISABLED INDIVIDUALS 21-22 (1984). The term has been used in numerous statutes and at least 150 reported American court cases. LEXIS Count (LEXIS search was designed to minimize the retrieval of all examples of the term outside the context of mental retardation and disability context). Legislatures and courts typically have adopted a definition identical or similar to AC/MRDD's. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 387, 395 (1972), *aff'd in part and remanded in part on other grounds sub nom.* Wyatt v. Aderholt, 503 F.2d 1305, 1312-13 (5th Cir. 1974); N.M. STAT. ANN. § 43-1-3(K) (1978 & repl. 1984). The Supreme Court used the term interchangeably with "training" in Youngberg v. Romeo, 457 U.S. 307, 316-19 (1982), but the words are not synonymous; "training" does not reflect adequately the other components of habilitation (including Nicholas Romeo's) such as physical therapy.

58. *See infra* notes 245-50 and accompanying text.

59. F. MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 126-27 (1977).

60. Individuals with both mental illness and mental retardation are often referred to as "dual diagnosis" clients. *See, e.g.*, HANDBOOK OF MENTAL ILLNESS IN THE MENTALLY RETARDED 10, 83-84 (F. Menolascino & J. Stark 1984).

61. F. MENOLASCINO, *supra* note 59, at 190 (1977).

62. *See, e.g.*, H. GODDARD, THE CRIMINAL IMBECILE: AN ANALYSIS OF THREE REMARKABLE MURDER CASES 106 (1915) ("[I]n the neighborhood of fifty percent of all criminals are feeble-minded."); McCarty, *Mental Defective and Criminal Law*, 14 IOWA L. REV. 401, 416 (1929) (25 to 50% of all prisoners were "feeble-minded"). A bibliography listed 210 publications on the subject through 1916. Crafts, *A Bibliography on the Relations of Crime and Feeble-Mindedness*, 7 J. CRIM L. & CRIMINOLOGY 544 (1916). One researcher has noted that approximately 500 studies have been published since Goddard's work in 1914: "No other single characteristic of the mental retardate has been so thoroughly studied, yet these investigations have failed to pro-

lished studies have produced widely disparate conclusions.[63] Many of these disparities can be explained by methodological factors.[64] The best modern evidence suggests that the incidence of criminal behavior among people with mental retardation does not greatly exceed the incidence of criminal behavior among the population as a whole.[65]

Although the early alarmist literature which proclaimed that mentally retarded people were naturally destined to become criminals — and in fact that mental retardation caused criminality — has been debunked, the question of a causal relationship has not been fully resolved. Monahan and Steadman, in their study of the epidemiology of crime and mental illness,[66] suggest an analysis of causation which may be a useful model in considering the parallel subject in mental retardation. They suggest that there are three possible paths that may link mental disorder (illness) to crime: mental disorder and crime may coexist without any causal relationship, mental disorder may predispose individuals toward criminality, or mental disorder may inhibit individuals from criminality.[67]

Applying this model to mental retardation, a striking difference between the two types of disabilities becomes clear. As with mental illness, mental retardation may coexist with criminality. It may also inhibit criminal behavior, as with a person who is profoundly retarded and so physically involved (disabled) that he requires assistance with every movement. But mental retardation

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vide conclusive evidence that intelligence level plays a role in delinquent and/or criminal behavior." F. MENOLASCINO, *supra* note 59, at 181.

63. *Compare* Brown & Courtless, *The Mentally Retarded in Penal and Correctional Institutions*, 124 AM. J. PSYCHIATRY 1164, 1166 (1968) (national average of about 10% with some states lower than 3%) *with* McCarty, *supra* note 62, at 416 (25 to 50% of all prisoners found to be "feeble-minded").

64. Early in this century, one authority observed that the statistics on retarded offenders were inflated by researchers counting only prisoners, thus failing to account for different rates of apprehension and parole at different levels of intelligence. The author then conducted her own study of the percentage of "feeble-minded" among criminals in Chicago and concluded that it was less than 10%. Bronner, *A Research on the Proportion of Mental Defectives Among Delinquents*, 5 J. CRIM. L. & CRIMINOLOGY 561, 568 (1914).

65. *See* Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Causal Link?*, 10 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 172 (J. Wortis ed. 1978) (an estimate of retarded persons in prisons may not reflect any greater propensity of the mentally retarded to commit crime than other segments of the general population); MacEachron, *Mentally Retarded Offenders: Prevalence and Characteristics*, 84 AM. J. MENTAL DEFICIENCY 165, 168 (1979) (prevalence rates for retarded offenders in Maine and Massachusetts were only slightly higher than the prevalence rate of mental retardation in the general population). *See generally* Santamour, *A Functional Discussion of Mental Retardation and Criminal Behavior*, in THE RETARDED OFFENDER, *supra* note 33.

66. Monahan & Steadman, *Crime and Mental Disorder: An Epidemiological Approach*, in 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 145 (M. Tonry & N. Morris eds. 1983).

67. *Id.* at 182. *See generally* Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 AM. J. PSYCHIATRY 593 (1985); Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCHOLOGIST 794 (1984) (suggesting that mentally ill persons are undergoing criminalization with adverse public policy consequences).

will rarely, if ever, cause criminality. Mental retardation is a learning deficiency rather than a thinking disorder; the irrationality, paranoia, and delusions that can indicate mental illness and which are related to criminality are not indicators of mental retardation.[68] But while direct causation can be ruled out, there are indirect consequences of mental retardation, including the iatrogenic effects on personality and behavior of living in dehumanizing institutions. These consequences may affect the interaction between the mentally retarded and the criminal justice system.[69]

D. Characteristics of People with Mental Retardation

Mentally retarded people are individuals. Any attempt to describe them as a group risks false stereotyping and therefore demands the greatest caution.[70] Nevertheless, some characteristics occur with sufficient frequency to warrant certain limited generalizations. Several of these traits have important implications for the

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68. However, mental illness and mental retardation can coexist in the same individual, and those mentally retarded people may have symptoms of mental illness associated with criminal behavior. *See supra* note 59 and accompanying text.

69. Two distinguished social scientists recently analyzed the relationship between crime and intelligence. Their review of the data, controlling for socioeconomic status and cultural and family background, suggests that the average IQ of offenders is approximately 92, eight points less than the average of the population (but not within the mental retardation range), and that deficits in verbal ability account for much of that difference. The data also suggest that offenders of lower intelligence commit different types of crimes than other offenders. Crimes such as forgery, embezzlement, and securities fraud are associated with higher IQs; impulsive crimes such as assault, homicide, and rape are associated with lower IQs; and property crimes and drug and alcohol related offenses are associated with offenders of average IQ. The scholars suggest several possible explanations for these relationships: more intelligent criminals are deterred by the risk of arrest and prosecution and thus choose lower risk crimes; less intelligent offenders have fewer internal controls and thus commit impulsive crimes that do not involve preparation, planning, and delayed achievement of the criminal goal; and less intelligent offenders do not usually have the skills or social contacts to enter settings in which crimes such as embezzlement could be committed. J. WILSON & R. HERRNSTEIN, CRIME AND HUMAN NATURE 148-72 (1985). *See also* Hirschi & Hindelang, *Intelligence and Delinquency: A Revisionist Review*, 42 AM. SOCIOLOGICAL REV. 571, 575 (1977) (the link between intelligence and crime is attributable to a person's experience in school); Edgerton, *Crime, Deviance and Normalization: Reconsidered*, in DEINSTITUTIONALIZATION AND COMMUNITY ADJUSTMENT OF MENTALLY RETARDED PEOPLE 145 (R. Bruninks, C. Meyers, B. Sigford & K. Lakin eds. AAMD Monograph No. 4 1981).

70. One author has commented:

> It is a typical observation in behavioral research that there is more variability within a group of mentally retarded persons than between retarded and non-retarded persons . . . . Mentally retarded people are not alike, because mental retardation is not an entity. It is a collection of well over 200 syndromes that have only one element in common: relative inefficiency at learning by the methods and strategies devised for other people to learn.

Haywood, *Reaction Comment*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 677 (1976). *See Edgerton*, *supra* note 69, at 145 (emphasizing the variation among retarded offenders).

criminal justice system, and therefore merit close attention to determine if they exist in an individual criminal case.

1. *Communication and Memory*

Many mentally retarded people have limited communication skills. The most seriously disabled persons have no expressive language and limited or no receptive language.[71] Therefore, it would not be unusual for a mentally retarded individual to be unresponsive to a police officer or other authority or to be able to provide only garbled or confused responses when questioned. Even when the mentally retarded person's language and communication abilities appear to be normal, the questioner should give extra attention to determining whether the answers are reliable. Several factors can influence the reliability of an answer. For example, many people with mental retardation are predisposed to "biased responding" or answering in the affirmative questions regarding behaviors they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited.[72] The form of a question can also directly affect the likelihood of receiving a biased response,[73] and thus police officers, judges, and lawyers may inadvertently or intentionally cause the susceptible mentally retarded accused person to answer in an inaccurate manner by asking a question in an inappropriate form.

Further, many mentally retarded persons are reluctant to resist questioners by refusing to answer questions that are beyond their ability.[74] Even when a person with mental retardation can verbalize effectively, memory will often be impaired. This is particularly true of events which the individual had not identified as important.[75] Because few mentally retarded people are able to de-

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71. "Expressive language" refers to an individual's ability to speak or otherwise communicate while "receptive language" refers to the ability to understand the communication of others.

72. *See, e.g.*, Rosen, Floor & Zisfein, *Investigating the Phenomenon of Acquiescence in the Mentally Handicapped: 1 Theoretical Model, Test Development and Normative Data*, 20 BRIT. J. MENTAL SUBNORMALITY 58, 58-68 (1974); *see generally* Sigdman, Budd, Stankel & Schoenrock, *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53 (1980).

73. Question types can be ordered in terms of difficulty along a continuum. An individual's ability to answer a certain type of question is directly related to the individual's intellectual ability. Thus, "yes-no" questions and choosing among pictures are simpler than "either-or" questions or the progressively more difficult multiple choice and open-ended questions. Sigelman, Winer & Schoenrock, *The Responsiveness of Mentally Retarded Persons to Questions*, 17 EDUC. & TRAINING MENTALLY RETARDED 120, 123 (1982). Although the "yes-no" questions are easiest for a retarded person to answer, the validity of the answer is so suspect, given the danger of response bias, that it has been suggested that questioners abandon the use of "yes-no" questioning techniques. Budd, Sigelman & Sigelman, *Exploring the Outer Limits of Response Bias*, 14 SOCIOLOGICAL FOCUS 297, 305-06 (1981).

74. In one study mentally retarded persons were asked for directions to their homes. Fifty-five percent of the sample gave directions which, although complete, proved inaccurate in significant ways. Kernan & Sabsay, *Getting There: Directions Given by Mildly Retarded and Nonretarded Adults*, in LIVES IN PROCESS: MILDLY RETARDED ADULTS IN A LARGE CITY (R. Edgerton ed. 1984).

75. *See, e.g.*, Luftig & Johnson, *Identification and Recall of Structurally Impor-*

termine what information might have legal significance for their case, spontaneous memory and cursory questioning cannot reliably ascertain all the facts.

2. *Impulsivity and Attention*

People with mental retardation are often described as impulsive or as having poor impulse control.[76] This characteristic appears to be related to problems in attention and thus involves attention span, focus, and selectivity in the attention process.[77] In the criminal justice system, deficits in attention or impulse control can have important implications in almost all steps from the commission of the offense through sentencing. The mentally retarded person might accompany perpetrators or actually commit a crime on impulse or without weighing the consequences of the act; when stopped by the police he might be unable to focus on the alleged crime or appreciate the gravity of his arrest; in trial preparation the individual would likely be similarly ineffective at focusing on the relevant aspects of the incident or attending to the task of assisting counsel; at trial the individual may appear deviously to steer away from certain lines of testimony or may appear obstinate when in fact his attention disability prevents him from responding appropriately. Similar problems may arise at each step of the judicial process.

3. *Moral Development*

Studies on the moral development of people with mental retardation reveal that some individuals have incomplete or immature concepts of blameworthiness and causation.[78] Some mentally retarded people will determine or assign guilt even when a situation

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tant Units in Prose by Mentally Retarded Learners, 86 AM. J. MENTAL DEFICIENCY 495, 501 (1982); *infra* note 77.

76. *See* AAMD, CLASSIFICATION IN MENTAL RETARDATION, *supra* note 40, at 16; PSYCHOLOGY OF EXCEPTIONAL CHILDREN AND YOUTH 513 (W. Cruickshank ed. 3d ed. 1971); Santamour & West, *The Mentally Retarded Offender: Presentation of the Facts and a Discussion of Issues*, in THE RETARDED OFFENDER, *supra* note 33, at 7, 18.

77. *See generally* C. MERCER & M. SNELL, LEARNING THEORY RESEARCH IN MENTAL RETARDATION 94-141 (1977).

78. The factors that appear to be related to moral development include intelligence, opportunity for interaction with others, living in an enriching environment, chronological age, and mental age. Boehm, *Moral Judgment: Cultural and Subcultural Comparison with Some Piaget's Research Conclusions*, 1 INT'L J. PSYCHOLOGY 143, 149-50 (1966); Boehm, *The Development of Conscience: A Comparison of American Children of Different Mental and Socioeconomic Levels*, 33 CHILD DEVELOPMENT 575, 590 (1962); Ozbek & Forehand, *Factors Influencing the Moral Judgment of Retardates*, 17 J. MENTAL DEFICIENCY RESEARCH 255, 259-60 (1973); Whiteman & Kosier, *Development of Children's Moralistic Judgments: Age, Sex, IQ, and Certain Personal-Experiential Variables*, 35 CHILD DEVELOPMENT 843, 843-44 (1964). *Cf. supra* note 20 and accompanying text (the earlier belief that mentally retarded people had "moral deficits" analogous to color-blindness).

is the result of an unforeseeable accident. The inability to distinguish between an incident which is the result of blameworthy behavior and an incident which results from a situation beyond the individual's control can have serious consequences. For example, a defendant with retardation may plead guilty to a crime which he did not commit because he believes that blame should be assigned to someone and he is unable to understand the concept of causation and his role in the incident.

Similarly, some people with mental retardation will eagerly assume blame in an attempt to please or curry favor with an accuser. This phenomenon of "cheating to lose" may give rise to unfounded confessions.[79]

4. *Denial of Disability*

Certain dimensions of self-concept and self-perception are also often affected by mental retardation. It is not uncommon for individuals with mental retardation to overrate their own skills, either out of a genuine misreading of their own abilities[80] or out of defensiveness about their handicap.[81] This tendency is evident in estimates by retarded people of their academic achievement, physical skill, and intellectual level.[82] It is therefore not surprising when a mentally retarded person brags about how tough he is or how he outsmarted a victim, when in fact, he accomplished neither feat. Overrating is probably closely tied to desperate attempts to reject the stigma of mental retardation. Many mentally retarded individuals expend considerable energy attempting to avoid this stigma.[83] In a similar vein, some mentally retarded people make ill-advised and damaging attempts to enhance their status or deny their disability in the courtroom.[84]

Given these characteristics, it should not be surprising that few

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79. *See, e.g.*, PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 33 (1967); Person, *The Accused Retardate*, 4 COLUM. HUM. RTS. L. REV. 239, 254 (1972). *See generally* Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W.L. REV. 365 (1981).

80. *See, e.g.*, Ringness, *Self-concept of Children of Low, Average, and High Intelligence*, 65 AM. J. MENTAL DEFICIENCY 453, 453 (1961).

81. *Cf.* Cleland, Patton & Seitz, *The Use of Insult as an Index of Negative Reference Groups*, 72 AM. J. MENTAL DEFICIENCY 30, 33 (1967) (the most common insults used by people with mental retardation relate to intelligence, indicating that denial of their intellectual limitations is a nearly universal defense).

82. *See, e.g.*, Bialer, *Emotional Disturbance and Mental Retardation: Etiologic and Conceptual Relationships*, in PSYCHIATRIC APPROACHES TO MENTAL RETARDATION 68, 79 (F. Menolascino ed. 1970).

83. For example, in one study individuals institutionalized for mental retardation attempted to conceal the reason for institutionalization with "tales" of "mental illness," "nerves," and even "criminal offenses." R. EDGERTON, THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED 148 (1967). *See generally* J. DUDLEY, LIVING WITH STIGMA: THE PLIGHT OF THE PEOPLE WHO WE LABEL MENTALLY RETARDED (1983).

84. *See, e.g.*, Tyars v. Finner, 709 F.2d 1274, 1277 (9th Cir. 1983). During involuntary commitment proceedings the retarded respondent began to punch the air and yell "pow, pow" when he heard the incriminating testimony on his alleged aggressiveness. *Id.*

people with mental retardation identify themselves as disabled when arrested or at any other point in the criminal justice system. In fact, many of these individuals will go to great lengths to hide their disability.[85]

5. *Lack of Knowledge of Basic Facts*

The very nature of the cognitive deficits inherent in the classification of a person as mentally retarded means that most individuals with mental retardation will know less than most people without mental retardation.[86] This knowledge deficit is often aggravated by the special education curriculum for mentally retarded children, which is less informative than the regular curriculum. Special education students will often be excluded from certain classes and activities that teach general knowledge about the world, in order to focus more time and attention on learning basic skills or participating in vocational training.[87] For example, while other students are learning the concepts and vocabulary of civics and social studies, students with mental retardation may instead receive extended instruction in reading or engine assembly. Although special curricula are necessary for most mentally retarded students, their exclusion from certain courses is not without cost.

6. *Motivation*

Many people with mental retardation appear to be less motivated toward the mastery of problems than people of normal intelligence. The general desire to be effective at life's tasks, a strong motivator for mentally typical people, fails to motivate most mentally retarded people in the same way.[88]

However, the desire to please authority figures does appear to be a powerful motivator. Many persons with mental retardation, especially those who have experienced institutionalization, have a particular susceptibility to perceived authority figures and will

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85. Incarcerated mentally retarded offenders have been described as "clever in masking their limitations." Santamour & West, *supra* note 76, at 18.

86. At least four of the twelve subtests found in the commonly used Wechsler Intelligence Scale-Revised are designed to assess vocabulary, information, similarities, and comprehension. Thus, an IQ score indicating mental retardation will almost always mean that the person has deficits in each of these areas. D. WECHSLER, WECHSLER'S MEASUREMENT AND APPRAISAL OF ADULT INTELLIGENCE (5th ed. 1972).

87. *See, e.g.*, Brown, Branston-McClean, Baumgart, Vincent, Falvey & Schroeder, *Using the Characteristics of Current and Subsequent Least Restrictive Environments in the Development of Curricular Content for Severely Handicapped Students*, 4 AM. ASS'N FOR THE EDUC. OF THE SEVERELY AND PROFOUNDLY HANDICAPPED REV. 407, 408-09 (1979).

88. *See, e.g.*, Harter & Zigler, *The Assessment of Effectance Motivation in Normal and Retarded Children*, 10 DEVELOPMENTAL PSYCHOLOGY 169, 178-80 (1974).

seek the approval of these individuals even when it requires giving an incorrect answer.[89] Such "outer-directed" behavior suggests that many people with mental retardation will be particularly vulnerable to suggestion, whether intentional or unintentional, by authority figures or high-status peers.

The phenomenon of "learned helplessness," or "fatalistic passivity," has also been reported in people with mental retardation.[90] This characteristic resignation has been attributed to the experiencing of repeated failures and the tendency among mentally retarded people to attribute their failures to uncontrollable factors.

III. Criminal Responsibility of Retarded Defendants

A. The Defense of Mental Nonresponsibility[91]

The relevance of mental retardation to criminal responsibility has been debated for centuries.[92] Established authorities have long accepted that an "idiot" cannot be convicted of a criminal offense.[93] The principal points of contention have centered around the definition of the level of disability sufficient to constitute "idiocy,"[94] and the legal relevance of lesser degrees of disability.

Courts have consistently held that mental retardation must be almost totally disabling to constitute a defense to accusations of crime.[95] In the famous early eighteenth century case of *Rex v.*

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89. *See, e.g.*, Harter, *Mental Age, IQ and Motivational Factors in the Discrimination Learning Set Performance of Normal and Retarded Children*, 5 J. EXPERIMENTAL CHILD PSYCHOLOGY 123, 137-38 (1967).

90. *See, e.g.*, DeVellis, *Learned Helplessness in Institutions*, 15 MENTAL RETARDATION 10 (Oct. 1977); Weisz, *Learned Helplessness and the Retarded Child*, in MENTAL RETARDATION: THE DEVELOPMENTAL-DIFFERENCE CONTROVERSY 27 (E. Zigler & D. Balla eds. 1982).

91. Mental nonresponsibility is commonly referred to as "insanity." *See infra* text accompanying notes 138-40.

92. *See supra* notes 9-30 and accompanying text.

93. *See, e.g.*, 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *24: "The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, *viz.* in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is that "*furiosus furore solum punitur.*" In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself." *Id. Accord* M. DALTON, THE COUNTREY JUSTICE 223 (1619) ("If one that is *non compos mentis*, or an ideot, kill a man, this is no felony; for they have no knowledge of good and evill, nor can have a felonius intent, nor a will or mind to doe harm . . . .").

94. "[Imbecility] differs from idiocy in the circumstance that while in the latter there is an utter destitution of every thing like reason, the subjects of the former possess some intellectual capacity, though infinitely less than is possessed by the great mass of mankind." I. RAY, *supra* note 13, at 65. The exculpation of severely and profoundly retarded persons never engendered much controversy. "The general principles that determine the legal relations of idiocy are so obvious, and the fact of its existence so easily established that little occasion has been afforded for doubt or diversity of opinion." *Id.* at 78.

95. *Cf.* Ellis, Tort Responsibility of Mentally Disabled Persons, 1981 AM. BAR FOUND. RESEARCH J. 1079, 1092-96 (discussing mental disability in the context of the defense of contributory negligence).

Arnold,[96] the English court of Common Pleas formulated what came to be known as the "wild beast" test: "it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment."[97]

More than a century later, the House of Lords created the most famous and long-lasting definition of those mentally disabled people who are entitled to exculpation. The *M'Naghten* test[98] was phrased in terms of "a defect of reason, from disease of the mind."[99] There remained some uncertainty as to whether it was meant to include defendants whose incapacity resulted from mental deficiency.[100] However, since "idiocy" and "imbecility" were at that time universally viewed as forms of insanity, there is little doubt they were both understood to be within the formulation.[101] Almost immediately, courts incorporated the "right from wrong" test into jury instructions where the claim was that the defendant "was of very weak intellect."[102]

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96. 16 How. St. Tr. 695 (1724). *See* 1 N. WALKER, *supra* note 11, at 52-57 (1968) (discussing the case in historical context).

97. 16 How. St. Tr. at 765. It should be noted that the *Arnold* case involved a defendant who claimed to be mentally ill rather than mentally retarded. "[T]hey admit he was a lunatic, and not an ideot. A man that is an ideot, that is born so, never recovers, but a lunatic may, and hath his intervals; and they admit he was a lunatic." *Id.*

98. Daniel M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843). On the antecedents of M'Naghten using the right from wrong distinction, see Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227 (1966).

99. *Id.* at 722. *See* R. MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTON (1981) (an investigation into the political nature of the crime and the verdict); DANIEL MCNAUGHTON: HIS TRIAL AND THE AFTERMATH (D. West & A. Walk eds. 1977) (a compilation of commentaries on the historical, medical, and legal consequences of the decision); 1 N. WALKER, *supra* note 11, at 84-103, *see also* Diamond, *On the Spelling of Daniel M'Naghten's Name*, 25 OHIO ST. L.J. 84 (1964).

100. *See, e.g.*, State v. Palmer, 161 Mo. 152, 172, 61 S.W. 651, 657 (1901) ("Mental disorders cannot be regarded as evidence of insanity which will confer legal irresponsibility for crime, however, unless they are caused by or result from disease or lesion of the brain. . . . Thus, mere weakness of mind does not excuse crime, nor will bad education or bad habits, nor the fact that a person is of a low order of intellect . . . .").

101. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 447 (2d ed. 1961).

102. R. v. Higginson, 174 Eng. Rep. 743 (1843); *cf.* R. SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 93 (1981) (suggesting that the execution of Higginson despite evidence of his "imbecility" may have represented an attempt to tighten the defense in the wake of *M'Naghten*, and thus reduce public criticism).

A similar result had been reached earlier in this country by Justice Story, sitting as Circuit Judge, in United States v. Cornell:

> There is no pretence to say, that the prisoner is in any legal or accurate sense, deficient in understanding. It was proved by all the witnesses, by his own witnesses, it was admitted by his counsel, that he was compos mentis, having intelligence to discern what was right and what was wrong. All that was suggested was, that he was more ignorant and somewhat

Subsequent litigation focused on whether a defendant was sufficiently retarded to be held unable to distinguish right from wrong. Numerous courts have held evidence of mental retardation[103] insufficient to justify an acquittal, or in some cases, even to warrant a jury instruction on insanity.[104] The only point of disagreement involved claims that a retarded adult defendant had a "mental age"[105] equivalent to that of a child incapable of committing a crime.[106]

Surprisingly, the debate about the analogy between mental deficiency and the criminal law's treatment of children began before the development of intelligence tests and the subsequent popularity of the notion of "mental age." Justice Seymour's charge to the jury in *State v. Richards*[107] relied upon the comparison drawn by Lord Hale between infants and "imbeciles:" "[I]nasmuch as children under fourteen years of age are prima facie incapable of crime, imbeciles ought not to be held responsible criminally unless of capacity equal to that of ordinary children of that age."[108]

> more stupid than common men, of bad education, and bad passions, and bad habits. Now these are precisely the common causes of crimes; but certainly they form no legal excuse or justification for the commission of them.

25 F. Cas. 650, 657 (D.R.I. 1820) (No. 14,868).

103. Mental retardation appears to have been often described by the phrase "weak minded." Ambiguities in 19th century terminology of mental disability make it impossible to be certain whether all such cases involved mental retardation. At least in England, it was not uncommon for persons whose behavior was viewed as eccentric and morally unacceptable to be labelled as "weak minded," or even as "idiots" or "imbeciles," without a suggestion that the person was mentally deficient. R. SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 116 (1981).

104. *E.g.*, State v. Pinski, 163 S.W.2d 785, 788 (Mo. 1942); Wartena v. State, 105 Ind. 445, 450, 5 N.E. 20, 23 (1886); State v. Johnson, 233 Wis. 668, 674, 290 N.W. 159, 162 (1940); Craven v. State, 93 Tex. Crim. 328, 247 S.W. 515, 517 (1923). *See* H. WEIHOFEN, *supra* note 30, at 120 n.4 (1954) (listing cases); Annot., 44 A.L.R. 584 (1926).

Some states had statutes which provided that "idiots" were incapable of committing crimes. H. WEIHOFEN, *supra* note 30, at 50 n.1. But courts uniformly held that this did not create a defense broader than that provided by the locally adopted test for insanity. *See, e.g.*, Singleton v. State, 90 Nev. 216, 522 P.2d 1221, 1223 (1974) (even when there was expert testimony that defendant's IQ fell within the professionally accepted definition of an "idiot," the appropriate test was still *M'Naghten*).

105. "Mental age" is a means of describing the severity of a mentally retarded person's disability. The concept was invented by Alfred Binet, one of the creators of the earliest intelligence tests. The concept of mental age represents an attempt to compare the intellectual functioning of the individual being tested with the performance of mentally typical (nonretarded) people. Thus, a child with a chronological age of 12 may receive a similar score on an IQ test to a nonretarded child who is six years old, and therefore be said to have a mental age of 6. This is accomplished by identifying for each question or item on an IQ test the age level at which most children typically can answer the question successfully. *See* N. ROBINSON & H. ROBINSON, THE MENTALLY RETARDED CHILD 340-42 (2d ed. 1976).

106. *See* Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426, 438-53 (1939).

107. 39 Conn. 591 (1873).

108. *Id.* at 594. Defendant, described as "considerably below par in intellect" but "not a mere idiot," was charged with burning a barn. *Id.* at 592. The prosecution's witnesses are said to have described him as "inferior in intellect to children ten years of age," while defense witnesses stated that "they are acquainted with many children of six years who are his superiors in mental capacity." *Id.* at 594. In applying the analogy, Justice Seymour charged the jury to be careful of the imperfection of the comparison "between the healthy and properly balanced, though immature, mind of a

The *Richards* case has been severely criticized[109] and its approach has not been followed in subsequent cases.[110] Following the popularization of intelligence tests early in this century, defendants frequently sought to use the "mental age" component of test results to seek exculpation based on analogy to the legal rules governing children whose chronological age compared with the defendant's mental age. These attempts were universally unsuccessful.[111] The courts held that there was not full equivalence between a child and a mentally disabled adult, and resisted a doctrine which might have resulted in successful defenses for substantial numbers of defendants.[112]

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child, and the unhealthy, abnormal and shrivelled intellect of an imbecile." *Id.* The instruction also asserted the relevance of the defendant's life-long confinement in alms-houses, suggesting that this constraining background had an impact on his ability to control his own impulses: "He has, it appears, been seldom left to the free guidance of his own judgment." *Id.* at 595. Justice Seymour concluded by instructing the jury to specify if their acquittal was

> on the ground of want of mental capacity . . . in order that the prisoner may in that event have the benefit under our statute of a home where he will be kindly cared for, but kept under such restraints as to prevent his doing injury to the persons or property of others.

Id.

109. *E.g.*, H. WEIHOFEN, *supra* note 30, at 193 n.77. *But see* S. GLUECK, MENTAL DISORDER AND CRIMINAL LAW 196-97 (1925) (feebleminded adults with a mental age of seven to fourteen should enjoy a rebuttable presumption of innocence when pleading not guilty by reason of insanity).

110. *See* H. WEIHOFEN, *supra* note 30, at 39, 193 n.78.

111. A typical case was State v. Schilling, 95 N.J.L. 145, 148, 112 A. 400, 402 (1920), in which a 28-year-old man was said to have a mental age of 11:

> There is a vast difference between a child at the age of 11 years and that of a man of 28, and while perhaps there is a presumption that an infant of tender years is incapable of committing a crime, that presumption does not extend to one of advanced years, requiring the state to rebut it . . . . The presumption of the lack of power of thought and capacity in favor of a child is due more to the number of years he has lived than to the character of the development of his mind, . . . but that reason does not apply when he comes to manhood.

Id. at 402. *See also* Chriswell v. State, 171 Ark. 255, 258, 283 S.W. 981, 983 (1926) ("where an adult person has the intelligence of a child from 7 to 9 years of age, that fact alone cannot be made the test [of insanity]"); People v. Marquis, 344 Ill. 261, 176 N.E. 314 (1931) (subnormal mentality is not a defense to a crime unless it renders the accused unable to distinguish right from wrong). *Cf.* Commonwealth v. Stewart, 255 Mass. 9, 151 N.E. 74 (1926) (defendant unsuccessfully objected to testimony that a person with a mental age of 13 could be capable of first degree murder); State v. Kelsie, 93 Vt. 450, 452, 108 A. 391, 392 (1919) (defense counsel's attempt to ask expert witness whether 33-year-old defendant would qualify as an imbecile was rejected because the expert had already testified that "the accused was mentally and morally an 8-year old boy"); Annot., 44 A.L.R. 584, 586 (1926) (a comparison of chronological with mental age when defining subnormal mentality is not, without more, a defense to a crime).

112. *E.g.*, *In re* Ramon M., 22 Cal. 3d 419, 429-30, 584 P.2d 524, 531, 149 Cal. Rptr. 387, 394 (1978) ("Approximately 16% of the adult population and a much higher percentage of adolescents between ages 14 and 18 have mental ages below 14 years. Under defendant's proposed interpretation . . . all such persons would be presumed incapable of committing crimes."). *Cf.* Commonwealth v. Szachewicz, 303 Pa. 410, 154

In the last three decades, the few reported judicial opinions addressing the criminal responsibility of mentally retarded individuals have focused on the relationship between modern formulations of the test for insanity and the disabilities of the defendants. In *Durham v. United States*,[113] dissatisfaction with the perceived harshness of the *M'Naghten* test led the United States Court of Appeals for the District of Columbia to formulate a new test that created a defense for acts which were the "product of mental disease or defect."[114] The definition of the disabilities entitling a defendant to this defense was extremely significant. Recognition of a retarded defendant's mental condition as a "mental defect" would be outcome-determinative under this test where that condition was held to have "produced" the criminal behavior. In *Durham*, the court used "disease" to signify a condition capable of improving or deteriorating. "Defect" signified a permanent condition, either congenital, the result of an injury, or the residual effect of mental or physical disease.[115]

Eight years later, the same court warned that this passage in *Durham* had not been intended to define the terms, but rather to differentiate between the two kinds of disabilities. In *McDonald v. United States*,[116] the court ruled that the definitions were to come from the judiciary; factfinders were not bound by ad hoc definitions formulated by experts.[117] Therefore, the court ruled, juries should be instructed that "a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."[118] This meant that definitions by mental disability professionals, such as the AAMD's definition of mental retardation, would not be dispositive on the issue of criminal responsibility. The court retained the authority to define "mental defect" more narrowly (or more broadly) than mental retardation professionals, basing the choice on jurisprudential rather than clinical considerations.[119]

A. 483, 484-85 (1931) (related doctrine of partial responsibility "would turn loose on society a class of dangerous citizens, who, because of their legalized immunity, would prey on other members of society without much restraint.") Similarly, an early adherent of more lenient doctrinal treatment of retarded defendants insisted that those acquitted receive "*absolutely indeterminate* incarceration" in a special institution or colony. S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 385 (1925) (emphasis in original).

113. 214 F.2d 862 (D.C. Cir. 1954).

114. *Id.* at 874-75.

115. *Id.* at 875.

116. 312 F.2d 847 (D.C. Cir. 1962).

117. *Id.* at 851. "A psychiatrist's determination of 'a mental disease or defect' for clinical purposes . . . may or may not be the same as the jury's purpose in determining criminal responsibility." *Id.*

118. *Id.*

119. *Id.* In the *McDonald* decision, the court required more than the results of intelligence testing to warrant sending the issue of insanity to the jury. *Id.* at 850. An IQ score of 68 standing alone was not evidence of a mental defect sufficient to invoke the *Durham* charge. The court concluded that where "other evidence of mental abnormality appears, in addition to the IQ rating, . . . the instruction should be given."

The *Durham* test was not adopted by any other jurisdiction and after two decades even the Court of Appeals for the District of Columbia replaced it because its reliance on expert testimony regarding causation of criminal behavior was perceived to be unworkable.[120] The abandonment of the *Durham* rule shifted the debate to the meaning and relative merits of the *M'Naghten* test and that of the American Law Institute's [ALI] Model Penal Code. The latter test provides: "A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."[121]

Courts employing the ALI's test have held that the term "mental defect" includes mental retardation.[122] The precise contours of the definition of "mental defect" are less significant under the ALI's test than under *Durham;* under the ALI's test, a finding of mental defect is only a prerequisite to determining whether the defendant could appreciate criminality or conform his conduct.

The American Bar Association's *Mental Health Standards* reject the ALI's test and recommend a modified version of the *M'Naghten* test: "[A] person is not responsible for criminal conduct if at the time of such conduct, and as a result of a mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct."[123] Mental defect is defined to include

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Id. Thus a score within the upper range of the professional definition of mental retardation required corroborative evidence (in this case involving only conclusory testimony) to warrant jury consideration of an insanity defense.

120. United States v. Brawner, 471 F.2d 969, 973, 980 (D.C. Cir. 1972). For a relatively recent compilation of the insanity defense tests used by the various states, see Favole, *Mental Disability in the American Criminal Process: A Four Issue Survey*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 247, 257-69 (J. Monahan & H. Steadman eds. 1983) [hereinafter cited as Favole].

121. MODEL PENAL CODE § 4.01 (1985).

122. *E.g., In re* Ramon M., 22 Cal. 3d 419, 427-28, 584 P.2d 524, 529-30, 149 Cal. Rptr. 387, 394 (1978); United States v. Shorter, 343 A.2d 569, 572 (D.C. 1975).

123. MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.1(a). The test contained in this standard is similar to the new federal test for insanity enacted by Congress in 1984:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Act of Oct. 12, 1984, Pub. L. No. 98-473, § 402(a), 98 STAT. 2057 (1984) (to be codified at 18 U.S.C. § 20). The principal difference between the ABA's standard and the new federal test is the latter's inclusion of the adjective "severe" to modify mental disease or defect. The legislative history indicates that the drafters were concerned with the severity of mental illness, rather than mental retardation:

> The concept of severity was added to emphasize that non-psychotic behavior disorders or neuroses such as an "inadequate personality," "immature

mental retardation "which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense."[124]

The principal difference between the ALI's test, which had previously been endorsed by the ABA,[125] and the new standard is the omission of the so-called "volitional prong." Thus, under the *Mental Health Standards*, a defendant would not be exculpated if a mental disease or defect prevented him from conforming his conduct to the law's requirements. The ABA committee's argument for this change exclusively involves mental illness, suggesting that in practice the volitional test is often combined with vague or broad definitions of "mental illness." The mixture of "these two imprecise notions results in expert opinions regarding the psychological causes of criminal behavior which strain the public's credulity and offend moral sentiments, especially in cases involving defendants with personality disorders, impulse disorders, or some other diagnosable abnormality short of a clinically recognized psychosis."[126]

There are two separate contentions in this rationale. The first is that mental illness constitutes an "imprecise notion," fraught with definitional and diagnostic fuzziness. This is somewhat less true of mental retardation, for which a uniform definition is more generally accepted and for which the methodologies of diagnosis and

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personality," or a pattern of "antisocial tendencies" do not constitute the defense.

S. REP. NO. 225, 98th Cong., 2d Sess. 229, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 341.

124. MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.1(b). The commentary to this standard notes:

> it is not possible to state, in the abstract, that a certain level of retardation (e.g., severe, as opposed to moderate or mild) would or would not cross the threshold [to warrant exculpation]. To impose such limitations would take insufficient account of both the continuing imprecision of the diagnostic process and the unique features of each individual's disorder.

Id. commentary at 334. The drafters clearly did not intend that a defendant should be entitled to a finding that he had a "mental defect" merely by proving that he was mentally retarded under the AAMD's definition; rather, the standard contemplates those with "mental defect" as a smaller subclass. Nevertheless, it is difficult to imagine a retarded defendant whose retardation did not "substantially affect [his] mental or emotional process . . . at the time of the offense." *Id.* 7-6.1(b). The AAMD's definition requires "significantly subaverage intellectual functioning" and "deficits in adaptive behavior." AAMD, CLASSIFICATION AND MENTAL RETARDATION, *supra* note 40, at 1. It is not clear what purpose is served by requiring courts to determine whether such an individual's thought processes were "substantially affected" at the time of the offense. The requirement may represent an inappropriate attempt to treat mental retardation in strict parallel with mental illness, where a threshold of severity is warranted. A preferable approach would provide that all mentally retarded defendants have a "mental defect" for purposes of the insanity defense. The only remaining step to determine responsibility would inquire whether the retardation rendered the defendant unable to appreciate the wrongfulness of his conduct.

125. *See* MENTAL HEALTH STANDARDS, *supra* note 4, Part VI introduction at 318.

126. *Id.* 7-6.1 commentary at 327-36. A leading advocate for the ABA's omission of the volitional prong has asserted that "[t]he volitional inquiry probably would be manageable if the insanity defense were permitted only in cases involving psychotic disorders." Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983). *Cf. supra* note 123.

testing are somewhat more objective. The second component of the committee's explanation is that the general public finds the notion of "irresistible impulse" implausible in those defendants capable of appreciating the wrongfulness of their conduct. This contention may be equally true for mentally ill and mentally retarded defendants. Popular tolerance may not be much greater for claims that retardation impaired impulse control than for assertions that mental illness did so.

While the public credulity about irresistible impulses may be the same for both kinds of disability, the omission of the volitional prong of the insanity defense may have a particular impact on retarded defendants. As discussed previously, a common characteristic of many mentally retarded people is a reduced ability to control impulses.[127] This trait may have its roots in the cognitive impairment that leads to reduced intellectual functioning. The ability to control impulsive behavior is related to the ability to understand both the nature of behavior and the social circumstances that make an action appropriate or inappropriate to a particular occasion. Thus, to some extent, impulsivity may reflect an educational deficit, because proper teaching can equip most retarded persons to tailor their actions to social expectations. This deficit is particularly common in people who have been institutionalized.[128] There should be considerable discomfort with the prospect of punishing retarded individuals whose ability to control their impulses is underdeveloped or atrophied, in part, as an iatrogenic consequence of state action.[129]

Other features of the *Mental Health Standards'* formulation of the insanity defense are also noteworthy. By explicitly including mental retardation within the definition of mental defect, the *Mental Health Standards* reject the argument that the insanity defense should be unavailable to mentally retarded people who are

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127. *See supra* notes 76-77 and accompanying text.

128. This phenomenon has long been observed:

> The history of the prisoner's life is somewhat significant. From early childhood it has been spent in alms-houses, subjected to constant constraint. In the most ordinary acts of his life he has been governed by the superior will of others to whose care he has been committed. He has, it appears, been seldom left to the free guidance of his own judgment. When so left, he seems to have acted without forecast, under the pressure of immediate wants and impulses.

State v. Richards, 39 Conn. 591, 595 (1873).

129. It is not our contention that the existence of retarded individuals with impairments in their ability to control their behavior should dictate the choice between the ALI's test and that of the *Mental Health Standards*. However, the appropriate treatment of these defendants should be one factor in deciding to abandon the volitional component of the insanity defense. In those jurisdictions that retain the volitional component, courts should be aware of these factors in deciding the individual cases of retarded defendants who assert the defense.

not also mentally ill. The ABA Commission on the Mentally Disabled recently published a proposed model statute which took this approach.[130] This statute provides that "[d]efendants who have a developmental disability but who do not also have a mental illness are not entitled to assert a defense that they are not guilty by reason of insanity. . . ."[131] The comment to this section of the model statute argues that developmental disabilities (including mental retardation) present issues of criminal responsibility which are more appropriately addressed in the context of the doctrine of "diminished capacity."[132] Subsequent sections of the statute provide for a verdict of acquittal by reason of diminished capacity, and an accompanying set of procedures for evaluation and commitment[133] of those so acquitted. The approach taken by the *Mental Health Standards* is preferable to that of the model statute. Arguments can be made for abolishing the insanity defense entirely, and relying, instead, solely upon the requirement of mens rea for exculpation of the mentally disabled.[134] Nevertheless, abolishing the insanity defense for mentally retarded defendants and leaving it in place for mentally ill defendants would create a serious inequity; the inability to appreciate the wrongfulness of criminal conduct would exculpate a person who was mentally ill, but would not exculpate a mentally retarded person. No principled reason has been advanced for the differential treatment of these two similarly situated groups of defendants, each of whom is equally "innocent" of responsibility for his conduct.[135]

Another feature of the *Mental Health Standards* is the use of the term "appreciate" instead of "know" in the formulation of the defense. The commentary states that this choice parallels that of the drafters of the ALI's test for the cognitive component of their formulation, and reflects the view that a responsibility test should go beyond a defendant's "superficial intellectual awareness;" the

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130. MODEL DEVELOPMENTALLY DISABLED OFFENDERS ACT, *supra* note 8, §§ 1-4.

131. *Id.* § 10(1).

132. *Id.* § 10(2), (3). It should be noted that the *Mental Health Standards* provide for the admissibility of evidence of mental condition relevant to the issue of mens rea. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.2 commentary at 341.

133. MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT, *supra* note 8, § 10(1)-(4). The act avoids the use of the term "commitment" and opts for the euphemism of "provision of habilitation services on an involuntary basis." *Id.* § 10(6)(b).

134. *See, e.g.*, Idaho Code § 18-207 (1982). *But see* MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.1 commentary at 334; *Limiting The Insanity Defense: Hearings on S. 818, S. 1106, S.1558, S. 1995, S. 2572, S. 2658, and S. 2669 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 255, 269-75 (1982) (statement of Professor Richard Bonnie); MODEL PENAL CODE, § 4.01 commentary at 180-86 (1985).

135. Other commentators also have suggested that the insanity defense is inappropriate for retarded defendants, but these suggestions appear to be based, in part, on practical considerations concerning subsequent confinement. S. HAYES & R. HAYES, SIMPLY CRIMINAL 165 (1984) (the authors suggest that under the Australian system, because a retarded person will not "recover" from his retardation, the insanity defense is inappropriate); *see also* S. HAYES & R. HAYES, MENTAL RETARDATION: LAW, POLICY AND ADMINISTRATION 406 (1982) (arguing that the principle of normalization requires that mentally retarded people should receive no special doctrinal treatment on the basis of their disability).

focus of the inquiry into criminal responsibility should not be limited, as the term "know" might suggest, to a defendant's limited understanding of the law or prevailing morality. Instead, the test for criminal responsibility should take into account all aspects of the defendant's mental and emotional functioning which relate to the ability to recognize and understand the significance of one's actions.[136]

Although this shift in terminology is relevant to the mental condition of some mentally ill defendants, it is particularly important in cases involving mental retardation. When a retarded defendant's understanding of the wrongfulness of his conduct is in question, it is often a "lack of appreciation for the subtleties of social interaction and abstract concepts of right and wrong that impair his behavior."[137] Identifying the issue as the retarded defendant's ability to "appreciate" the wrongfulness of his conduct allows the trier of fact to focus more realistically on the defendant's actual understanding than does the more ambiguous "knowledge" formulation.

Finally, it should be noted that the label which the *Mental Health Standards* assign to the defense, "mental nonresponsibility" rather than "insanity," is a felicitous choice for cases involving mental retardation. The commentary argues that the newer term is preferable because " 'insanity' carries with it too much stigmatizing baggage and . . . conjures up visions from an earlier era."[138] In addition to "conjur[ing] up visions of beastlike derangement,"[139] "insanity" also connotes a mental illness or disease, which is inapplicable to mental retardation.[140] Therefore, the term "mental nonresponsibility" has the additional virtue of eliminating the confusion as to whether retarded defendants who are not mentally ill are entitled to assert the defense.

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136. MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.1 commentary at 330-35; *see also* MODEL PENAL CODE § 4.01 commentary at 178-80 (1985) (stating that the inquiry should focus on "whether the defendant was without capacity to conform his conduct to the requirements of law").

137. Tupin & Goolishian, *Mental Retardation and Legal Responsibility*, 18 DE PAUL L. REV. 673, 677 (1969); *see Empirical Study: The Mentally Retarded Offender in Omaha-Douglas County*, 8 CREIGHTON L. REV. 622, 646 (1975) (arguing that, although mentally retarded persons may be able to distinguish right from wrong in the abstract, they have difficulty applying the abstract concepts to specific factual settings). *See generally* Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 573 (1972) (discussing Piaget's theories of abstract thinking and moral development).

138. MENTAL HEALTH STANDARDS, *supra* note 4, ch.7 introduction at 5.

139. *Id.* part VI introduction at 316.

140. The stigmatizing aspects of the label "insane" may be felt in a particularly acute manner by mentally retarded people and their families. *Cf.* S. HAYES & R. HAYES, SIMPLY CRIMINAL 69 (1984) ("The aims of the criminal process . . . [cannot] be fulfilled adequately or appropriately while mentally retarded offenders remain categorised as 'insane' ").

B. *Guilty But Mentally Ill*

Dissatisfaction with the perceived leniency of the insanity defense has led a number of states to adopt statutes providing an alternative verdict of "guilty but mentally ill."[141] The momentum for adoption of these laws appears to have increased following the insanity acquittal of John Hinckley, Jr.[142] The guilty-but-mentally-ill statutes typically provide for the alternative verdict to be offered in jury instructions in cases in which the defendant has raised the defense of insanity.[143] The *Mental Health Standards* unequivocally recommend that states refuse to adopt this verdict.[144]

The ABA's criticism of these statutes is based on the belief that they may prove confusing to juries and thus result in compromise verdicts or otherwise deny an acquittal to a mentally nonresponsible defendant with meritorious defenses.[145] The commentary does not discuss the extent to which these statutes affect mentally retarded defendants or the meaning and impact of the alternative verdict in mental retardation cases.

Initially, it appears that the very formulation of the "guilty but mentally ill" verdict would make it inapplicable to mentally retarded defendants who were not also mentally ill. Although "insanity" has become a legal term whose meaning is sufficiently flexible to encompass defendants who are mentally retarded,[146] "mental illness" appears unambiguously to exclude those who are not mentally ill. But some of the guilty-but-mentally-ill statutes are not so clear.

Michigan's law, the first to be enacted, is typical in its confusing treatment of mentally retarded defendants. It provides that a defendant can be found guilty but mentally ill if he raises the defense of insanity, which can be based on mental retardation,[147] and

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141. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.10(b) commentary at 386-88. For a general discussion of the guilty-but-mentally-ill verdict, see also Hermann & Sor, *Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittees*, 1983 B.Y.U. L. REV. 499; Stelzner & Piatt, *The Guilty But Mentally Ill Verdict and Plea in New Mexico*, 13 N.M.L. REV. 99 (1983); Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URB. L. 471 (1976). *See generally* Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 (1985).

142. *See* George, *The American Bar Association's Mental Health Standards: An Overview*, 53 GEO. WASH. L. REV. 338, 345-46 (1985).

143. In New Mexico the court delivers the guilty-but-mentally-ill instruction upon the defendant's claim that he lacked the mens rea necessary for the offense, even if the defendant's request for an insanity instruction is denied by the trial court. State v. Page, 100 N.M. 788, 791, 676 P.2d 1353, 1356 (Ct. App. 1984).

144. MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.10(b).

145. *Id.* commentary at 386-88. Michigan's experience suggests that the introduction of the verdict does not reduce insanity acquittals, and that the majority of guilty-but-mentally-ill verdicts result from defendants' pleas. Project, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REF. 77, 100-04 (1982).

146. *See supra* note 122 and accompanying text.

147. People v. Gasco, 119 Mich. App. 143, 144, 326 N.W.2d 397, 398 (1982).

the trier of fact finds he "was mentally ill at the time of the commission of that offense."[148] This would appear to make the verdict unavailable when the defendant's insanity defense was based solely on evidence of mental retardation. However, a subsequent section provides that a defendant found guilty but mentally ill shall be evaluated by the department of corrections "and be given such treatment as is psychiatrically indicated for his mental illness *or retardation*."[149] Other states define "mental illness" for purposes of the guilty-but-mentally-ill defense to include mental retardation.[150] Another approach has been to define mental illness in terms similar to the state's mental illness civil commitment statute. This presumably excludes mentally retarded people, as they do not fall within the scope of that statute.[151] Certainly the most confusing of the guilty-but-mentally-ill laws are those that define "mentally ill" in terms similar to those employed in the formulation of the insanity defense itself.[152]

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148. MICH. COMP. LAWS ANN. § 768.36(1) (West 1982).

149. *Id.* § 768.36(3) (emphasis added). The confusion between mental illness and mental retardation is exacerbated by the reference to "psychiatrically indicated." Although some psychiatrists work with mentally retarded individuals, they are not the principal experts on mental retardation. *See infra* notes 392-402 and accompanying text.

150. *E.g.*, IND. CODE ANN. § 35-1-36-1 (Burns Supp. 1984). " 'Mentally ill' means having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function; 'mentally ill' also includes having any mental retardation." *Id.* Georgia includes within the definition of "mentally ill" the AAMD definition of mental retardation. GA. CODE ANN. § 17-7-131(a)(2) (Michie Supp. 1985). Indiana also provides that a convict shall be treated in a manner "psychiatrically indicated for his illness" upon determining a disposition after a guilty-but-mentally-ill verdict. IND. CODE ANN. § 35-2-36-5 (Burns Supp. 1984). *See also* GA. CODE ANN. § 17-7-131(d), (e) (1984).

151. *Compare* N.M. STAT. ANN. 31-9-3(A) (1978 & repl. 1984) ("mentally ill means a substantial disorder of thought, mood or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment . . . .") *with* N.M. STAT. ANN. 43-1-3(N) (1978 & repl. 1984) ("mental disorder means the substantial disorder of the person's emotional processes, thought or cognition which grossly impairs judgment, behavior or capacity to recognize reality").

152. Pennsylvania defines "mentally ill" for guilty-but-mentally-ill purposes as "one who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law," and defines "legal insanity" as "laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong." 18 PA. CONS. STAT. ANN. § 314(c) (Purdon 1982). Similarly, Alaska defines the insanity defense in terms of the defendant being "unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct," ALASKA STAT. § 12.47.010 (1984), and defines guilty-but-mentally-ill in terms of "the defendant lack[-ing], as a result of a mental disease or defect, the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of law." *Id.* § 12.47.030. Under these statutes, jurors could probably tell that mentally retarded defendants were included in the scope of both the insanity and guilty-but-mentally-ill instructions, but the jurors' ability to disentangle the definitions for other purposes is open to serious doubt.

In one sense, where mentally retarded defendants are within the scope of the statutes, they are no more disadvantaged by guilty-but-mentally-ill instructions than are mentally ill defendants. Each group is subjected to the risk of jury confusion and compromise verdicts, although the risk for retarded defendants may be somewhat higher because of ambiguous terminology. In another sense, however, mentally retarded defendants are at greater risk. Typically, guilty-but-mentally-ill statutes do not guarantee treatment for defendants who are convicted under this verdict.[153] But the likelihood that mentally retarded individuals will receive necessary and individualized habilitation may be even smaller where the focus of the statute is on "psychiatrically indicated treatment."[154] For a convict whose need is special education, mental health treatment, particularly if it is of marginal quality, will do little to alleviate that need. The availability of the guilty-but-mentally-ill verdict may persuade some juries and some defendants that there is an increased opportunity for appropriate treatment, but this is unlikely to be true for mentally retarded people.[155]

IV. Competence Issues for Mentally Retarded Defendants

For a mentally retarded defendant, many of the most important issues in the criminal justice system turn on the question of "competence." This term eludes precise definition, but the issues within its scope help explain its basic meaning. These issues involve the individual's ability to understand certain important and relevant concepts and to act on the basis of that understanding at a minimally acceptable level of skill. While the term "competence" is not ordinarily employed in discussions of the insanity defense, the questions of a retarded person's ability to appreciate the wrongfulness of his conduct (and perhaps to conform his actions to the requirements of the law) invoke the same principles and thus constitute a parallel inquiry.

This section will analyze three competence issues to which mental retardation is particularly relevant: competence to waive constitutional rights in the context of confessions, competence to stand trial, and competence to enter a plea of guilty.[156]

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153. *See* Stelzner & Piatt, *The Guilty But Mentally Ill Verdict and Plea in New Mexico*, 13 N.M.L. REV. 99, 115 (1983). The study of the operation of Michigan's statute found that guilty-but-mentally-ill convicts were no more likely to receive treatment than other prisoners. Project, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J. L. REFORM 77, 104-05 (1982).

154. *See supra* note 150.

155. For a discussion of habilitation in prisons, *see supra* notes 363-91 and accompanying text.

156. There are, of course, numerous other contexts in which the competence of a retarded defendant may come into question, including compentence to testify and competence to waive other constitutional rights, such as assistance of counsel, jury trial, and appeals.

A. Confessions

American courts have long recognized that confessions by mentally retarded persons are somewhat suspect, although they have not always been successful in articulating the reasons for their skepticism.[157] Long before *Miranda v. Arizona*[158] and its detractors made criminal confessions a long-playing national controversy,[159] courts occasionally overturned convictions because they believed questionable confessions should not have been admitted into evidence. Some such cases have involved mentally retarded defendants.

The confession of a boy "of crude and feeble mind and irresolute will" was held to be inadmissable when it was shown that the confession was made as an angry crowd threatened to hang the boy (and had already hanged another person for the crime).[160] In another case, the Supreme Court of Mississippi threw out the confession of an individual who was described as "not bright" and whose employer testified that "[h]e is going to give you the answer you desire. If you want a 'yes,' he will give it to you; and if you want a 'no,' he will give you that."[161] The Alabama Supreme Court found inadmissable the confession of a "colored" servant "of weak mental capacity, and humble, docile disposition" to her employer, who had locked the servant in a smoke-house until she confessed.[162] The Supreme Court of Arkansas threw out a confession by a "stupid and weak-minded" teenager who had not been told of the possible consequences of such a confession and who had been promised that if he confessed he would not be harmed.[163]

It certainly would be inaccurate to suggest that American courts readily excluded criminal confessions on grounds of mental deficiency in the nineteenth and early twentieth centuries. For exam-

157. For a modern statement of the law in this area, see W. LAFAVE & J. ISRAEL, 1 CRIMINAL PROCEDURE 525-27 (1984); *see also* Annot., 8 A.L.R.4th 16 (1981) (mental subnormality is one factor identified in the totality of the circumstances to be considered in determining voluntariness). For a discussion of Canadian cases addressing the same problem, see Henderson, *Mental Incapacity and the Admissibility of Statements*, 23 CRIM. L. Q. 62, 71-73 (1980).

158. 384 U.S. 436 (1966).

159. *See generally* L. BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983) (analyzing the evolution of the *Miranda* doctrine).

160. Butler v. Commonwealth, 63 Ky. (2 Duv.) 435, 435-36 (1865).

161. Ford v. State, 75 Miss. 101, 103-04, 21 So. 524, 535 (1887).

162. Hoober v. State, 81 Ala. 51, 52, 1 So. 574, 575 (1886).

163. Williams v. State, 69 Ark. 599, 600, 65 S.W. 103, 104 (1901). *See also* State v. Mason, 4 Idaho 543, 548, 43 P. 63, 64 (1895) (holding a confession coerced from a "half-witted" boy by the armed emissary of an insurance company inadmissable); Hamilton v. State, 77 Miss. 675, 678, 27 So. 606, 608 (1900) (holding confessions of a "dull" defendant in response to the repeated urging of his employer involuntary and thus inadmissible); Peck v. State, 147 Ala. 100, 102, 41 So. 759, 760 (1906) (holding confession of a "weak minded" defendant, evoked by a question that assumed the defendant's guilt, inadmissible).

ple, the Georgia Supreme Court rejected a challenge to a confession by a "man of weak mind" who was not an "idiot," declaring that persons who knew the difference between right and wrong and were capable of committing the crime were "liable to be convicted upon their own confession."[164] The court was unpersuaded by claims that such confessions were unreliable, and observed that: "[E]xperience teaches that, in point of fact, the cunning and crafty are much more likely to conceal and misrepresent the truth, than those who are less gifted."[165] Nevertheless, courts did widely accept some degree of mental disability as sufficient to call into question the validity of a confession.[166]

As these early cases suggest, the relevance of mental retardation to the validity of a confession has more than one component. One consideration is the increased likelihood that the retarded person may be abnormally susceptible to coercion and pressure, and therefore more likely to give a confession that is not truly voluntary.[167] Another consideration is the possibility that the suspect will make a false confession out of a desire to please someone perceived to be an authority figure.[168] There is also reason for concern that the retarded suspect does not understand, and may be incapable of understanding, the ramifications of a confession, and his right not to confess.[169]

These considerations mirror the factors involved in obtaining legally adequate consent from retarded people in other areas, such as medical care and admission to residential facilities and institutions.[170] Confessions involve waivers of constitutional rights, and

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164. Studstill v. State, 7 Ga. 2, 12 (1849).

165. *Id.* The court buttressed its conclusion by declaring: "It is the trite observation of all travelers that if you wish to learn the truth with respect to the health of a country, you must interrogate the children and servants about the matter." *Id.*

166. The Texas Court of Criminal Appeals, in a case involving minority rather than mental deficiency, declared: "[I]f the party against whom the confessions are introduced is shown not to possess sufficient intelligence . . . to understand the nature and obligation of an oath, . . . the statement or confession of such witness ought not to be received in evidence." Grayson v. State, 40 Tex. Crim. 573, 574, 51 S.W. 246, 246 (1899).

It is noteworthy that the analogy between children and mentally retarded adults, which encounters strenuous resistance in the area of the insanity defense, *see supra* notes 105-12 and accompanying text, finds more acceptance in the courts in cases involving the admissibility of confessions. Courts in confession cases frequently state, and appear to place some reliance on, the mental age of defendants. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 620 (1961) (court did not admit the confession of a thirty-three year old man with a mental age of nine and a half); United States v. Hull, 441 F.2d 308, 312 (7th Cir. 1971) (court did not admit the confession of an illiterate thirty-four year old man with a mental age of eight or nine); Hines v. State, 384 So. 2d 1171, 1177 (Ala. Crim. App.) (court did not admit the confession of a defendant who had a mental age of a six-year old), *cert. denied*, 384 So. 2d 1184 (1980).

167. *See, e.g.*, Williams v. State, 69 Ark. 599, 602, 65 S.W. 103, 105 (1901) (promise of protection induced confession); Hoober v. State, 81 Ala. 51, 53, 1 So. 574, 575-76 (1887) (prosecutor led defendant to believe that she could go free only if she confessed).

168. *See, e.g.*, Ford v. State, 75 Miss. 101, 102-04, 21 So. 524, 525-26 (1887); *see also supra* note 79 and accompanying text (discussing the concept of "cheating to lose").

169. *See* Grayson v. State, 40 Tex. Crim. 573, 574, 51 S.W. 246, 246 (1899) (confession admissable only if defendant possessed "sufficient intelligence").

170. *See* Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 745, 370 N.E.2d 417, 427 (1977); AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CONSENT

thus require careful judicial scrutiny to ensure their validity.[171] Considerations affecting the validity of such a waiver parallel those involved in other forms of consent.[172] The three necessary elements of a legally valid consent or waiver are capacity, information, and voluntariness.[173] Each of these elements presents particular problems in confession cases involving mentally retarded people.[174]

Whether a waiver is "intelligent" (and therefore valid) depends on the circumstances of the particular case, "including the background, experience, and conduct of the accused," according to *Johnson v. Zerbst*.[175] This description is surely broad enough to encompass a suspect's mental retardation as a relevant factor. An intelligent waiver[176] requires that the individual make "a rational choice based upon some appreciation of the consequences of the decision,"[177] and a retarded person's limited intelligence may diminish his ability to appreciate these consequences, just as it may limit his ability to appreciate the wrongfulness of his conduct.[178] Courts have recognized that a person's mental retardation does not, by itself, render him automatically incapable of the waiver inherent in a voluntary confession.[179] Mental retardation, how-

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HANDBOOK 11 (H.R. Turnbull ed. 1977) [hereinafter cited as CONSENT HANDBOOK]; Price & Burt, *Nonconsensual Medical Procedures and the Right to Privacy*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 93-112 (M. Kindred, J. Cohen, D. Penrod & T. Shaffer eds. 1976).

171. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

172. Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 71 (1975).

173. CONSENT HANDBOOK, *supra* note 170, at 6-13; Friedman, *supra* note 172, at 52; *see* Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628, 630-46 (1970).

174. Courts have recognized, for example, that mental retardation may be relevant to the issue of voluntariness even where it has been determined that an individual's capacity and information were acceptable. *See, e.g.*, State v. Cheshire, 313 S.E.2d 61, 65 (W.Va. 1984).

175. 304 U.S. 458, 464.

176. An intelligent waiver by a mentally retarded person is, of course, an oxymoron. The Third Circuit discussed the intelligent waiver of a defendant's *Miranda* rights as follows:

> [I]ndeed it may be argued forcefully that a choice by a defendant to forego the presence of counsel at a police interrogation is almost invariably an unintelligent course of action. It is not in the sense of shrewdness that *Miranda* speaks of "intelligent" waiver but rather in the tenor that the individual must know of his available options before deciding what he thinks best suits his particular situation. In this context intelligence is not equated with wisdom.

Collins v. Brierly, 492 F.2d 735, 738-39 (3d Cir.), *cert. denied*, 419 U.S. 877 (1974).

177. Cooper v. Griffin, 455 F.2d 1142, 1146 (5th Cir. 1972).

178. *See supra* note 137 and accompanying text.

179. *See* Commonwealth v. White, 362 Mass. 193, 196, 285 N.E.2d 110, 113 (1972) (the court admitted the otherwise valid confession of a feeble-minded and illiterate defendant); State v. Anderson, 379 So. 2d 735, 736-37 (La. 1980) (in considering whether a mentally retarded defendant knowingly and intelligently waived his rights,

ever, raises serious questions about the suspect's understanding of the situation. Moreover, the Supreme Court has placed the burden of persuasion to establish the validity of the waiver on the state.[180] Therefore, it is in the interest of prosecutors and law enforcement officials to document that each confession by a retarded suspect was within his capacity.

The capacity issue is likely to focus on the retarded person's ability to understand the warning which *Miranda* requires the police give to all suspects.[181] The first issue is whether the retarded suspect understands the concepts which constitute the warning.[182] The concepts of what "rights" are, what it means to give them up voluntarily, the notion of the ability to refuse to answer questions asked by a person of great authority, the concepts of the subsequent use of incriminating statements, the right to counsel and the right to have the state pay for that counsel, and the idea that the suspect can delay answering questions until a lawyer arrives are all of some abstraction and difficulty.[183] A substantial number of retarded people will not know what one or more of these ideas means.[184] A related difficulty is that the vocabulary of many retarded people is so limited; they may not be able to understand the warning even if they are familiar with its component concepts.[185]

Several courts have held a confession inadmissable where it was

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court considered additional factors including expert testimony and the arresting officer's ambivalent testimony questioning whether the defendant ever understood the rights explained to him); *accord* THE PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 33 (1963).

180. Miranda v. Arizona, 384 U.S. 436, 475 (1966).

181. The *Miranda* Court required that police warn each suspect "prior to any questioning that he has the right to remain silent, that anything he says can and will be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479 (1966).

182. It has been suggested that the anxiety some retarded defendants will experience upon being arrested may reduce their ability to understand the warning statement. F. MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 185 (1977).

183. *See* Cooper v. Griffin, 455 F.2d 1142, 1145 (5th Cir. 1972). The *Cooper* court found

> substantial uncontroverted testimony that neither boy was capable of meaningfully comprehending the *Miranda* warning. The special education teachers testified that the boys would not have understood the gravity of the charges against them, the consequences of a conviction, any defenses which might be available to them, or any circumstances which might mitigate the charges.

Id. See also Henry v. Dees, 658 F.2d 406, 411 (5th Cir. 1981) (mentally retarded defendant did not "separately and independently" name his constitutional rights because it was unlikely that he understood the complex waivers and their consequences).

184. *See* People v. Bruce, 62 A.D.2d 1073, 1073-74, 403 N.Y.S.2d 587, 589 (N.Y. App. Div. 1978). Indeed, the *Bruce* court found it necessary to explain the meaning of voluntary to the defendant, a 17-year-old boy with an IQ of 59, before accepting his guilty plea. *Id.*

185. *See id.*, 403 N.Y.S.2d at 588-89 (A special education teacher testified that the defendant who had an IQ of 59 "had a vocabulary of the approximate level of a 10 year old, and would have difficulty understanding the entire warning form, unless it were read at a slow pace with emphasis on certain words . . . . The officer . . . did not attempt to explain the meaning of the warning to defendant.").

shown that the defendant was unlikely to have understood the warning and where it was read to them "in a summary fashion, without elaboration."[186] One state court has turned this holding into a more general rule: "When expert testimony indicates that a defendant could have intelligently understood the waiver of his constitutional rights only if they were simply and clearly explained, the record must expressly and specifically establish that such an explanation was given."[187] These concerns arise even with defendants classified as mildly retarded.[188]

A substantial problem develops when the difficulties with a mentally retarded defendant's capacity are not identified at the time his confession is sought.[189] Capacity problems may work to the serious disadvantage of the defendant if they result in an invalid confession being used against him at trial. They may also create serious problems for the prosecution if the disability is later identified and the confession proves to be inadmissible. A number of indicators might provide early warning of a capacity problem. One would be to identify whether the suspect is literate.[190] An-

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186. *E.g.*, Toliver v. Gathright, 501 F. Supp. 148, 150 (E.D. Va. 1980); *see infra* note 193.

187. Hines v. State, 384 So. 2d 1171, 1181 (Ala. Crim. App. 1980). Although such elaboration and explanation may require a deviation from the usual wording of the *Miranda* test, this deviation should not create a difficulty as long as the explanation is clear and complete. The Supreme Court has held that the "precise formulation of the warning" is not required as a "talismanic incantation." California v. Prysock, 453 U.S. 355, 359 (1981).

188. The defendants in *Toliver*, *Cooper*, and *Bruce* were all mildly retarded. *See supra* notes 183-86. In *Cooper*, the court characterized the defendants as having "extreme mental deficiency." 455 F.2d 1142, 1145 (5th Cir. 1972). Although the defendant's IQ scores fell within the "mild" range, the court's characterization is understandable, because the level of handicap, especially for verbal tasks like those involved in a *Miranda* waiver, was substantial. *See id.*

Unlike these cases *Hines* involved a defendant with an IQ of 39, which is on the border between severe and moderate retardation. Hines misspelled his last name two different ways in signing the waiver form, and there was expert testimony that at his level of functioning "tying a shoe would be a complex task." 384 So. 2d at 1175-76.

189. *See, e.g.*, People v. Redmon, 127 Ill. App. 3d 342, 468 N.E.2d 1310, 1313 (1984) (16 year-old defendant had an IQ between 70 and 73). In *Redmon*, the defendant's confession, obtained after 19 hours of interrogation, was suppressed for lack of capacity to waive his right to counsel. *Id.* at 1316. During the interrogation, police officers repeatedly read Redmon the *Miranda* warning, but he understood it only later, when the prosecutor explained the warning in greater detail. *Id.* at 1315.

190. Morrow, *A Legal Framework: An Insider's Perspective*, in REHABILITATION AND THE RETARDED OFFENDER 60-61 (P. Browning ed. 1976). The author notes that "[a]pparently the question, 'Can you read?' is rarely asked." *Id.* The mechanisms that a retarded person has used all his life to minimize the stigma that accompanies his disability may make identification of this problem a little more difficult. Morrow depicts a scene in which the defendant, in his desire to please the police officer, makes a statement. The police officer normally writes down the statement, reads it back, says "something to the effect of 'read this over . . . is it right?,' and requests the accused's signature. Sometimes the retarded person will appear to read the document to himself, but in fact, will not read it at all." *Id.*

other approach is to ask about the suspect's educational background.[191] Observing the ease with which he signs his name would also provide some clue.[192] Indications of confusion and inconsistency may also indicate a lack of capacity.[193] The scope of the accused person's apparent vocabulary may also provide some guidance. Ultimately, the most useful approach is to ensure that the warning itself is given in a clear and unhurried fashion. Whenever a doubt arises, explanations should be offered and inquiries made to determine if the accused has really understood.

The inquiry about the capacity of an individual to consent is closely related to the issue of whether he has sufficient information upon which to base a choice.[194] The information component of legally adequate consent for a retarded suspect may turn on whether he understands the concepts contained in the waiver. But retarded individuals, particularly if they have led a life isolated from the community, may also lack basic information about the workings of the criminal justice system. Failure to understand the adversarial nature of prosecutions and the concepts of trials and their consequences should invalidate a confession.[195]

The third element of legally adequate consent is that the act must be voluntary. This component has engendered a great deal of litigation concerning the confessions of mentally retarded suspects. The concern with this element is not that the suspect did not understand what was being asked of him, but rather that his action, either a confession or a waiver of the right to counsel, was the product of coercion. In evaluating voluntariness, the Supreme Court has warned of the importance of "the unusual susceptibility of a defendant to a particular form of persuasion."[196] An individual with mental retardation may be particularly susceptible to nonphysical coercion.[197] Lower courts have identified special

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191. *See* People v. Varecha, 353 Ill. 52, 57-58, 186 N.E. 607, 608-09 (1933) (court must look to defendant's ability to be taught in determining his mental competence).

192. *Id.; see supra* note 188.

193. *See* Toliver v. Gathright, 501 F. Supp. 148, 151 (E.D. Va. 1980). The court observed: "The fact that Toliver said he would not make a statement, just moments after he signed the waiver form, evinces confusion rather than comprehension." *Id.*

194. This element of the "consent triad" has been the focus of much litigation in the area of medical care for mentally typical people. *See, e.g.*, Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972). It is the concentrated focus on information in this context that leads to the somewhat misleading label "informed consent." *See* CONSENT HANDBOOK, *supra* note 170, at 6.

195. The Supreme Court has recently observed: "This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." Oregon v. Elstad, 105 S. Ct. 1285, 1297 (1985). But *Elstad* and the decisions it cites involved marginal misunderstandings by defendants who were mentally typical. The "ignorance of the full consequences" of a mentally retarded defendant may be different in kind, not just degree, from those envisioned by the *Elstad* majority.

196. Rhode Island v. Innis, 446 U.S. 291, 302 n.8 (1980).

197. *See* Sims v. Georgia, 389 U.S. 404, 407 (1967); Wreck v. Pate, 367 U.S. 433, 442 (1961); Culombe v. Connecticut, 367 U.S. 568, 625, 633 (1961); Fikes v. Alabama, 352 U.S. 191, 196-97 (1957); *see also* Jurek v. Estelle, 623 F.2d 929, 938 (5th Cir. 1980) (en banc) (accused was functionally isolated from all but his interrogators), *cert. denied*, 450 U.S. 1001 (1981). The *Jurek* court stated:

problems with retarded defendants in cases involving prolonged questioning,[198] threats and promises of leniency,[199] a strip search,[200] and a polygraph test.[201] Another court noted that a retarded defendant, confronted with an accomplice's statement implicating him, "was particularly likely to have an exaggerated perception of the dangers of remaining silent."[202]

Some courts have suggested that mental deficiency alone, without a showing of threats, deprivation of food, or some similarly extreme circumstance will not render the voluntariness of a confession suspect,[203] but intimidation and coercion may take on subtle forms with a mentally retarded suspect. More than twenty years ago, the President's Panel on Mental Retardation observed:

> The retarded are particularly vulnerable to an atmosphere of threats and coercion, as well as to one of friendliness designed to induce confidence and cooperation. A retarded person may be hard put to distinguish between the fact and the appearance of friendliness. If his life has been molded into a pattern of submissiveness, he will be less able than the average person to withstand normal police pressures. Indeed they may impinge on him with greater force because their lack of clarity to him, like all unknowns, renders them more frightening. Some of the retarded are characterized by a desire to please authority: if a confession will please, it may be gladly given. "Cheating to lose," allowing others to place blame on him so that they will not be angry with him, is a common pattern among the submissive retarded. It is unlikely that a retarded person will see the implications of consequences of his statements in the way a person of normal intelligence will.[204]

> In considering the voluntariness of a confession, this court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will . . . . The concern in a case involving a defendant of subnormal intelligence is one of suggestibility.

623 F.2d at 937-38.

198. United States v. Hull, 441 F.2d 308, 312 (7th Cir. 1971).

199. United States v. Blocker, 354 F. Supp. 1195, 1201 (D.D.C. 1973), *aff'd*, 509 F.2d 538 (D.C. Cir. 1975).

200. *Id.*

201. Henry v. Dees, 658 F.2d 406, 411 (5th Cir. 1981).

202. Toliver v. Gathright, 501 F. Supp. 148, 154 (E.D. Va. 1980)

203. United States v. Barnes, 520 F. Supp. 946, 957 (D.D.C. 1981). Other courts have suggested that the significance of mental retardation may be less where the defendant has had extensive experience with the criminal justice system. *E.g.*, United States v. Young, 355 F. Supp. 103, 111 (E.D. Pa. 1973). Still other courts have suggested that whether the retarded suspect is employed may be relevant. *E.g.*, People v. Bruce, 62 A.D.2d 1073, 403 N.Y.S.2d 587, 589 (1978). It is not clear from these opinions whether employment is thought relevant to the suspect's capacity to understand the waiver or to his susceptibility to coercion. *E.g.*, State v. Anderson, 379 So. 2d 735, 737 (La. 1980).

204. PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE

These factors should induce great caution in law enforcement officials seeking confessions and in courts reviewing their legal adequacy.[205]

Part II of the new *Mental Health Standards*[206] addresses "Police and Custodial Roles," but does not directly treat the waiver and confession problems. It does, however, recommend that law enforcement personnel receive specialized training to help them identify mental health and mental retardation problems.[207] Further, in a different context, the *Mental Health Standards* recognize the problem with involving mental retardation professonals in the interrogation process in the absence of counsel; *Miranda*-type warnings are insufficient where the defendant is unaware of the precise nature of the interview and the adversarial role of the interviewer.[208]

B. Competence to Stand Trial

The competence of mentally retarded defendants to stand trial is a crucial issue.[209] While the doctrine in this area is well settled, practical problems with its implementation loom large, and the nature of mental retardation exacerbates those problems.

The courts have long accepted that it is impermissible to try a defendant who lacks the ability to understand the proceedings or to present a defense. Blackstone declared that such persons could not be tried.[210] This view has been fully supported by other com-

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ON LAW 33 (1963); *see also* Morrow, *supra* note 190, at 60 (the retarded individual's desire to assimilate may also make it very difficult to identify him as retarded); CONSENT HANDBOOK, *supra* note 170, at 11 (mentally retarded persons are more likely to aquiesce to requests from authority figures).

205. One appellate court stated with admirable candor: "We do not know enough about intelligence quotients (IQ) and mental retardation to rule conclusively on this question. Yet we do know enough to believe the matter needs further analysis." Commonwealth v. Daniels, 366 Mass. 601, 608, 321 N.E.2d 822, 828 (1975). The court went on to suggest that expert testimony on mental retardation might be necessary at suppression hearings. *Id.*, 321 N.E.2d at 828.

206. MENTAL HEALTH STANDARDS, *supra* note 4, 7-2.1 - 7-2.9.

207. *Id.* 7-2.8.

208. *See id.* 7-3.1 commentary at 75-76. The *Mental Health Standards* point out the potentially ironic result of a mental health professional's presence at the interrogation. The contrast between antagonistic police interviewers and the compassionate mental health or mental retardation professional interviewer may induce the defendant to make legally damaging statements he might not otherwise make. This is particularly true in light of the professional's sophisticated interviewing techniques. Questions that require seemingly innocuous answers may be intended to evoke, and may result in, legally damaging responses. *Id.*

209. *See generally* Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375 (1985).

210. Blackstone elaborated:

> Also, if a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried, for how can he make his defense?

4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *24. Hale reached the same conclusion:

> If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be ar-

mentators and courts in England and America.[211] The United States Supreme Court has observed that trying an incompetent defendant violates due process.[212] And although the public has fixed its attention on the insanity defense,[213] Dr. Alan Stone is certainly correct in calling competence to stand trial "the most significant mental health inquiry pursued in the system of criminal law."[214]

The theoretical applicability of the competence doctrine to mentally retarded defendants has never been seriously questioned. The early pronouncements of the doctrine used the term "insane," which was then broad enough to encompass people labeled "idiots."[215] The fact that a functional measure, rather than one limited by clinical etiology, determined incompetence is demonstrated by the early English cases which discussed the competence of deaf mutes.[216] These cases were followed by the North Carolina Supreme Court in *State v. Harris*.[217] *Harris* held that a deaf and dumb prisoner who, despite efforts to educate him, was unable to understand the significance of a trial ought not be compelled to participate; "[w]hether arising from physical defect or mental disorder, he must, under such circumstances, be deemed "not sane,"

> raigned during such his phrenzy; but be remitted to prison until that incapacity be removed; The reason is, because he cannot advisedly plead to the indictment . . . . And if such person after his plea, and before his trial, become of non sane memory, he shall not be tried . . .

1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 34-35 (London 1736).

211. *See* Youtsey v. United States, 97 F. 937 (6th Cir. 1899) (discussion of early authorities); 1 N. WALKER, *supra* note 11, at 219-41 (detailed discussion of the British experience); United States v. Chisolm, 149 F. 284, 285-86 (S.D. Ala. 1906) (announcing a test for competence that was similar to the modern formulation because it measured competence by a person's ability to aid counsel and testify at trial); Commonwealth v. Braley, 1 Mass. 103, 104 (1804); State v. Peacock, 50 N.J.L. 653, 654-55, 14 A. 893, 894 (1888) (court held proof of insanity was improperly excluded by the lower court and was injurious to the defendant); Freeman v. People, 4 Denio 9, 20 (N.Y. 1847) ("The true reason why an insane person should not be tried, is, that he is disabled by an act of God to make a just defence if he have one.").

212. Drope v. Missouri, 420 U.S. 162, 172 (1974); Pate v. Robinson, 383 U.S. 375, 378 (1966).

213. *See generally* L. CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR. (1984); C. ROSENBERG, THE TRIAL OF THE ASSASSIN GUITEAU: PSYCHIATRY AND LAW IN THE GILDED AGE (1968) (an account of the insanity trial of President Garfield's assassin).

214. *See* A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 200 (1975). Competence issues involve vastly larger numbers of defendants than does the insanity defense. *See id.* at 203; Steadman & Hartstone, *Defendants Incompetent to Stand Trial*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE, *supra* note 3, at 39-42; *see generally* H. STEADMAN, BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL (1979).

215. 1 N. WALKER, *supra* note 11, at 225.

216. *Id.*

217. 53 N.C. (8 Jones) 136 (1860).

and . . . he ought not to be tried."[218]

Another nineteenth-century American case[219] acknowledged that mental retardation could constitute the basis for incompetence, but required that the degree of disability be substantial.[220] The same concerns that retardation could cause incompetence,[221] but that the retardation had to be truly disabling, continued well into this century.[222]

The new *Mental Health Standards* recognize that mental retardation may be the source of incompetence to stand trial. Standard 7-4.1 identifies the test for competence as "whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings."[223] The same standard explicitly recognizes that incompetence "may arise from . . . mental retardation or other developmental disability . . . so long as it results in a defendant's inability to consult with defense

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218. *Id.* at 143. Even at that early date, the court explicitly recognized that the provision of counsel was insufficient to cure the problems of incompetence. *Id.*

219. State v. Arnold, 12 Iowa 479 (1861).

220. *Id.* at 484. The court noted that testimony had indicated that defendant's "manner occasionally indicated mental imbecility," but ruled that he had failed to rebut the presumption of sanity:

> To do this, evidence of mere incapacity to fully understand and comprehend all his legal rights; and to make known in the most succinct and intelligent manner to his counsel all the facts material to his defense, is not sufficient. A doubt must be raised whether at the time there is such mental impairment, either under the form of idiocy, intellectual or moral imbecility, or the like, as to render it probable that the prisoner cannot, as far as may devolve upon him, have a full, fair and impartial trial.

Id.

A substantial degree of disability was also generally required to successfully invoke the insanity defense. *See supra* note 94.

221. *See* State v. Brotherton, 131 Kan. 295, 300, 291 P. 954, 960 (1930) (observing that the court below "showed a proper concern that no person of feeble mind should be put to trial on a serious charge"); Act of 1919, ch. 299, § 2, 1919 Kan. Sess. Laws, 490, 490 (codified at KAN. STAT. ANN. 39-237 (1923)) (repealed 1939). The act stated: "That whenever in a court of record, during the hearing of any person charged with a misdemeanor or crime, it shall be made to appear to the court that the person is feeble-minded the court shall summarily remand such person to the probate court of the county for examination . . . [for possible civil commitment]." *Id.* *See also* H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 434 n.21 (1954) (similar statutes recognizing retardation as a cause of incompetence to stand trial).

222. *See* State v. Lammers, 171 Kan. 668, 669, 237 P.2d 410, 411 (1951). In *Lammers*, the trial court's charge to the examining commissioners stated:

> You have been appointed . . . to ascertain, after a thorough examination, . . . whether he be insane, an idiot or an imbecile and unable to comprehend his position and make his defense. A person may be illiterate, have a low degree of competency and a low I.Q. rating as relates to scholastic matters but he may have a normal or high degree of competency through native or natural ability.

Id.

223. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.1(b). This standard is similar to the test announced by the Supreme Court in Dusky v. United States, 362 U.S. 402, 402 (1960) ("whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceeding against him."). *Id.* *See* Favole, *supra* note 120, at 247-57 (a compilation of tests employed by the various states for competence to stand trial).

counsel or to understand the proceedings."[224]

One issue that remains unresolved in the modern era is the degree of retardation necessary for finding a defendant incompetent to stand trial. Courts often rely upon IQ scores[225] and estimates of "mental age"[226] to determine whether a defendant is competent. Many appellate courts conclude that even a relatively low level of intellectual functioning is sufficient to establish competence.[227] The approach taken by the *Mental Health Standards* is preferable. The commentary observes that "[c]ompetence is functional in nature, context dependent and pragmatic in orientation. If a defendant is capable of meeting the articulated requirements for competence, the presence or absence of mental illness is irrelevant."[228] The same is true for mental retardation. While the presence or absence or degree of mental illness or mental retardation "may certainly be significant in evaluating the defendant's competence,"[229] the ultimate question is the actual ability of the individual defendant to perform tasks required at trial.

Mental retardation may affect an individual's functioning in ways that make him incompetent to stand trial.[230] A defendant's receptive and expressive language skills, vocabulary, conceptual

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224. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.1(c).

225. A surprisingly large number of reported cases involve expert testimony in which the witness ascribes an IQ score or range of IQ scores to the defendant without administering any standardized intelligence tests. *See, e.g.*, State v. Rogers, 419 So. 2d 840, 842 (La. 1982). In the *Rogers* case, a psychiatrist who had not conducted any intelligence tests testified that the defendant's IQ was between 60 and 70, and concluded that he was competent to stand trial because of "[his] ability to recall the phone number and city block number at his mother's house where he resided, [and] his place of employment . . . [and because of] defendant's statement that he had dropped out of school in the eighth grade." *Id.* Dr. Mauroner did not determine whether the defendant had been socially promoted in school, and none of the doctors inquired as to whether he could read or write. Although this same witness "conceded that a psychological test would be the most accurate means of determining the level of defendant's retardation, he insisted that a test result showing even severe mental retardation would not cause him to change his opinion that the defendant could assist counsel at trial." *Id. See also* State v. Bennett, 345 So. 2d 1129, 1137 (La. 1977) (the "guesses" by expert witnesses, none of whom had tested the defendant, ranged from IQ scores of 35 to 90). This sort of guesswork, of course, does not fall within the proper scope of expert testimony. *See infra* note 397. It may also violate the ethical code of the witness's profession. *Id.*

226. *Cf. supra* notes 105-12 and accompanying text.

227. For a compendium of decisions organized by levels of intellectual functioning, see Annot., 23 A.L.R.4th 493 (1983).

228. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.1 commentary at 187.

229. *Id.*

230. The court in State v. Williams, 381 So. 2d 439, 440 (La. 1980), stated that: "Being mentally retarded or of subnormal intelligence is not in itself proof of incapacity . . . . However, when substandard mental ability combines with other problems to prevent a defendant from rationally assisting his counsel, a fair trial cannot proceed." (footnotes omitted). The first sentence in this statement is certainly true, but the second suggests that factors unrelated to mental retardation produce the effect of incompetence. This may be misleading because the effects of the mental retardation

ability, and low level of general knowledge may all impair his ability to participate in his defense. Even at the higher levels of mild mental retardation, a defendant may be unable to understand a concept like "waiver" or the elements of the crime with which he is charged unless special efforts are made to explain them and assist him in understanding them.[231] Therefore, courts err when they suggest that it is only the accompanying presence of a mental illness that makes a mentally retarded person incompetent to stand trial.[232]

Similarly, courts should not accept expert testimony from an evaluator who merely tells the court that a retarded defendant is not psychotic, and therefore is competent to stand trial.[233] Such testimony is even less helpful than that of an expert who tells the court the defendant's IQ score or estimates his mental age and

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may themselves be the indicia of incompetence. This is demonstrated by the *Williams* case itself in which there was testimony that the defendant was:

> moderately retarded, suffering from a severe speech disorder and hampered by an extremely primitive ability to cope. Williams cannot read or write, remember his address or his attorney's name . . . . His judgmental capacity is impaired by an inability to concentrate and a limited education . . . . [He] does not know the name of the President of the United States.

Id. With the possible exception of the speech impediment, each of these factors is almost certainly a direct consequence of defendant's "mild to moderate" mental retardation.

231. In United States v. Glover, 596 F.2d 857, 865 (9th Cir.), *cert. denied*, 444 U.S. 857 (1979), a defendant with an IQ of 67 and a first to second-grade reading level, was so described by an expert witness for the defense. The prosecution's expert witness basically agreed but stated that the defendant would be competent if questions, terms, and proceedings were explained to him in simple words and simple sentences, using concrete examples. *Id.* The court held that the defendant could be competent if properly assisted, asserting that the extra burden upon counsel of assisting the defendant "certainly does not establish that the defendant is incompetent to stand trial." *Id.* at 867.

232. *See* State v. Edwards, 257 La. 707, 711-12, 243 So. 2d 806, 808 (1971) (distinguishing a case which found defendant incompetent to stand trial at roughly the same level of retardation, IQ 59, because the defendant involved was psychotic).

233. *E.g.*, State v. Bennett, 345 So. 2d 1129 (La. 1977). The *Bennett* court found "[i]t was insufficient [to show competence] for the court to find that defendant was not psychotic, was oriented as to time and place and was aware of his surroundings." *Id.* at 1137. The factors listed by the court are traditional diagnostic indicia for the lack of psychosis. The witness in *Bennett* revealed a lack of understanding of both mental retardation and the criteria for competence to stand trial by stating "that a severely retarded individual with an IQ of 10 might be aware of his surroundings, and thus he could presumably assist counsel and understand the proceedings against him 'within his capabilities.'" *Id.* The Supreme Court of Louisiana correctly rejected this contention, noting that "[d]ue process, however, requires a level of *effective* participation by an accused in criminal proceedings against him." *Id.*

This sort of misleading testimony may result from the court's appointment of mental health professionals as evaluators who lack any knowledge or experience in the field of mental retardation. Standard 7-4.4(a)(iii) requires that evaluators have appropriate training and experience. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.4(a)(iii); *see also id.* 7-3.10. Knowledge about mental illness is not a sufficient qualification for evaluating a retarded defendant unless the mental health professional also happens to have expertise in the area of mental retardation. *See* text accompanying notes 51-61. Testimony by such an unqualified witness may go unchallenged at the hearing because the witness's qualifications in the area of mental illness are known and accepted by counsel and the court, but this illusory expertise ill serves the court and may result in substantial injustice to both the defendant and the prosecution.

then makes a conclusory statement about his competence to stand trial.[234] Courts should not only insist on testimony which evaluates the defendant's degree of mental retardation, but also should require descriptions of its effects in some detail, and explanations of how these effects would affect the individual's ability to participate in a trial.[235] Only this kind of detailed, nonconclusory testimony will allow the court itself to retain the ultimate decision on competence rather than merely deferring the decision to evaluators whose expertise does not extend to the nature of the trial process.[236]

An even greater concern than the possibility of misleading testimony on competence is the likelihood that the failure to detect the defendant's disability will result in no competence evaluation at

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234. State v. Bennett, 345 So. 2d 1129, 1137 (La. 1977). The court noted that "[t]he . . . hearing redounded with statements by the two examining physicians that defendant was able to assist counsel, but there was scant testimony to support this conclusion." *Id.*

235. Such testimony can be provided by a qualified mental retardation professional who has personally interviewed and evaluated the defendant without resort to any diagnostic instruments beyond the adaptive behavior scales and the generally accepted intelligence tests. *Cf.* notes 400-09 and accompanying text. Some evaluators, however, make use of a check list for estimating a defendant's competence to stand trial. LABORATORY OF COMMUNITY PSYCHIATRY, HARVARD MEDICAL SCHOOL, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS 106-13 (1973) [hereinafter cited as LABORATORY OF COMMUNITY PSYCHIATRY]; *see also* Lipsitt, Lelos & McGarry, *Competency for Trial: A Screening Instrument*, 128 AM. J. PSYCHIATRY 105 (1971) (competency screening questions and test results discussed). The Harvard Laboratory's work was published as a monograph by the National Institute of Mental Health, and some evaluators have apparently asserted that a score derived from this check list represents "competency to stand trial according to National Institute of Mental Health Standards." State v. Young, 291 N.C. 562, 566, 231 S.E.2d 577, 580 (1977); State v. Willard, 292 N.C. 567, 575, 234 S.E.2d 587, 592 (1977). This checklist has received substantial criticism. *See, e.g.*, Brakel, *Presumption, Bias and Incompetency in the Criminal Process*, 1974 WIS. L. REV. 1105, 1107-08; *see also* MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.1 commentary at 184-85 (check lists of specific criteria fail to fully resolve the issue of the defendant's competence). The check list is useful in directing the attention of evaluators to the relevant issues affecting competence to stand trial, but the suggested "scores" given to mentally retarded defendants in some of the published clinical examples are highly questionable. The defendant's second, and improved, explanation of the concepts in question may not represent a true increase in understanding of the trial process. The improved response may merely represent mimicking of an answer supplied by the evaluator. *See* LABORATORY OF COMMUNITY PSYCHIATRY, *supra*, at 106-13.

236. *Bennett*, 345 So. 2d at 1137. Although the *Bennett* court agreed that "it may be impossible in a pretrial competency hearing to avoid reliance upon psychiatric prediction concerning the accused's capabilities, the trial court may not rely so extensively upon medical testimony as to commit the ultimate decision of competency to the physician." *Id. See also* MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.8(c)(ii) (court is to decide on the issue of competence "by the greater weight of the evidence."); *id.* 7-3.9(a) ("[T]he expert witness should not express, or be permitted to express, an opinion on any question requiring a conclusion of law . . . properly reserved to the court or the jury."). Of course the same principle applies where the expert witness is a mental retardation professional other than a psychiatrist or other physician.

all.[237] The efforts that many mentally retarded people typically expend in trying to prevent any discovery of their handicap[238] may render the existence or the magnitude of their disability invisible to criminal justice system personnel. These attempts to "pass" as a mentally typical person may be as "successful" in the context of a trial as they often are in the setting of confessions and *Miranda* warnings.[239] This may account for what prominent observers have identified as the relative "paucity [of case law and commentary on competence] which cite mental retardation." These observers conclude "[i]t is our impression that the competency issue is raised too often for the mentally ill and too infrequently for the mentally retarded."[240] The *Mental Health Standards* place responsibility on the prosecutor, defense counsel, and the court itself to raise the issue of competence whenever any of those individuals "has a good faith doubt as to the defendant's competence."[241] Nevertheless, experience teaches that without extraordinary diligence, these persons are most likely to raise the issue of competence only when the defendant is acting in a bizarre or disruptive fashion.[242] This extra diligence is warranted[243] because the prospect of an undetected mentally retarded defendant sitting through a trial he does not understand is exactly the evil the doctrine of competence was

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237. *See* Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W.L. REV. 365, 367 (1981) (contending that most retarded defendants are never examined for competence to stand trial).

238. *See supra* notes 80-85.

239. *See supra* text accompanying notes 189-93.

240. LABORATORY OF COMMUNITY PSYCHIATRY, *supra* note 235, at 6. The authors of the Harvard study view this result as paradoxical because

> [t]here are good grounds to speculate that retardates are a good deal less able to cope adequately with criminal trial than the mentally ill. This speculation is based both on the cognitive deficits of the retarded and their characteristic dependency and malleability which permits them to be easily manipulated by investigatory and prosecutory personnel.

Id. at 14.

241. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.2(a); *see also* Drope v. Missouri, 420 U.S. 162, 177 (1975) (trial court should have ordered a competency exam, as motion for continuance alleged that defendant was not "of sound mind" and requested a psychiatric examination).

242. Many of the reported cases in which a retarded defendant was found incompetent to stand trial involved individuals who also manifested obvious symptoms of mental illness. *See, e.g.*, People v. Samuel, 29 Cal. 3d 489, 499-500, 629 P.2d 485, 489-90, 174 Cal. Rptr. 684, 688-89 (1981) (regressed behavior including eating feces); *see also* Seasoms v. United States, 359 F.2d 268, 270 n.3 (D.C. Cir. 1966) (defendant was "narcistic" and "schizoid").

243. The need for great caution in preventing incompetent defendants from being tried extends to the appellate courts, which have traditionally given substantial deference to trial courts on the issue of competence. *See, e.g.*, People v. Murphy, 72 Ill. 2d 421, 431, 381 N.E.2d 677, 682 (1978) (trial court in a position to observe defendant and his conduct). However, judges are not experts on mental retardation and its manifestations and consequences. Where the record below indicates that the trial judge received only conclusory, inconsistent, or incompetent testimony from evaluators, or relied solely on the court's own observation of the defendant's docility and apparent attentiveness, an appellate court can appropriately scrutinize whether there was an adequate basis for the finding that a retarded defendant was competent to stand trial. *See, e.g.*, State v. Bennett, 345 So. 2d 1129, 1137-38 (La. 1977) (psychiatric reports were conclusory and without support).

originally designed to prevent.[244]

Finally, it is worth noting that mentally retarded defendants present unique issues regarding attempts to effect[245] competence once they have been found incompetent. It was previously believed that the incompetence of retarded defendants was almost always permanent. "Treatment" with the hope of eventually rendering the defendant able to stand trial was thus futile.[246] Modern developments in the field of habilitation[247] and special education[248] have greatly increased our ability to teach retarded individuals particular concepts and skills. The disability which makes some retarded defendants incompetent will be so substantial that no teaching or habilitation can effect competence. For many others, however, a carefully designed and individualized program of habilitation may make it possible for the defendant to receive a fair trial.[249] It is clear, however, that this can only be accom-

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244. *See supra* note 210.

245. The term "effect" is more appropriate for retarded defendants than the more common "restore" because most mentally retarded defendants who are incompetent will not have been competent at any previous time. *Testimony Presented to the ABA Standing Comm. on Assoc. Standards for Criminal Justice* 2 (1983) (testimony of Thomas E. Coval and Dr. Sheldon R. Gelman on behalf of the AAMD). *See also* MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.10 (stating that a defendant determined to be incompetent to stand trial has a right to treatment to "effect" competence).

246. PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 35 (1963). The task force concluded that

> [i]n the case of the mentally retarded defendant, unlike the mentally ill, there is often little point in finding inability to stand trial at the moment, but requiring that a trial must follow 'recovery.' Limited, though valuable, gains may be possible if the patient receives treatment and training, but for the majority of the retarded, the likelihood of great change remains slight.

Id.

247. *See supra* note 57.

248. *See* B. BLATT, D. BILKEN & R. BOGDAN, AN ALTERNATIVE TEXTBOOK IN SPECIAL EDUCATION (1977); D. EVANS, THE LIVES OF MENTALLY RETARDED PEOPLE 57-113 (1983); D. MACMILLAN, MENTAL RETARDATION IN SCHOOL AND SOCIETY 453-536 (2d ed. 1982); E. POLLOWAY, J. PAYNE, J. PATTON & R. PAYNE, STRATEGIES FOR TEACHING RETARDED AND SPECIAL NEEDS LEARNERS 152-294 (3d ed. 1985); W. SAILOR & D. GUESS, SEVERELY HANDICAPPED STUDENTS: AN INSTRUCTIONAL DESIGN 51-203 (1983). *See generally* SYSTEMATIC INSTRUCTION OF THE MODERATELY AND SEVERELY HANDICAPPED (M. Snell 2d ed. 1983) (a collection of articles on teaching concepts and skills).

249. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.10 (provides for the right to habilitation pursuant to an individualized plan designed to effect the defendant's competence). For example, when the nature of the incompetence is the individual's general inability to understand concepts of the complexity required for trial, habilitation is unlikely to be successful. On the other hand, when a defendant's incompetence results from the lack of general knowledge about the role of the various participants in criminal trials, or from correctible gaps in vocabulary and communications skills, a trial may be possible within the time framework allowable under law. *See generally* Jackson v. Indiana, 406 U.S. 715 (1972); MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.14 (trial of defendant rendered competent by habilitation).

plished by qualified mental retardation professionals experienced in the arts of habilitation. It is cruelly futile to send such defendants to state hospitals for the mentally ill that have no programs to habilitate retarded individuals, and this happens far too frequently.[250]

C. *Competence to Plead Guilty*

Guilty pleas by mentally retarded defendants present one of the most difficult doctrinal and practical problems faced by the criminal justice system in the mental disability area. Courts are sharply divided on the appropriate standard for competence to plead, and the practical consequences of the choice between the competing formulations are substantial.

Historically, acceptance of the idea that some retarded defendants are incompetent to enter a plea has paralleled the awareness that some defendants are incompetent to stand trial.[251] Pleas had special significance for medieval courts, and the failure, or refusal, of a defendant to enter a plea made it impossible to convict or punish him.[252] Therefore it was of the greatest importance to know whether the failure to plead was a conscious decision, or, in the alternative, "by visitation of God," a category which included "idiots."[253]

Of course, today guilty pleas have an entirely different significance.[254] The operation of the criminal justice system depends on a predictable quantity of plea bargaining, and for many defendants, a plea bargain appears to be their only substantial hope of reducing their sentence.[255] Therefore, the modern criminal justice

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250. *Cf.* People v. Lang, 76 Ill. 2d 311, 326-28, 331-32, 391 N.E.2d 350, 356-59, *cert. denied*, 444 U.S. 954 (1979) (involving a deaf defendant).

251. *See supra* notes 209-250.

252. The most common difficulty with which medieval and Tudor judges had to contend at the outset of a trial for felony or treason was the man who simply refused to plead "guilty" or "not guilty." Unless he uttered the necessary words, reverence to the ritual of the law made it unthinkable to proceed with the trial, with the result that he could not be convicted and executed. More important still for the Exchequer, his property would not be forfeit. But to take this course for the sake of one's dependents called for great fortitude, since the courts' remedy was to order the man who refused to plead to be subjected to the *peine forte et dure*, which consisted of slowly pressing him to death under an increasing weight, unless his endurance gave out in the process and he consented to plead. 1 N. WALKER, *supra* note 11, at 220. Therefore, if a prisoner refused to plead, as was quite likely if he was a madman or deaf-mute, the first question for the court was: "Is he mute of malice, or by visitation of God?" *Id.*

253. *Id.*

254. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, ch. 14 introduction at 14-5 (reflecting the widespread acceptance of plea bargaining in the criminal process); J. BOND, PLEA BARGAINING AND GUILTY PLEAS (2d ed. 1982); A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE (1976) (critical analysis of plea bargaining in a number of jurisdictions); Alschuler, *The Changing Plea-Bargaining Debate*, 69 CALIF. L. REV. 652 (1981) (critical review of the plea bargaining process).

255. Recent research suggests, however, that at least for common law crimes, the defendant has less to gain from a plea bargain than any other participant in the trial. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 CRIMINOLOGY — (in press 1985).

system provides numerous incentives for all parties to attempt to negotiate a plea of guilty to avoid trial.[256] At the same time, a guilty plea has the effect of waiving all of the defendant's constitutional rights in the adjudicative process and is the full equivalent of a conviction.[257] The prospect of a mentally retarded defendant entering a guilty plea without fully understanding its consequences is most alarming, because those consequences are uniquely momentous for that defendant.[258]

While it is generally recognized that the standard for competence to plead guilty is higher than for other kinds of consent or waivers,[259] the key issue today is whether the standard to plead guilty is higher than, or otherwise different from, the standard for competence to stand trial. It appears that most courts view the tests as identical, and thus apply the *Dusky* test[260] for competence to stand trial to the issue of the adequacy of a guilty plea.[261] There is, however, a substantial and persuasive minority view. The Ninth Circuit has rejected the identity of the two tests in a case involving mental illness,[262] and the District of Columbia Circuit has rejected their identity in a case involving the issue of mental retardation.[263]

The reason for establishing a different test for competence to plead is the imperfect match between the test for competence to stand trial and the issues involved in assessing the adequacy of a plea. The ABA's trial standard requires the court to inquire "whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational un-

256. *But see supra* note 255 (incentives offered by the criminal justice system to entice defendants to plead guilty do not work to defendants' best advantage); Brereton & Casper, *Does it Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 64 (1981-1982).

257. The Supreme Court noted long ago that "[a] plea of guilty . . . is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." Kercheval v. United States, 274 U.S. 220, 223 (1927).

258. *See* CONSENT HANDBOOK, *supra* note 170, at 22-23 (suggesting that the formality of checking the adequacy of a retarded person's consent should vary with the importance of the consequences of his decision); *see also* Monroe v. United States, 463 F.2d 1032, 1036 (5th Cir. 1972) (noting the significant consequences of a guilty plea to include the waiver of several constitutional rights, including the privilege against self incrimination, trial by jury, and confrontation).

259. *See, e.g.*, United States v. Young, 355 F. Supp. 103, 111 (E.D. Pa. 1973) ("[T]he procedures for taking a guilty plea are more stringent than those for waiving Miranda rights.").

260. *See supra* note 223 and accompanying text.

261. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-5.1; Note, *Competence to Plead Guilty: A New Standard*, 1974 DUKE L.J. 149, 155; *cf.* Sharp v. Scully, 509 F. Supp. 493, 495 (S.D.N.Y. 1981) (a petitioner found competent to stand trial on serious charges is competent to strike a favorable sentencing bargain and plead guilty).

262. Sieling v. Eyman, 478 F.2d 211, 214-15 (9th Cir. 1973).

263. United States v. Masthers, 539 F.2d 721, 726 n.30 (D.C. Cir. 1976).

derstanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings."[264] A court using this standard to assess the adequacy of a guilty plea will inquire into the defendant's memory of relevant events and his ability to communicate,[265] rather than address his appreciation of the consequences of a guilty plea and his ability to assess its desirability in his case. The alternative selected by the United States Court of Appeals for the Ninth Circuit in *Seiling v. Eyman* is a separate test which focuses more directly on the issues involved in the plea bargaining process: "A defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea."[266] The Ninth Circuit defends this choice on the grounds that it "requires a court to assess a defendant's competency with specific reference to the gravity of the decisions with which the defendant is faced."[267]

The D.C. Circuit found the Ninth Circuit's approach particularly helpful in reviewing the guilty plea of a mentally retarded defendant in *United States v. Masthers*.[268] The trial court had accepted a guilty plea from a mildly retarded defendant with a reported IQ of 57. The court of appeals, concerned that the plea may have been incompetent, held that the trial court's observations of the defendant's demeanor and the colloquy in accepting the plea[269] were not sufficient to justify a finding that the plea was competent and voluntary.[270] Judge Bazelon, writing for the court, noted that the defendant's answers in the colloquy almost never went beyond a simple affirmation. This apparently disguised the defendant's disability from both the trial judge and from his own counsel.[271] Judge Hastie's concurring opinion observed that

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264. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.1; *cf.* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (stating the test for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable understanding and whether he has a rational as well as factual understanding of the proceedings against him").

265. *See, e.g.*, State v. Cheshire, 313 S.E.2d 61, 64 (W. Va. 1984).

266. Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973) (quoting Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir.) (Hufstedler, J., dissenting), *cert. denied*, 400 U.S. 834 (1970)); *see also* United States v. Webb, 433 F.2d 400, 404 n.3 (1st Cir. 1970) (citing *In re* Williams, 165 F. Supp. 879 (D.D.C. 1958)) ("Courts have recognized that the conclusion that a defendant is competent to stand trial does not necessarily mean he has the mental capacity needed for an intelligent decision to plead guilty.").

267. *Seiling*, 478 F.2d at 215.

268. 539 F.2d 721, 726 (D.C. Cir. 1976).

269. *See* FED R. CRIM. P. 11.

270. *Masthers*, 539 F.2d at 723-25. The court of appeals sought to explore the issue as it related to mentally retarded defendants by inviting the Mental Health Law Project to participate as an *amicus curiae*.

271. *Id.* at 723-25 (Defendant Masthers acquiesced with simple responses of "Yes Ma'am" or "No Ma'm" to all but one question asked during the colloquy. At sentencing, the defendant explained his pending marriage: "[W]e haven't been together for about three years and we were getting married this month or last month, like she is expecting a kid." When the trial judge replied, "Not yours, I take it," defendant responded: "I don't know."); *see* R. EDGERTON, THE CLOAK OF COMPETENCE: STIGMA IN

as special efforts are made to improve the understanding of the deaf litigant and the litigant who little comprehends English, "it seems neither fair nor humane to refuse to make an analogous appropriate special effort when it appears that an accused person's comprehension is substantially impaired because of mental retardation."[272] *Masthers* accurately reflects what we know about common characteristics of mentally retarded people, and correctly analyzes the effect of both the disability and the individual's attempt to disguise it in criminal proceedings.[273]

The *Mental Health Standards* take a somewhat ambiguous position on the applicability of the trial competence test to the adequacy of guilty pleas. The commentary notes that there may be defendants who are competent to stand trial but whose mental illness makes it impossible for them to plead at an acceptable level of competence.[274] But the standard itself states that "[o]rdinarily, absent additional information bearing on defendant's competence, a finding made that the defendant is competent to stand trial should be sufficient to establish the defendant's competence to plead guilty."[275] This appears to establish a rebuttable presumption that a defendant who meets the test for standing trial will also be competent to plead. To the extent that it merely suggests that the two groups will substantially overlap, and that defendants competent to stand trial will most frequently be competent to plead, the statement is certainly accurate. However, it would be misleading for courts to use the standard to justify a refusal to inquire into competence to plead where there may be reason to doubt that the defendant's guilty plea was knowing and voluntary.[276]

THE LIVES OF THE MENTALLY RETARDED 144-71 (1967) (discussing the attempts of some mentally retarded people to hide and deny their disabilities and to "pass" as normal).

272. *Masthers*, 539 F.2d at 730; *see supra* note 37 (discussion of Judge Robb's dissenting opinion).

273. *See* Note, *Competence to Plead and the Retarded Defendant:* United States v. Masthers, 9 CONN. L. REV. 176 (1976) (discussion of the case, including the guilty-plea hearing on remand).

274. MENTAL HEALTH STANDARDS, *supra* note 4, 7-5.1 commentary at 291-95. The commentary uses the example of a defendant so overwhelmed by guilt caused by the mental illness that the guilty plea seems necessary to expiate the guilt. *Id.* Guilty pleas prompted by mental illness, and not actual guilt, should not be accepted. *Id.*

275. MENTAL HEALTH STANDARDS, *supra* note 4, 7-5.1(a)(i).

276. This refusal to inquire into competence to plead probably also misreads the standard. The commentary accompanying the standard explicitly anticipates cases in which additional information suggests a difference in the competence to perform the two different tasks involved in trials and pleas: "[T]he test should not be equated to that of competence to stand trial testing whether the defendant has the mental capacity to assist his attorney to make the plea decision, but instead should directly address the defendant's ability to make that decision in light of all the attendant factors . . . ." *Id.* 7-5.1 commentary at 292.

The approach taken in *Sieling* and *Masthers* is particularly attractive for cases involving mental retardation. There are likely to be a significant number of retarded defendants who remember the events of the incident at issue, can communicate with counsel, and understand the proceedings of trial, but nevertheless are incapable of weighing the choices necessary to make a competent plea of guilty. But the very existence of this presumed subset of retarded defendants is the reason that different tests are troubling. If a defendant is so retarded that he is incompetent to plead but not incompetent to stand trial, he is denied the opportunity to reduce his sentence through effective plea bargaining — an opportunity available to all other defendants.

Therefore, defendants who are incompetent to plead guilty but are competent to stand trial will, at least theoretically, face the prospect of a harsher sentence than a similarly situated nonretarded defendant who can avail himself of the opportunity to plea bargain.[277] Denying this opportunity to the first defendant solely because of his disability offends basic notions of fairness and equal protection. An artificial identity between the standards for trial and pleading avoids the creation, or recognition, of this anomalous class. This artificial identity can be created only by accepting guilty pleas from some defendants who cannot understand the nature and consequences of their agreement, or by refusing to try some defendants who can understand the nature of trial proceedings and assist counsel.[278]

The better approach would be to accept, as the *Mental Health Standards* implicitly do, the fact that a realistic inquiry into the defendant's competence to enter a guilty plea will produce a small group of defendants who are denied access to the advantages of plea bargaining.[279] Fair implementation of this approach requires that the sentencing judge be informed of the defendant's incompetence to enter a guilty plea. The judge should then take the defendant's incompetence to plead into account and reduce the sentence to approximate that which the defendant might have received had he been able to engage in effective plea bargaining.[280]

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277. *But see supra* note 255.

278. The model statute suggested by the ABA Commission on the Mentally Disabled argues that another, more satisfactory, resolution of the dilemma is available. Section nine of that act provides for a more thorough and detailed explanation of the nature of the guilty plea that the defendant must make. The commentary to this section suggests that this approach is preferable to the Ninth Circuit's test in *Seiling* because it "appear[s] to provide the same protection without the ambiguities and complications introduced by a having [sic] dual standards of competence." MODEL DEVELOPMENTALLY DISABLED OFFENDERS ACT, *supra* note 8, commentary at 746. As desirable and appropriate as the Model Act's more detailed explanation is, it can only reduce the size of the group of retarded defendants competent to stand trial but incompetent to plead guilty. This reduction is a valuable mitigation of the problem, but appearances to the contrary notwithstanding, it is not a complete solution because it does not offer a comparable guarantee of the adequacy of pleas to that afforded by the *Seiling* test.

279. *See supra* note 274 and accompanying text.

280. This reduction is not the same as, and should not be viewed as a substitute for,

This imprecise substitute for the availability of the plea bargaining process[281] would reduce the unfairness to those defendants denied effective plea bargaining, recognizing that different tasks are involved in trials and pleas, and that the competence required for one is not identical to that required for the other.

Finally, it should be noted that the number of defendants incompetent to plead guilty because of mental retardation can be reduced substantially through modern special education.[282] It is true that some defendants are so substantially disabled that no educational efforts will allow them to attain the competence required to meet the *Sieling* test. For example, some retarded defendants, even with skilled teaching, will still be incapable of grasping the abstract concepts involved in a plea agreement. Others, however, would be incompetent to plead only because they do not know the meaning of key words[283] or because, unaided, they cannot understand the bargaining process or the conceptual foundation for a particular proposed agreement. Many individuals in this latter group are able to learn the necessary in-

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the mitigating impact of mental disability recognized in standard 7-9.3. *See infra* note 320.

281. The plan is a necessarily imprecise substitute for plea bargaining because the judge cannot replicate with complete accuracy the process and product of plea negotiations. Plea negotiations typically depend on factors such as the strength of the prosecution's case and the expense of bringing it to trial. It does not seem impractical or inappropriate to ask the sentencing judge to approximate the likely result of hypothetical negotiations by taking these factors into account. Of course plea bargaining also depends on the defendant's willingness to forego a trial by pleading guilty, and there is no practical way for a court to replicate the defendant's decision-making process if the defendant lacks the ability to comprehend the terms of the proposed agreement. Establishing the unavailability of the plea bargaining process as a mitigating factor in sentencing thus gives a few defendants the benefit of a bargain to which they would not have agreed if they were competent. It also gives defendants the theoretical benefits of both pleading to a lesser offense (reduced sentence) and pleading not guilty (the possibility of acquittal). At the same time, it requires the state to give up that portion of the full sentence it would have lost in a plea bargain without the plea's concomitant benefits to the prosecution (certainty of conviction and avoiding the expense of trial). Nevertheless, these factors merely evidence the unavoidable imprecision of attempting to replicate a negotiating process when one party is incapable of negotiating. Further, because the number of defendants who are triable but incompetent to plead will be very small, the imprecision and awkwardness of this approximation will be outweighed by the advantages of realistic evaluations of the defendant's competencies and more equitable treatment of disabled defendants.

282. As Judge Hastie observed in *Masthers*, if the defendant "should be permitted to withdraw his plea, it should not be too difficult to find someone skilled in working and communicating with the mentally retarded who could and would communicate effectively with him, so that his participation in any further proceeding would be knowing and meaningful." *Masthers*, 539 F.2d at 730 (Hastie, J., concurring).

283. For example, on remand in the *Masthers* case, the trial judge substituted the simple question "Did anyone scare you into this?" for the more inaccessible and unfamiliar "coerced" in conducting the colloquy on a new proposed guilty plea. It appears that the defendant clearly understood the judge's question when phrased in this manner. *See* Note, supra note 273, at 178 n.9 (quoting a telephone interview with observers at Masthers's trial).

formation and skills from a competent special education teacher.[284] Of course, the ability to effect competence in these defendants requires referral to professionals with skills and training which match the nature of the particular handicap involved.[285] The availability of this professional expertise offers the realistic prospect that a substantial number of retarded defendants can be made competent to decide whether or not to plead guilty.[286]

V. Dispositional Issues

A. Civil Commitment

The civil commitment of defendants found not guilty by reason of insanity has fostered a great deal of controversy,[287] although very little has focused on mentally retarded defendants.[288] The commitment of defendants found permanently incompetent to stand trial has received less public attention,[289] but presents issues acknowledged to be of particular importance to retarded defend-

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284. *See supra* note 248 (discussing the training and capabilities of modern special educators).

285. The typical order committing the retarded incompetent defendant to the state mental hospital, or other psychiatric facility or agency, to "restore" competence usually fails because those facilities typically lack expertise in special education. Today, however, the implementation of the Education for Handicapped Act, 20 U.S.C. §§ 1400-61 (1982), has produced a substantial pool of special education talent in communities throughout the nation. Courts and other agencies involved in the criminal justice system should have little difficulty in enlisting the assistance of qualified mental retardation professionals with these skills.

286. For example, one of the authors, Professor Luckasson, recently served as an expert witness in the case of a mentally retarded convict whose earlier plea of guilty was being challenged in state court as incompetent. Evaluation of the prisoner's intelligence revealed him to be mildly mentally retarded with an extremely limited vocabulary and understanding of the criminal justice system. For example, when he was asked the meaning of the operative terms of the plea bargain he had "approved," he could only define "rights" as the opposite of "lefts" and identify "waive" as a physical gesture. His understanding of these terms had not been explored at the time of his original plea. It also became clear during the evaluation that the defendant had thought a guilty plea appropriate because he felt bad that he had not prevented the commission of the crime by another person and not because he himself had committed it (as he apparently had not). The trial judge agreed to a withdrawal of the original guilty plea. Subsequently, it became clear that the defendant's best interest would be served by an *Alford* plea, resulting in a sentence of time already served, rather than a new trial. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970). However, this would be possible only if the defendant became competent to agree to the even more conceptually complex *Alford* plea. Using standard special education methodology, it was possible to teach the defendant the necessary vocabulary and concepts in four sessions over a period of one week. The trial judge then conducted a thorough inquiry into the defendant's current competence and accepted the plea.

287. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-7 introduction at 392-93; *Limiting the Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658, and S. 2669 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1-395 (1982); L. CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR. 122-24 (1984); Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528, 528-32 (1985).

288. Courts have held, apparently without exception, that statutes providing for subsequent commitment of insanity acquittees apply to acquittees who are mentally retarded. *See, e.g.*, United States v. Shorter, 343 A.2d 569, 571-72 (D.C. 1975).

289. *But see* H. STEADMAN, BEATING A RAP? DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL 1-10 (1979).

ants.[290] For both groups of defendants, the key issue is whether commitment must be according to procedures established for all civil patients, or in the alternative, by a special system of commitment designed for individuals in the criminal justice system.[291] The *Mental Health Standards* provide a system of special commitment for mentally ill and mentally retarded defendants found permanently incompentent and not guilty by reason of mental nonresponsibility.[292] The proposed provisions of this special commitment system are particularly important for mentally retarded defendants.

The *Mental Health Standards* establish as the criteria for special commitment[293] that the individual be "currently mentally ill or mentally retarded: and, as a result [pose] a substantial risk of serious bodily harm to others."[294] This requirement precludes commitment when the sole ground is the mere continuation of mental disability. Some state statutes still provide that an insanity acquittee cannot be released until he is free from mental disability.[295]

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290. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 738 (1972) (criminal commitment of a mentally retarded deaf-mute until he became sane held unconstitutional, given the lack of a substantial probability that he could ever fully participate in a trial).

291. The Supreme Court held in *Jackson* that permanently incompetent defendants could not be held indefinitely without a general commitment hearing on their current mental condition. *Id.* In Jones v. United States, 463 U.S. 354, 366-68 (1983), the Court declined to require that acquittees who had established their own insanity at criminal trial receive a commitment hearing at which the state bore the burden of persuasion. *Cf.* Addington v. Texas, 441 U.S. 418, 431-32 (1979) (requiring that the state bear the burden of persuasion by clear and convincing evidence at general commitment hearings). The Supreme Court in *Jones* distinguished *Jackson* on the ground that the insanity acquittee had been found by the criminal trial jury to have committed the criminal act. 463 U.S. at 364 n.12. It is this distinction that appears to support the constitutionality of using special commitment procedures in seeking the confinement of permanently incompetent defendants whose "factual guilt" has been determined by a trial court. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.13(b).

292. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.13, 7-7.3.

293. The criteria for commitment and the procedures for adjudicating commitment cases are identical for acquitted and incompetent defendants. *See id.* 7-4.13(b)(ii).

294. *Id.* 7-7.4(b).

295. *See, e.g.*, VA. CODE § 19.2-181 (Supp. 1985) (requiring that an acquittee be committed as long as he or she "is insane or mentally retarded or . . . his discharge would be dangerous to the public peace and safety"). A 1984 amendment substituted the term "mentally retarded" for "feebleminded." Act of April 9, 1984, ch. 703, 1984 Va. Acts 1527, 1543.

For a listing of states' statutory grounds for commitment of insanity acquittees see Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 606 n.6 (1981). *See generally* Yankulov v. Bushong, 80 Ohio App. 497, 504, 77 N.E.2d 88, 92-93 (1945) (court ordered a mentally retarded acquittee released on habeas corpus because he could not be found dangerous as a result of continuing insanity). The court reasoned:

> While it is established that Steve Yankulov is a moron and therefore easily subject to influence, whether for good or bad, he is apparently no different than any other moron, and the mere fact that a person is a moron does not subject him to incarceration in a hospital for criminal insane persons.

Id. at 504, 77 N.E.2d at 93.

Such provisions are unreasonable and arguably unconstitutional[296] for both mentally ill and mentally retarded defendants because the state lacks a distinctive interest in confining insanity acquittees who lack a relevant characteristic that differentiates them from general civil patients. The only such trait that has been asserted is their dangerousness.[297] The mere continuation of mental disability, in the absence of a showing of dangerousness, cannot justify the commitment of an acquittee. This is particularly true when the disability results from mental retardation because, unlike individuals with an episodic or cyclical or curable mental illness, few acquittees who are mentally retarded will be able to shed their retardation during commitment.[298] Thus, for most retarded acquittees, a provision requiring their confinement until they persuade a court that they are no longer retarded or "insane" constitutes a life sentence — even when it is demonstrable that the individual is not dangerous to anyone.

The procedures for special commitment are also of particular interest in cases involving mentally retarded individuals. The *Mental Health Standards* establish procedural protections that grant the basic rights enjoyed by proposed patients under most mental health civil commitment statutes.[299] However, these procedures may be substantially more rigorous than those usually employed for the civil commitment of mentally retarded persons.[300] Paradoxically, mentally retarded acquittees and defendants found permanently incompentent to stand trial may receive greater procedural protection under these *Mental Health Stan-*

296. *See* State v. Krol, 8 N.J. 236, 246-49, 344 A.2d 289, 295-96 (1975) (holding that due process and equal protection require that the standard for commitment of a person who has been acquitted by reason of insanity be cast in terms of continuing mental illness and dangerousness to self and others, and not in terms of insanity alone). Although the United States Supreme Court did not directly hold that a statute would be unconstitutional if it provided for release of an insanity acquittee only if he showed that he was no longer insane *and* no longer dangerous, the formulation of its holding in *Jones* approved confinement "until such time as he has regained his sanity *or* is no longer a danger to himself or society." 463 U.S. at 370 (emphasis added).

297. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.4 commentary at 413-16.

298. *See supra* note 54.

299. *See, e.g.*, MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.5, 7-7.8 commentary at 430-33. The procedural protections do differ from the usual commitment procedures in some respects. Acquittees are entitled to representation by counsel, confrontation and cross-examination of adverse witnesses, independent expert witnesses, the privilege against self-incrimination, and an expedited appeal. *Id.* 7-7.5. The rules of evidence, including the prohibition on hearsay testimony, apply. *Id.* 7-7.5(d). But, in contrast to many civil commitment statutes, periodic review is less frequent and acquittees cannot be released without a court order. Special acquittees may petition for a rehearing one year after commitment and every two years thereafter. And unlike regular commitment review, the burden of initiating review rests with the special acquittee. *Id.* 7-7.8 & commentary at 430-33. For a general discussion of state law, see Van Duizend, McGraw & Keilitz, *An Overview of State Involuntary Commitment Statutes*, 8 MENTAL & PHYSICAL L. REP. 328 (1984).

300. *See* DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES, *supra* note 8, at 416-21 (1982) (discussing the general procedures and criteria for voluntary admission in various jurisdictions); *see generally* Dybwad & Herr, *Unnecessary Coercion: An End to Involuntary Civil Commitment of Retarded Persons*, 31 STAN. L. REV. 753 (1979).

dards than they would receive if subjected to their state's general civil commitment laws.[301] The resolution of this paradox lies in reform of those general commitment laws which fail to provide basic procedural protections.[302] The fact that the American Bar Association has identified these protections as necessary for the commitment of acquittees suggests that no fewer protections can be afforded to individuals who have not been accused of any wrongdoing, but whose commitment is sought on civil grounds.[303]

Perhaps the most important of these procedures for retarded acquittees and incompetent defendants are the requirements for periodic review. The *Mental Health Standards* provide that one year after the initial commitment hearing and every two years thereafter, the state has the burden of persuading the court by clear and convincing evidence that the acquittee or incompetent defendant still meets the commitment criteria.[304] This is likely to be especially important for retarded individuals, who may stand a greater than average chance of getting lost in the system and thus remain in confinement long after its necessity has ended. But unless the superintendent of the facility petitions for their release,[305] acquittees and incompetent defendants must initiate the periodic review hearings.[306] Because of their limited ability to understand their rights, the procedures for implementing them, and their acquiescence to authority,[307] mentally retarded individuals will often lack the ability to trigger periodic review of their continued confinement. Thus, for retarded persons, the requirement of regularly available legal counsel is particularly crucial,[308] and a heavy responsibility falls upon the attorney to both ascertain carefully whether the retarded person understands his or her rights and to contest continued confinement whenever the client has not com-

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301. This is particularly true of incompetent defendants, who will have received a hearing on both whether they committed the criminal act and a commitment hearing. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.13, 7-7.5.

302. Indeed, standard 7-7.3(b) provides for the use of general commitment procedures, rather than those designed for violent insanity acquittees, for those acquittees whose cases do not involve dangerous felonies, but requires that those procedures satisfy due process. This requirement is directed at those states whose mental retardation civil commitment statutes lack basic procedural protections. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.3 commentary at 405-10.

303. In particular, the procedural protections provided at the special commitment hearing described in standard 7-7.5 and at periodic reviews described in standard 7-7.8 constitute a floor for implementing the requirement of fundamental fairness in the general civil commitment of mentally retarded persons.

304. MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.8.

305. *See id.* 7-7.9.

306. *See id.* 7-7.8(a).

307. *See supra* notes 88-90 and accompanying text.

308. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.8(c) commentary at 431.

petently waived such a hearing.[309]

Finally, it is noteworthy that the *Mental Health Standards* acknowledge that specially committed mentally retarded persons have rights during their confinement equivalent to those enjoyed by civilly committed individuals.[310] Among the most important of these is the right to habilitation.[311] By casting the rights of acquittees in terms equivalent to those found in the civil commitment system, the *Mental Health Standards* avoid limiting the right to habilitation to the rather parsimonious formulation recognized by the Supreme Court in *Youngberg v. Romeo*.[312] In *Romeo*, the Court held that substantive due process required that civilly committed mentally retarded persons receive habilitation sufficient to ensure their physical safety and freedom from unnecessary physical restraint. Though the Court did not suggest that its ruling constituted the entirety of a retarded person's constitutional right to habilitation,[313] the habilitation specially committed retarded persons are entitled to receive under the *Mental Health Standards* is not limited to whatever the Court ultimately concludes to be the minimum requirement of due process. State statutes,[314] and possibly state constitutions,[315] typically provide a more explicit and expansive right to habilitation, including the right to an individualized habilitation plan.[316] The *Mental Health Standards* requirement of equivalent habilitation rights to those enjoyed by civilly committed persons also protects specially committed retarded individuals from a lack of appropriate mental retardation services at state mental hospitals that do not otherwise serve retarded people.[317]

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309. *See* Luckasson & Ellis, *Representing Institutionalized Mentally Retarded Persons*, 7 MENTAL DISABILITY L. REP. 49, 50 (1983).

310. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.6.

311. *See supra* note 57.

312. 457 U.S. 307, 322-23 (1982).

313. *See Romeo*, 457 U.S. at 326-29 (Blackmun, J., concurring); *see also* Ellis, *The Supreme Court and Institutions: A Comment on Youngberg v. Romeo*, 20 MENTAL RETARDATION 197, 198 (1982) ("[B]y tying Mr. Romeo's right to habilitation to his right to freedom from undue restraint within the institution, the court left open the possibility that the right to habilitation includes the training needed to acquire community living skills for those individuals whose release from the institution is feasible.").

314. *See* DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES, *supra* note 8, at 849-64 (compilation of relevant state statutes).

315. *See generally* Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 LAW & CONTEMP. PROBS. 7 (Summer 1982).

316. *See, e.g.*, N.M. STAT. ANN. § 43-1-9 (1978 & Repl. 1984); *see also* MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT, *supra* note 8, § 6 (providing model rules for "Preparation of Individualized Program Plans"); Bennett, *Reviewing an Individual Habilitation Plan: A Lawyer's Guide*, 4 U. ARK. LITTLE ROCK L.J. 467, 474-84 (1981).

317. The appropriate comparison group for determining an acquittee's or an incompetent defendant's right to habilitation would clearly be mentally retarded people in residential confinement in that state, whether they were located in the same facility or in another. The *Mental Health Standards* would not be satisfied if a state claimed that specially committed persons were entitled only to those services offered to other committed persons confined at the same facility, if other mentally retarded people were receiving more appropriate habilitation in other facilities.

B. Sentencing

Mentally retarded defendants who are convicted or who plead guilty present the issue of the possible relevance of their disability in the determination of an appropriate sentence.[318] Disagreeing with those courts that have held that mental retardation has no relevance in setting a criminal sentence,[319] the *Mental Health Standards* provide that "[e]vidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender."[320] The commentary to this section justifies its provision by reference to the appropriateness of "individualized justice"[321] and apparently is premised on the notion that a defendant's mental retardation is extremely likely to have influenced his or her criminal actions in a way that reduces the degree of culpability.[322] H. L. A. Hart has argued that mitiga-

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318. In addition to the usual ways in which many defendants do not reach the sentencing stage, including incompetence and acquittal, a substantial number of retarded defendants are "diverted" from the criminal justice system before going to trial. Some of this process occurs through formal referrals to community retardation agencies from personnel in the criminal justice system. *See, e.g.*, Schwartz, *A Diversionary System of Services for the Mentally Retarded Offender*, in THE RETARDED OFFENDER 298, 298-302 (M. Santamour & P. Watson eds. 1982); Note, *The Mentally Retarded Offender in Omaha-Douglas County*, 8 CREIGHTON L. REV. 622, 649-57 (1975). Other retarded persons accused of being lawbreakers are diverted informally through a decision by service providers in the community that invoking a criminal sanction would be undesirable. *See* Edgerton, *Crime, Deviance and Normalization*, in DEINSTITUTIONALIZATION AND COMMUNITY ADJUSTMENT OF MENTALLY RETARDED PEOPLE, *supra* note 69, at 145, 162. For a proposed statutory structure for the diversion of retarded defendants, see MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT, *supra* note 8, § 7.

319. McCune v. State, 56 Tex. Crim. 207, 212, 240 S.W.2d 305, 309 (1951) ("We have been cited to no decision requiring or permitting the trial judge to instruct the jury in his charge that they might consider feeble-mindedness of the accused in mitigation of the punishment to be assessed in the event of conviction."); *see* H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 206-11 (1954); S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 412-18 (1925). *But cf.* May v. State, 398 So. 2d 1331 (Miss. 1981) (remanding for resentencing a mildly retarded fourteen-year-old, who had been tried as an adult, on the issue of mitigation because special education opportunities were not available at the state penitentiary).

320. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.3. Although some of the provisions of the *Standards* relating to sentencing are limited to the more seriously disabled mentally retarded defendants, *see infra* notes 326-62 and accompanying text, this provision applies unambiguously to all individuals who have mental retardation.

321. *Id.* 7-9.3 commentary at 463; *cf.* Morris, *Sentencing the Mentally Ill*, in REFORM AND PUNISHMENT: ESSAYS ON CRIMINAL SENTENCING 125 (M. Tonry & F. Zimring eds. 1983) (arguing that a defendant's mental illness should normally reduce the severity of the punishment imposed but that occasionally it should be a factor that prolongs punishment).

322. *Cf.* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, 18-3.2(b)(i)(D) (2d ed. 1981) (suggesting mitigation of criminal sentences when "the offender because of youthful age or any physical or mental impairment lacked substantial capacity for judgment when the offense was committed"). The commentary refers to this provision as "a 'diminished responsibility' criterion." *Id.* 18-3.2(b)(i)(D) commentary at 18.229.

In contrast the Model Developmentally Disabled Offender Act provides: "In sen-

tion is particularly appropriate where a convicted criminal's "ability to control his actions is thought to have been impaired or weakened . . ., so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally placed."[323] The United States Supreme Court has held that mental condition may not be constitutionally excluded from consideration in capital sentencing.[324] The *Mental Health Standards* extend the principle of allowing consideration of mental condition to sentencing in noncapital cases. This broader requirement of mitigation may prove imprecise in its im-

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tencing a defendant who is developmentally disabled, the court shall impose the least restrictive alternative consistent with the needs of the defendant, and of public safety." MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT, *supra* note 8, § 11(3). This approach to sentencing incorporates a modified mandate to employ no greater restriction than individual circumstances require — a requirement that is absent in the sentencing of mentally typical convicts. The Model Act's commentary argues that this

> simply legitimizes consideration of developmental disability in determining the degree and duration of the restraints on liberty to be imposed, and establishes a presumption in favor of selecting a sentence or conditions of probation which are no more harsh, hazardous or intrusive and involve no more restrictions on the defendant's physical freedom or social interaction than are absolutely essential.

Id. commentary at 760; *cf.* AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE LEAST RESTRICTIVE ALTERNATIVE: PRINCIPLES AND PRACTICES, 51-52 (H.R. Turnbull ed. 1981).

The Model Act thus incorporates into sentencing a principle designed to reduce unnecessary deprivation of liberty in the civil commitment process. This is a much more substantial departure from traditional theories of sentencing than is the *Mental Health Standards'* requirement of mitigation. But it should be recalled that the Model Act also provides that a developmental disability cannot constitute the basis for a defense of nonresponsibility, and thus retarded convicts under its provisions include some who would have been acquitted under standard 7-6.1. *See supra* notes 130-35.

323. H. HART, PUNISHMENT AND RESPONSIBILITY 15 (1968). Of course this justification for mitigation sounds remarkably like the volitional prong of the insanity defense, which was rejected in standard 7-6.1. *See supra* note 125-29. The *Mental Health Standards'* call for mitigation can thus be read as a partial substitute for the full exculpation some mentally disabled defendants would have received under a broader definition of the insanity defense. *Cf.* B. WOOTTON, CRIME AND THE CRIMINAL LAW 77 (1963) (arguing that mental disability should not form a defense to criminal charges, but instead should be considered as a factor at sentencing, relevant "to the choice of treatment most likely to be effective in discouraging [the defendant] from offending again"). *But see* R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 81 (1979). Singer argues against mitigation for provocation or duress: "To attempt to alter the substantive criminal law in the sentencing criteria . . . is both duplicitous and undesirable." Singer accepts the relevance of diminished capacity, but believes its determination by the jury should not be displaced by the sentencing judge. *Id.*

324. Eddings v. Oklahoma, 455 U.S. 104, 116 (1982), held that the sentencing judge in a capital case could not decline to consider the possibly mitigating circumstances of a defendant's mental state arising from a troubled family background. *Id.* The *Eddings* majority relied on the plurality opinion in Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion by Burger, C.J.), which declared that, while individualization of sentencing was not constitutionally required in noncapital cases, a statute precluding consideration of any possible mitigating circumstances in a death penalty case constituted cruel and unusual punishment. One of the limited mitigating circumstances recognized by the statute in *Lockett* was that the "offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." *Id.* at 607, 612-13. One of Lockett's accomplices "received a lesser penalty because it was determined that his offense was 'primarily the product of mental deficiency' . . . ." *Id.* at 591.

plementation, but it may also reduce the problems caused by inappropriate imprisonment of vulnerable retarded convicts.[325]

The *Mental Health Standards* also propose a system of commitment[326] at sentencing for those defendants with particularly severe disabilities. This system provides for habilitation of less disabled mentally retarded convicts in correctional facilities,[327] and for more substantially handicapped offenders in mental retardation facilities "preferably under the supervision of the jurisdiction's department of mental health or mental retardation."[328] The more seriously disabled convicts may be committed upon the petition of either the prosecutor or the offender[329] if a court, by clear and convincing evidence, finds that the defendant "requires treatment or habilitation in a . . . mental retardation facility rather than an adult correctional facility."[330] This dichotomous system for the habilitation of retarded convicts parallels the proposed system for treating mentally ill offenders, but raises substantially different issues as applied to persons with mental retardation.

The first issue involves the separation of two groups of retarded offenders on the basis of the severity of their disability.[331] Mentally ill convicts deemed severely disabled enough to qualify for post-conviction commitments are those "who suffer a substantial disorder of thought, mood, perception, orientation or memory

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325. We have also suggested reducing of sentences to diminish potential injustice arising from the trial and conviction of defendants found incompetent to enter a plea of guilty. *See supra* notes 280-281 and accompanying text. This adjustment should be separately considered from any reduction due to mitigating circumstances.

326. The approach bears some resemblance to the diversion of mentally disabled offenders. *See supra* note 318. It differs from diversion in that it follows a criminal trial and conviction and because it results in a formal criminal sentence. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.10(a).

327. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.7(a).

328. *Id.* 7-9.7(b).

329. *Id.* 7-9.8(a).

330. *Id.* 7-9.9(d). The clear and convincing standard is set forth at *id.* 7-9.9(c).

331. A parallel distinction is drawn between prisoners who are "seriously mentally retarded" and other mentally retarded prisoners. *Id.* 7-10.1(b)-(c); *see infra* note 341, 385-91. In the context of defining the scope of the insanity defense, Congress has also apparently attempted to distinguish defendants on the basis of the severity of their mental retardation. Insanity Defense Reform Act of 1984, § 402(a), 18 U.S.C.A. § 20(a) (West Supp. 1985) ("as a result of severe mental disease or defect"). *See supra* note 123. The Senate Report elaborates:

> The provision that the mental disease or defect must be "severe" was added to section 20 as a Committee amendment. As introduced in S. 829, the provision referred only to a "mental disease or defect." The concept of severity was added to emphasize that nonpsychotic behavior disorders or neuroses such as an "inadequate personality," "immature personality," or a pattern of "antisocial tendencies" do not constitute the defense.

S. REP. NO. 225, 98th Cong., 2d Sess. 229, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3411; *cf. supra* note 126. There is no indication that the effect of the modifier on mental retardation ("defect") was considered, and there is currently no clarifying caselaw.

which grossly impairs judgment, behavior, or the capacity to recognize reality or the ability to meet the demands of life . . . ."[332] The commentary suggests that this dichotomy represents an attempt to reflect the psychiatric distinction between psychotic mental illness and lesser forms of mental disorder,[333] and thus to assure that "the standard for commitment of the mentally ill should be the same for offenders and non-offenders."[334] No parallel distinction exists in most mental retardation commitment laws on the basis of the severity of an individual's handicap.[335] Nevertheless, the *Mental Health Standards* opt for a parallel structure, "reflect[ing] the policy view that the standard for commitment of the mentally retarded should, so far as possible, track the standard for the commitment of the mentally ill offender."[336] A distinction in severity is therefore drawn, defining a "seriously mentally retarded offender" as one who has "very significant subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior."[337]

Ultimately, the attempt to treat mental illness identically with mental retardation fails because of differences between the composition of the two groups. Within the universe of mentally ill people, there are a substantial number of people, perhaps a majority, whose disability is so mild, ill-defined , and common that it subverts the purposes of the *Mental Health Standards* to address their situations with the same legal rules that encompass mental illness that is truly disabling, particularly psychotic illnesses.[338] Mental retardation, as currently defined, presents no such problem.[339] Even though the majority of mentally retarded individuals, and presumably an even larger majority of retarded defendants who reach sentencing, are labeled as "mildly" mentally retarded,[340] their disability is not comparable in relative lack of severity to that of defendants whose mental illness results from a neurosis or personality disorder. The substantial disability en-

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332. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.1(b).

333. *Cf.* AMERICAN PSYCHIATRIC ASSOCIATION, A PSYCHIATRIC GLOSSARY 114 (5th ed. 1980) (defining psychosis as "[a] major mental disorder of organic or emotional origin in which a person's ability to think, respond emotionally, remember, communicate, interpret reality, and behave appropriately is sufficiently impaired so as to interfere grossly with the capacity to meet the ordinary demands of life.").

334. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.1 commentary at 458.

335. DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 417-18 (1982). Apparently only Ohio and the District of Columbia limit by statute commitments based on the severity of an individual's mental retardation. OHIO REV. CODE ANN. § 5123.01(L) (Page 1981) ("at least moderately mentally retarded"); D.C. CODE ANN. § 6-1924 (1981) ("at least moderately mentally retarded and requires habilitation").

336. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.1 commentary at 458.

337. *Id.* 7-9.1(c).

338. During the reign of the *Durham* rule, the District of Columbia Circuit addressed similar issues in the debate about whether "psychopathic personality disorders" would suffice to support a defense of insanity. *See* Blocker v. United States, 288 F.2d 853, 860-62 (D.C. Cir. 1961) (Burger, J., concurring).

339. Note that individuals previously labeled "borderline" mentally retarded no longer fall within the definition of mental retardation. *See supra* note 44.

340. It is likely that an even larger majority of retarded defendants who reach sentencing are labelled as "mildly" mentally retarded. *See infra* note 342.

compassed by even "mild" mental retardation defeats any attempt to find a parallel distinction in mental retardation analogous to the division in mental illness between psychoses and less disabling disorders.

Both the definition and the underlying attempt at distinction are problematic.[341] The commentary notes that the majority of people with mental retardation are mildly retarded[342] and suggests that the distinction between the "seriously" mentally retarded offender and other mentally retarded convicts should be drawn somewhere within the mildly retarded range, with all profoundly, severely, and moderately retarded persons within the class of the "seriously" retarded, and some mildly retarded offenders included while others are excluded.[343] The *Mental Health Standards* attempt to accomplish this division by adding modifiers to the American Association on Mental Deficiency definition of mental retardation: the individual's intellectual functioning must be "*very* significantly subaverage" and the deficit in adaptive behavior must be "*substantial.*"[344] These "qualifying artifices"[345] require the sentencing tribunal[346] to consider "[t]he totality of the circumstances" in determining whether a particular mildly retarded offender falls within the commitment criteria, but "do not allow the sentencing tribunal to divide mathematically the I.Q. range of mild retardation and to thereby fix a precise I.Q. prerequisite dictating a commitment or incarceration decision."[347]

Drawing this line in individual cases is an unenviable task.[348]

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341. It should be noted that the definition contained in the final version of the *Mental Health Standards* is far superior to that in previous drafts, which was likely to cause serious confusion among courts and mental retardation professionals. *Cf.* Provisional Standards 7-9.1(c), 7-10.1(c) (1st Tent. Draft, July 1983).

342. MENTAL HEALTH STANDARDS, *supra* note 4, 7-10.1 commentary at 494-95. The commentary further observes that "[f]ew retarded offenders who progress to a sentencing hearing will fall within the severe or moderate classes and it is next to inconceivable that any would fall within the profound class." MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.1 commentary at 460. *See also* J. WILSON & R. HERNSTEIN, CRIME AND HUMAN NATURE 154 (1985) (the offender population contains relatively few very low IQ's). Our review of the appellate cases suggests that while the commentary's statement is generally accurate, it may be slightly exaggerated because a noticeable number of defendants with reported IQ scores indicating moderate retardation find their way to appellate courts.

343. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.1 commentary at 460. The *Mental Health Standards* state: "The . . . definition . . . is not meant to exclude from the commitment alternative all mildly retarded offenders nor is it meant to include automatically all mildly retarded offenders." *Id.*

344. *Id.* 7-9.1(c) commentary at 458-61.

345. *Id.* 7-9.1(c) commentary at 459.

346. *Id.* 7-9.9(a)(iv) (commitment hearing must take place before a "judicial hearing officer").

347. *Id.* 7-9.1 commentary at 460.

348. Part of the difficulty is semantic. An expert witness would be hard pressed to testify honestly and coherently that an IQ score that is at least two standard devia-

Determining whether it is worth the effort requires an evaluation of the anticipated benefit of the dichotomy. The principal purpose of drawing the line must be based on a conclusion that the less-disabled portion of mildly retarded individuals will more appropriately receive habilitation in prison while profoundly, severely, moderately, and the remainder of the mildly retarded convicts will more appropriately receive habilitation in mental retardation facilities.[349] The validity of these premises are open to question. It is true that the population of large residential facilities for mentally retarded people is now concentrated at the more disabled end of the spectrum of disabilty.[350] However, this strong trend toward deinstitutionalizing mildly retarded persons, and many individuals with much more substantial handicaps,[351] merely reflects the

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tions below the mean and ranks in the bottom three percent of the population is not "very significant[ly] subaverage." It is even more difficult to imagine a mentally retarded defendant convicted of a criminal offense who does not have a "substantial" deficit in adaptive behavior.

349. The symmetry of parallel treatment of mentally ill and mentally retarded convicts may also have some modest benefit, but standing alone, it would surely be insufficient to warrant the litigation that will result from the required distinctions between "seriously" retarded convicts and others.

Another possible rationale would suggest that it is politically unacceptable for less seriously mentally retarded individuals to "escape" the full brunt of punishment by commitment, or transfer to a mental retardation facility pursuant to standard 7-10.4 of the *Mental Health Standards*. This argument appears more persuasive regarding mental illness that is less severe than psychosis than it does for "mild" mental retardation, which is a substantial disability. *See supra* notes 338-40 and accompanying text.

Finally, it may be thought desirable to limit the use of state coercion in effecting involuntary habilitation. This is a principal reason for limiting the mental illness civil commitment criteria to those with substantial disorders, and may apply in similar fashion to mentally ill convicts. But society has not similarly rationed its use of coercion in the area of mental retardation. *See supra* note 335. Of course, this rationale would not apply to habilitation that the convict or prisoner seeks pursuant to standard 7-9.8(a) or 7-10.4(a). When neither the prosecution nor the offender objects to commitment at the time of sentencing, standard 7-9.9(b) still requires expert certification that the individual's retardation is "serious." There is no similar requirement in the case of a consensual transfer pursuant to standard 7-10.3, and indeed a prisoner seeking a transfer need not even allege that he is "seriously mentally retarded."

350. Hauber, Bruininks, Hill, Lakin, Scheerenberger & White, *A National Census of Residential Facilities: A 1982 Profile of Facilities and Residents*, 89 AM. J. MENTAL DEFICIENCY 236, 244 (1984) ("nearly half (46.8%) of the residents of facilities of 16 or more [residents] were profoundly retarded"). This concentration, however, does not provide useful data for deciding which individuals among the *mildly* retarded population of convicts will appropriately be served in such facilities.

It is also paradoxical that the more "seriously" retarded offenders are guaranteed placement consistent with the least restrictive alternative principle, while less disabled retarded individuals, who are usually viewed as the most likely candidates for community placement, have no such right under the standards. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.10(b).

351. For example, the ENCOR (Eastern Nebraska Community Office of Retardation) program has had great success in providing services in the community for severely and profoundly retarded people, and even those who are also "medically fragile." *See* K. CASEY, J. MCGEE, J. STARK & F. MENOLASCINO, A COMMUNITY-BASED SYSTEM FOR THE MENTALLY RETARDED: THE ENCOR EXPERIENCE 4 (1985); *see also* J. STARK, J. MCGEE & F. MENOLASCINO, INTERNATIONAL HANDBOOK OF COMMUNITY SERVICES FOR THE MENTALLY RETARDED 89, 161-68 (1984). Further evidence is provided by the thorough study of the process of deinstitutionalizing the residents of the much-litigated Pennhurst institution in Pennsylvania. J. CONROY & V. BRADLEY, PENNHURST LONGITUDINAL STUDY: A REPORT OF FIVE YEARS OF RESEARCH AND

judgment that they can receive more humane and efficient services in smaller community residential facilities.[352] This reveals little about the relative merits of large residential facilities in comparision to prisons for mildly retarded individuals.

Part of the difficulty may stem from the apparent premise that the array of alternatives is limited to prisons and large residential mental retardation facilities. Mental retardation professionals have developed "structured correctional services"[353] which provide habilitation to mentally retarded offenders in the community.[354] There is no reason to believe that these services will be more effective or appropriate for "seriously" retarded convicts

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ANALYSIS (Temple University and Human Services Research Institute 1985) (finding that all Pennhurst residents, regardless of their level of retardation, could be served successfully in the community); *cf.* Youngberg v. Romeo, 457 U.S. 307 (1982); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984).

352. *See* Lensink, *ENCOR Nebraska*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 280 (rev. ed. 1976); S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 161-207 (1983); Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L.J. 595, 603-11 (1983). For the literature on community residential placement of mentally retarded individuals, see generally B. BAKER, G. SELTZER & M. SELTZER, AS CLOSE AS POSSIBLE: COMMUNITY RESIDENCES FOR RETARDED ADULTS 3-10 (1977); D. BRADDOCK, OPENING CLOSED DOORS: THE DEINSTITUTIONALIZATION OF DISABLED INDIVIDUALS (1977); THE MENTALLY RETARDED CITIZEN AND THE LAW 499-514 (M. Kindred, J. Cohen, D. Penrod & T. Shaffer eds. 1976); F. MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 331-32 (1977); G. O'CONNOR, HOME IS A GOOD PLACE: A NATIONAL PERSPECTIVE OF COMMUNITY RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED 2-5, 66-73 (AAMD Monograph No. 2, 1976); R. SCHEERENBERGER, DEINSTITUTIONALIZATION & INSTITUTIONAL REFORM 39-52, 190-93 (1976); DEINSTITUTIONALIZATION AND COMMUNITY ADJUSTMENT OF MENTALLY RETARDED PEOPLE, *supra* note 69, at 15.

353. F. MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 195 (1977); *see* Note, *The Mentally Retarded Offender in Omaha-Douglas County*, 8 CREIGHTON L. REV. 622, 667-68 (1975); *see also* THE MENTALLY RETARDED OFFENDER, *supra* note 33; Harbach, *An Overview of Rehabilitation Alternatives*, in REHABILITATION AND THE RETARDED OFFENDER 122, 132-35 (P. Browning ed. 1976) (the result of community treatment centers reveal that community based corrections can serve as a practical alternative to conventional imprisonment).

354. Specialized community services are especially attractive for the habilitation of mentally retarded offenders since generic residential institutions for mentally retarded people usually lack the facilities and expertise necessary to deal with such offenders. Santamour and West explain:

> When placed in institutions for retarded persons, [offenders] victimize the other residents and disrupt routine. They present security risks and training needs that the institutions are ill-equipped to handle because of facility design and staffing patterns geared to meet the needs of the docile multiply handicapped individual. Accordingly, it is generally accepted in the field of retardation that the choice of residence for rehabilitation and training of the offender is some place other than existing state institutions for the mentally retarded.

Santamour & West, *The Mentally Retarded Offender: Presentation of the Facts and a Discussion of Issues*, in THE RETARDED OFFENDER 7, 29 (M. Santamour & P. Watson eds. 1982); *see* THE PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 40 (1963). Similar concerns were voiced more than 60 years ago. *See* W. Fernald, ANNUAL REPORT OF THE MASSACHUSETTS STATE SCHOOL FOR THE

than for those functioning at the upper end of the mildly retarded category; yet only the former appear to be eligible under the *Mental Health Standards* for post-conviction commitment to such programs.[355]

The problem may also inhere in the structure of the sentencing standards, which focus on whether the offender "requires" habilitation in a mental retardation facility.[356] It is not completely clear what is meant by the term "requires."[357] In any event, sentencing contemplates a formal inquiry into the individual habilitation needs of a particular offender, and yet access to this inquiry is limited artificially by a prerequisite of severity of handicap. The *Mental Health Standards* presuppose that the questions of degree of disability and need for services in a specialized facility will produce the same answer. This may be true for mentally ill prisoners; psychotic individuals may need the more intensive services of a mental health facility while persons with neuroses and personality disorders can be treated effectively in prison. Mental retardation, however, is different from mental illness, and the dividing line between "seriously" and "non-seriously" retarded offenders may not be closely related to habilitation needs. It is likely that most profoundly and severely retarded individuals would be difficult to serve in prison; the severity of their mental disability and the likelihood of accompanying physical handicaps[358] require specialized professional attention which few prisons provide.[359] Aside from discussion of physical disability, there is nothing in the literature to suggest that prisons are categorically better able to provide habilitation to individuals in the higher functioning range of

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FEEBLEMINDED 19 (1922), *quoted in* Menolascino, *The Mentally Retarded Offender*, 12 MENTAL RETARDATION 7, 9 (1974).

355. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.7. *See also supra* note 350.

356. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.7(a) (providing for habilitation in prison for convicts whose retardation does not "necessitate commitment"); *id.* 7-9.9(d) (formulating the criteria for commitment in terms of whether the offender "requires . . . habilitation in a . . . mental retardation facility rather than an adult correctional facility"); *see also id.* 7-10.4(b) (providing for transfer from prison when the seriously mentally retarded prisoner "requires care not available in the correctional facility").

357. For example, "requires" could be synonymous with "would benefit from" or, in the alternative, "will deteriorate or regress without." These different formulations will, of course, describe different groups of offenders.

358. There is a higher incidence of physical handicaps among severely and profoundly retarded individuals. Fewell & Cone, *Identification and Placement of Severely Handicapped Children*, in SYSTEMATIC INSTRUCTION OF THE MODERATELY AND SEVERELY HANDICAPPED 46, 47-48 (M. Snell 2d ed. 1983).

359. *See* Ruiz v. Estelle, 503 F. Supp. 1265, 1340-45 (S.D. Tex. 1980), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115, 1167 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). Severely or profoundly mentally retarded persons who have serious physical handicaps also require intensive specialized physical therapy services. For general discussions of the importance of physical therapy to people with mental retardation, see B. BOBATH, ABNORMAL POSTURAL REFLEX ACTIVITY CAUSED BY BRAIN LESIONS (2d ed. 1971); K. BOBATH, A NEUROPHYSIOLOGICAL BASIS FOR THE TREATMENT OF CEREBRAL PALSEY (2d ed. 1980); M. IIVANAINEN, BRAIN DEVELOPMENTAL DISORDERS LEADING TO MENTAL RETARDATION (1985); S. LEVITT, TREATMENT OF CEREBRAL PALSEY AND MOTOR DELAY (2d ed. 1982).

mild retardation than for other mildly retarded persons.[360] Therefore the definition of the dividing line between the two categories of retarded offenders does not seem well suited to the tasks it is asked to perform in the *Mental Health Standards*.

The resolution of this difficult problem may be found in the individualized hearing processes which the *Mental Health Standards* already provide. The attraction of parallelism with mental illness is outweighed by the dissimilar service needs of mentally retarded individuals and the different relationship between those needs and the severity of an individual's disability. Therefore, the attempt to classify retarded persons on the basis of "seriousness" of their disability should be abandoned, and a hearing on individual habilitation needs provided to any mentally retarded offender or prisoner whose commitment or transfer to a mental retardation facility is proposed.[361] Such hearings will be superior to a categorical exclusion in distinguishing those individuals who belong in prison from those who are more appropriately placed in specialized facilities.[362]

C. *Mentally Retarded Prisoners*

As a federal court has recently observed, "[m]entally retarded persons meet with unremitting hardships in prison."[363] They are more likely to be victimized,[364] exploited,[365] and injured[366] than

360. Similarly, there are fewer differences in management requirements for serving individuals with IQs of 50, as contrasted with 65, than there are in the mental health field in serving psychotic prisoners as contrasted with those who merely have neuroses or personality disorders.

361. If a jurisdiction believes that individual commitment or transfer proceedings may result in too many retarded convicts finding their way out of prisons and into mental retardation facilities, limitations can be accomplished through the formulation of commitment and transfer criteria. *See supra* note 357.

362. This is not to say that the severity of a particular individual's disability is irrelevant, because it may be an appropriate factor to consider in determining where his habilitation needs can be served.

363. *Ruiz*, 503 F. Supp. at 1344.

364. Santamour & West, *The Mentally Retarded Offender: Presentation of the Facts and a Discussion of the Issues*, in THE RETARDED OFFENDER, *supra* note 33, at 7, 29.

365. "[I]nmates with low intelligence levels are prime targets for exploitation. Consequently, they are peculiarly in need of special protection from physical, emotional, sexual, and financial abuse at the hands of others." *Ruiz*, 503 F. Supp. at 1344.

366. "Mentally retarded prisoners are markedly and abnormally prone to receive more injuries than the average inmate. Some of their injuries occur on the job; others are suffered at the hands of other inmates or security officers." *Id.* at 1344.

Injuries and beatings are also far from uncommon in large residential facilities confining mentally retarded people. *Cf.* Youngberg v. Romeo, 457 U.S. 307, 310-12 (1982); Woestendiek, *The Deinstitutionalization of Nicholas Romeo: The Unwitting Revolutionary of Pennhurst*, Phil. Inquirer, May 27, 1984, (*Inquirer Magazine*), at 18 (detailing beatings sustained by Nicholas Romeo at the Pennhurst State Hospital for the mentally retarded following the Supreme Court's decision); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 756 (E.D.N.Y. 1973) (1300 reported

other inmates. They are also more likely to be charged with disciplinary violations,[367] and partially as a result, to serve longer sentences.[368] Finally, they are unlikely to receive any habilitation designed to address the problems caused by their mental retardation.[369]

One of the most important provisions in the *Mental Health Standards* is the declaration that mentally retarded prisoners have a right to habilitation.[370] This explicit recognition of the habilitation needs of retarded individuals is a substantial advance from previous standards,[371] which typically discussed treatment

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incidents of injuries, assaults, and fights in an eight month period in one institution); D. ROTHMAN & S. ROTHMAN, THE WILLOWBROOK WARS 17-23, 75-76 (1984) (describing injuries, abuse and neglect suffered by residents of Willowbrook, a New York State institution for the mentally handicapped).

367. *Ruiz*, 503 F. Supp. at 1344. The court explained:

> [Retarded inmates] are slow to adjust to prison life and its requirements, principally because they have almost insurmountable difficulties in comprehending what is expected of them. Not understanding or remembering disciplinary rules, they tend to commit a large number of disciplinary infractions. Because they are often not as well coordinated as persons of average intelligence, they also frequently fail to meet work performance quotas and are, therefore, subjected to disciplinary action for laziness or refusal to work.

Id.

The *Ruiz* court also observed that retarded inmates tend to fare poorly before disciplinary adjudication tribunals, in part because they seldom have the assistance of counsel and are unable to make a persuasive presentation on their own behalf. The court also noted that retarded prisoners are punished in solitary confinement with disproportionate frequency. *Id.*

368. *Id.* at 1344. In addition to problems with disciplinary infractions, the *Ruiz* court observed that retarded prisoners "are frequently unable to succeed in institutional programs whose completion would increase their chances for parole, and they are also unlikely to be able to present well-defined employment and residential plans to the Parole Board." *Id.*

369. "[P]risons provide few, if any, meaningful programs or services for the retarded." United States v. Masthers, 539 F.2d 721, 729 n.56 (D.C. Cir. 1976); *see Ruiz*, 503 F. Supp at 1344; Brown & Courtless, *supra* note 63, at 1164, 1169. Santamour and West argue that "[t]he retarded offender is rejected . . . by the correctional field, who place the retarded offender as low man on the totem pole of those who might benefit from treatment and rehabilitation programs." Santamour & West, *supra* note 364, at 28-29.

370. *See* MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.7, 7-10.8. This right is extended to all retarded offenders and prisoners regardless of the "seriousness" of their mental retardation.

The *Mental Health Standards* distinguish between "seriously mentally retarded prisoners" and others who are less severely disabled. They provide that seriously mentally retarded prisoners can be transferred to a mental retardation facility while those who are less severely disabled are to receive habilitation services in correctional facilities. This distinction leads to the same problems discussed in the section on sentencing. *See supra* notes 326-62 and accompanying text.

371. *E.g.*, A.B.A. STANDARDS FOR CRIMINAL JUSTICE 23-5.1(a) (1982) ("Prisoners should receive routine and emergency medical care, which includes the diagnosis and treatment of . . . mental health problems."); STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS 27 (Am. Pub. Health Ass'n 1976) ("Mental health services should be made available in every correctional institution."); *see* George, *Standards Governing Legal Status of Prisoners*, 59 DENVER L.J. 93, 101 (1981). *But see* COMMITTEE ON ACCREDITATION FOR CORRECTIONS, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTS. standard 4278 (1977) (designating as "essential" the requirement that "[w]ritten policy and procedure specify that qualified psychological and psychiatric personnel provide services for inmates diagnosed as severely mentally retarded") The accompanying discussion does not make clear whether "severely

for mental illness without specific mention of the nonmedical services directed toward the amelioration of the handicaps caused by mental retardation.[372] There is little caselaw on the issue of whether failure to offer habilitation to retarded prisoners constitutes cruel and unusual punishment under the eighth amendment[373] and therefore this provision of the *Mental Health Standards* may be particularly influential in determining whether such services are provided.

Following the United States Supreme Court's decision in *Estelle v. Gamble* that failure to provide needed medical care can constitute cruel and unusual punishment,[374] numerous courts have held that psychiatric services are a form of medical care that must be available to mentally ill prisoners.[375] However, mental retardation is not an illness,[376] and habilitation includes services which are not medical in nature;[377] thus courts may not automatically

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mentally retarded" is intended as a term of art reflecting the American Association on Mental Deficiency classification system, but states:

> Severely mentally retarded inmates should be placed in facilities specially designed for their treatment. If they cannot be placed in such facilities outside the correctional institution, the institution should provide adequate services for their health, development and protection of their dignity. Where possible, programs should provide for their continued physical, intellectual, social, and emotional growth and should encourage the development of skills, habits, and attitudes that are essential to adaptation to society.

Id.

372. For a discussion of habilitation, see *supra* note 57. Of course, some mentally retarded prisoners will also be mentally ill, and these individuals will also require mental health treatment. *See supra* notes 59-61 and accompanying text; HANDBOOK OF MENTAL ILLNESS IN THE MENTALLY RETARDED (F. Menolascino & J. Stark eds. 1984); MENTAL HEALTH AND MENTAL RETARDATION: BRIDGING THE GAP (F. Menolascino & B. McCann eds. 1983); PSYCHIATRIC APPROACHES TO MENTAL RETARDATION (F. Menolascino ed. 1970).

373. U.S. CONST. amend. VIII.

374. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

375. The leading case is Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977). *See also* Balla v. Idaho State Bd. of Corrections, 595 F. Supp. 1558, 1576-77 (D. Idaho 1984); Ruiz v. Estelle, 503 F. Supp. 1265, 1332-34 (S.D. Tex. 1980), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); J. GOBERT & N. COHEN, RIGHTS OF PRISONERS 334-42 (1981); Brenner & Galanti, *Prisoners' Rights to Psychiatric Care*, 21 IDAHO L. REV. 1-34 (1985). *But see* Capps v. Atiyeh, 559 F. Supp. 894 (D. Or. 1983). In *Capps*, the court recognized a constitutional right to mental health care, but expressed concern about the subjectivity of psychiatric diagnoses, the possibility of malingering prisoners feigning mental illness, professional differences about the necessity of treatment in particular cases, and the possibility that some mentally ill prisoners may be uncooperative with treatment efforts. *Id.* at 916-21. The court stated: "The inmates must, therefore, show a pattern of cases, each of which discloses, with little or no room for reasonable mental medical opinions to differ, (1) a serious mental illness (2) for which the inmate wants treatment (3) which he does not receive (4) thereby causing the inmate to suffer mental pain." *Id.* at 917-18.

376. *See supra* notes 51-53.

377. *See supra* note 57.

conclude that the constitutional guarantee of medical care necessarily extends to habilitation services for retarded prisoners. The one court which has considered the matter concluded in *Ruiz v. Estelle* that the eighth amendment guarantees the availability of habilitation to mentally retarded inmates.[378]

This conclusion can be supported without designating habilitation as "medical," nor does it require courts to recognize a more general right to rehabilitation for all prisoners.[379] It is well documented that mentally retarded people, institutionalized without proper habilitation, will regress and lose vitally important life skills they previously possessed.[380] If such regression occurs in a prison setting, the eighth amendment's right to protection from harm[381] precludes the state from denying habilitation which would prevent that harm.[382] Where habilitation is necessary[383] for

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378. *Ruiz*, 503 F. Supp. at 1345-46. The portion of the district court's opinion reversed by the court of appeals was unrelated to the provisions regarding retarded prisoners, which had resulted in a consent decree prior to completion of the appeal. The consent decree required, in pertinent part, that defendants identify mentally retarded and other special needs prisoners, evaluate their needs, provide "individualized treatment and placement plans appropriate for such prisoners' needs and assurances for their implementation," and comply with procedural requirements for transferring mentally disturbed prisoners to mental institutions. *Ruiz*, 679 F.2d at 1167.

379. Most courts have been reluctant to recognize such a right. J. GOBERT & N. COHEN, RIGHTS OF PRISONERS 342-343 (1981); *see* McCray v. Sullivan, 509 F.2d 1332, 1335 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975) (failure of prison authorities to provide a rehabilitation program, by itself, does not constitute cruel and unusual punishment). Indeed, rehabilitation is offered less frequently as a justification for imprisonment. *See* Bainbridge, *The Return of Retribution*, 71 A.B.A. J. 61 (May 1985); *see also* Act of Oct. 12, 1984, Pub. L. No. 98-473, ch. 227 (D), 98 Stat. 1998 (to be codified at 18 U.S.C. § 3582(a)) ("imprisonment is not an appropriate means of promoting correction and rehabilitation").

380. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 7 (1981) (*Pennhurst I*); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 127-28 (1984) (*Pennhurst II*) (Stevens, J., dissenting); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 756 (E.D.N.Y. 1973). For citations to the scientific literature documenting institutional regression, see Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L. J. 595, 603 n.37 (1983); Teitelbaum & Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153, 183-84 nn. 127-34 (1978).

381. J. GOBERT & N. COHEN, RIGHTS OF PRISONERS 329 (1981); *cf.* New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 756 (E.D.N.Y. 1973). The constitutional right to medical care itself, as announced in Estelle v. Gamble, 429 U.S. 97, 104 (1976), is based on the unconstitutionality of deliberately failing to prevent the pain accompanying untreated illness or injury. One court has based the right of prisoners to receive psychiatric services on the constitutional duty to prevent "unnecessary pain or suffering." Grubbs v. Bradley, 552 F. Supp. 1052, 1124 (M.D. Tenn. 1982).

382. *Cf.* Youngberg v. Romeo, 457 U.S. 307, 329 (1982) (Blackmun, J., concurring) (if a mentally retarded individual possesses basic self-care skills and is sufficiently educable to maintain those skills with training then a state facility responsible for his care may be constitutionally required to provide that training).

383. The determination of a mentally retarded individual's habilitation needs is not fraught with the uncertainty and subjectivity that concerned one court regarding mental illness in Capps v. Atiyeh, 559 F. Supp. 894, 916-921 (D. Or. 1983). *See supra* note 375. The diagnosis of an individual as mentally retarded is a relatively objective exercise that uses standard instruments of measurement. There is no professional disagreement about what constitutes substantial impairment from mental retardation. Feigning mental retardation is more difficult than feigning mental illness, and habilitation does not always require the same kind of conscious decision to cooperate with the professional. Notwithstanding the Supreme Court's contrary view, there is a

an individual prisoner's mobility, physical safety, or other protected constitutional interests, such services cannot be denied.[384] The right to habilitation recognized in the *Mental Health Standards* should be reflected in the courts' interpretation of the eighth amendment.

The provisions in the *Mental Health Standards* for committing and transferring prisoners to mental retardation facilities are more problematic.[385] The difficulties stem, in part, from the fact that retarded convicts may not be suitable residents for either prisons or general mental retardation institutions,[386] and therefore any provision will engender difficulties in the many jurisdictions where no other alternatives currently exist. Nevertheless, it is troubling that some mentally retarded convicts may be committed to a mental retardation facility without a determination whether that facility is appropriate for retarded convicts, whether it is willing to receive them, and whether the convicts need, or would benefit from, the services the facility can provide.[387] Simi-

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consensus among mental retardation professionals that habilitation is possible and desirable for severely and profoundly retarded people. *Cf.* Youngberg v. Romeo, 457 U.S. at 316 n.20 (stating that mental retardation professionals disagree as to whether effective training is possible for all severely retarded people.) The belief of the Justices that no such consensus exists is flat wrong. *See* Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L. J. 595, 628-32 (1983).

384. *Cf.* Youngberg v. Romeo, 457 U.S. at 319 (concluding that liberty interests require that a state provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint).

385. One set of difficulties surround the question of the degree of restriction that retarded offenders require. The *Mental Health Standards* provide that committed or transferred retarded convicts should not "be permitted access into the community by . . . mental retardation officials without authorization from appropriate correctional officials or the court." MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.11, 7-10.8. Giving judges or correctional officials the final say over the liberty of such individuals makes some sense when the convict has demonstrated a risk of dangerous behavior. *Cf. id.* 7-7.11 (requiring a court order for authorized leave of specially committed acquittees). However, for some offenders transferred or committed at the time of sentencing there will be no indicia of dangerousness, or as the commentary suggests, "a threat to security," and thus in their cases the limitation is unwarranted. *See supra* note 245, at 19 (testimony of Gelman and Coval). In addition, the *Mental Health Standards* presuppose that the commitment or transfer is to a remote and secure facility, although it may in fact be to a "structured community program," for which the concept of limitation on "access to the community" is not meaningful. *See supra* note 353.

386. *See supra* notes 354, 363-69. The unsuitability of some retarded convicts for either institution buttresses the argument for creating special programs designed for mentally retarded offenders.

387. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.9(b). This standard addresses the sentencing of offenders when neither the individual nor the prosecution objects to the commitment, and the only evidentiary requirement is a professional report that the individual is "seriously mentally retarded." The Commentary suggests that under such circumstances, "the reason for an evidentiary hearing is eliminated." *Id.* 7-9.9 commentary at 476-77. But there remain two possible reasons for such a hearing. One is that the facility proposed for the commitment is not a party to the bargain, and may have legitimate objections to the commitment. The other is that the convict, while not "objecting," may not be competently consenting to the placement. Some retarded

larly, when a retardation facility objects to the transfer of a retarded prisoner, the court may order his placement upon evidence that he is "seriously mentally retarded and requires care not available in the correctional facility"[388] without ascertaining whether the proposed facility is willing or suitable.

The alternative approach, which recognizes a right, or at least an interest, in a facility determining the clients it can appropriately serve,[389] is not cost-free either, because it creates the risk of all available facilities declining to serve retarded offenders.[390] Ultimately, where no existing facility believes it can properly provide habilitation to these individuals, the better approach is to create new programs specifically designed to address their needs.[391]

VI. The Role of Mental Retardation Professionals

It has long been recognized that the fair and efficient administration of the criminal justice system requires the involvement of qualified professionals from disciplines other than the law. These professionals serve a variety of roles, including scientific, evaluative, consultative, and therapeutic. In this section, we will discuss the special concerns that arise when professionals perform evaluations and subsequently give expert testimony about mentally retarded defendants.

One of the first issues to arise is the selection of appropriately qualified professionals.[392] Given the historic confusion between mental illness and mental retardation[393], it is not suprising to find confusion on the question of which professionals have mental retardation expertise useful to the criminal justice system. Thus, courts have often addressed questions regarding scientific inquiry in the area of mental retardation and criminal justice, evaluation consultation, and habilitation, without the assistance of mental retardation professionals.[394] Excessive reliance has been placed on

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individuals will lack the ability to make such a judgment. *See supra* note 170. Because Vitek v. Jones, 445 U.S. 480, 487-94 (1980), suggests that there is an important liberty interest at stake in commitment even when the alternative is imprisonment, care should be taken to protect that interest on behalf of an individual who lacks the capacity to voluntarily waive his rights.

388. MENTAL HEALTH STANDARDS, *supra* note 4, 7-10.4(b).

389. *Cf.* N.M. STAT. ANN. § 43-1-13(I) (1978 & Repl. 1984) ("[N]o developmental disabilities treatment or habilitation facility is required to detain, treat or provide services to a client when the client does not appear to require such detention, treatment or habilitiation.").

390. *See supra* note 354, 369.

391. *See supra* note 353; SANTAMOUR & WEST, *supra* note 353, at 27-31. For a compilation of state laws on transfers from prisons to mental hospitals, see Favole, *supra* note 120, at 281-95.

392. MENTAL HEALTH STANDARDS, *supra* note 4, 7-1.1 commentary at 14.

393. *See supra* text accompanying notes 51-61.

394. *See, e.g.*, State v. Schlaps, 78 Mont. 560, 577-78, 254 P. 858, 862 (1927) (testimony of teacher who administered test ruled properly excluded as not competent to express an opinion); State v. Bennett, 345 So. 2d 1129, 1137 (La. 1977).

This problem can be compared to a similar problem that arises when mentally retarded defendants are imprisoned. Daniel and Menninger explain: "Mentally re-

psychiatrists to fulfill these duties, even after psychiatrists have suggested the limitations of their expertise.[395]

Selecting a qualified professional involves many factors. One major concern is the type of training received by the professional asked to evaluate or testify about a mentally retarded defendant's condition. In contrast to psychiatrists and other mental health professionals, whose training is usually limited to the needs of people with mental illness, mental retardation professionals have focused their training on the special needs and characteristics of people with mental retardation. The graduate course work of special education teachers, for example, will generally include work in the impaired learning ability of mentally retarded people; specialized educational curricula, techniques, methods, and materials; standardized assessment of deficiencies; applied behavior analysis;

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tarded forensic patients have often been confined in state hospitals where there are only a few clinicians with expertise in mental retardation. Consequently, the mentally retarded forensic patient may have stayed longer than some mentally ill patients because he received no appropriate rehabilitation." Daniel & Menninger, *Mentally Retarded Defendants: Competency and Criminal Responsibility*, 4 AM. J. FORENSIC PSYCHIATRY 145, 154 (1983).

395. In 1961, Dr. Walter Barton, president of the American Psychiatric Association, observed: "Psychiatrists as a group are disinterested in mental retardation. Many have no more accurate knowledge about the retarded than the layman does." Barton, *The President's Page: The Psychiatrist's Responsibility for Mental Retardation*, 118 AM. J. OF PSYCHIATRY 362, 362 (1961). Other psychiatrists express similar views. Dr. Menolascino states:

> [Psychiatry's] withdrawal and the historical events that led up to it have resulted in a number of stereotyped views or blindspots that psychiatrists characteristically exhibit when they must deal with the retarded. Briefly these blindspots are: uncritical acceptance of mental age as an adequate description of a person; treatment nihilism that is usually based on lack of program knowledge and a myopic view of conceivable or even available program alternatives; and excessive focus on the severely retarded and their families, in contrast to the mildly retarded.

Menolascino, *Psychiatry's Past, Current and Future Role in Mental Retardation*, in PSYCHIATRIC APPROACHES TO MENTAL RETARDATION 709, 717 (F. Menolascino ed. 1970). According to Dr. Bernstein, "Psychiatrists generally are not interested in and do not use the broad range of knowledge or treatment techniques available when confronted with [mentally retarded] patients." Bernstein, *Mental Retardation*, in THE HARVARD GUIDE TO MODERN PSYCHIATRY 551, 551 (A. Nicholi ed. 1978); *see also* Dybwad, *Psychiatry's Role in Mental Retardation*, in DIMINISHED PEOPLE: PROBLEMS AND CARE OF THE MENTALLY RETARDED 123 (N. Bernstein ed. 1970). Dybwad has stated:

> "[A] profession's commitment to a human problem and its solution can be measured by the extent and quality of its research operations in that field, by the volume of relevant papers in the journals maintained or largely supported by the profession, and by the attention given to the particular subject in the course of the profession's academic training program. On all of these three counts the factual evidence clearly points to a lack of interest in or commitment to mental retardation on the part of the psychiatric profession."

Id. at 123-24. *See also* 6 AM. JUR. PROOF OF FACTS *Idiocy and Mental Deficiency* Proof 1, 254 (psychiatrist more likely to concentrate on mental diseases of psychogenic origin than on mental deficiency).

communication for mentally retarded people; and extensive field work and supervised teaching of people with mental retardation in a variety of settings, including residential facilities and public schools. Other professionals, whose work addresses the types of disabilities which often accompany mental retardation, such as speech, language and hearing impairments, physical and motor disabilities, and vocational training and transitional problems, should have similarly extensive training in mental retardation.

The Federal Rules of Evidence limit the availability of "expert" status for the purpose of testimony. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[396]

This requirement limiting testimony to the individual professional's area of expertise is reflected in the *Mental Health Standards*.[397] The *Mental Health Standards* preclude mental health professionals from testifying, evaluating, or otherwise participating in the trial and adjudication of a mentally retarded individual if the mental health professional's expertise does not include substantial training and expertise in the field of mental retardation.[398]

Thorough assessment of the abilities and weaknesses of a mentally retarded defendant can result in information of tremendous assistance to a court. However, the assessment process requires great care and professional skill and any proffered results must be viewed with caution. At many points during the process, seemingly minor departures from good practice can severely limit the utility or validity of an assessment report.[399]

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396. FED. R. EVID. 702.

397. MENTAL HEALTH STANDARDS, *supra* note 4, 7-1.1(a) ("the [mental health and mental retardation] professional's performance within these roles should be limited to the individual professional's area of expertise and should be consistent with that professional's ethical principles").

398. The *Mental Health Standards* define mental retardation professionals as:

> individuals who have received extensive, formalized, post-graduate education and training in identifying specific functional deficits or habilitation needs of persons with mental retardation or developmental disability. Mental retardation professionals include special education teachers, speech and language pathologists, audiologists, physical therapists, occupational therapists, and those psychiatrists, psychologists, clinical social workers, psychiatric nurses or other mental health professionals who have received the necessary education and training on mental retardation issues. Mental retardation professionals must be licensed or certified to practice if the jurisdiction requires licensure or certification for the respective discipline.

MENTAL HEALTH STANDARDS, *supra* note 4, 7-1.1 commentary at 14. For a discussion of training techniques employed by mental retardation professionals, see D. MACMILLAN, MENTAL RETARDATION IN SCHOOL AND SOCIETY (2d ed. 1982); SYSTEMATIC INSTRUCTION OF THE MODERATELY AND SEVERELY HANDICAPPED (M. Snell 2d ed. 1983); E. POLLOWAY, J. PAYNE, J. PATTON & R. PAYNE, STRATEGIES FOR TEACHING RETARDED AND SPECIAL NEEDS LEARNERS (3d ed. 1985).

399. *See* HANDBOOK OF PSYCHOLOGICAL ASSESSMENT (G. Goldstein & M. Hersen eds. 1984). Even when an examination has been conducted in consistence with good

Competent, professional assessment requires personal observation and interaction with the allegedly mentally retarded defendant. The *Mental Health Standards* instruct that no witness should be qualified as an expert on a defendant's mental condition unless the witness "has performed an adequate evaluation, including a personal interview with the individual whose mental condition is in question, relevant to the legal and clinical matter(s) upon which the witness is being called to testify."[400] This required evaluation may be particularly important in cases involving mentally retarded defendants because it precludes hypothetical testimony about the mental status of a defendant based solely on the characteristics of a particular class of mentally retarded individuals without analyzing the individual characteristics of the defendant.

Only professionals who have training and experience in evaluating people with mental retardation should perform the assessments. As discussed earlier, mental retardation differs sufficiently from other forms of mental disability that training in mental illness cannot, without more, qualify a physician to provide useful information about a mentally retarded person. Similarly, typical medical school training and the attainment of the academic degree of M.D. cannot, without more, qualify a physician to give expert testimony about mental retardation.[401] The *Mental Health Standards* recognize that the field of mental retardation requires particular training and experience and that relatively few professionals have expertise in both mental illness and mental retardation.[402]

Courts should not operate under the illusion that the simple administration of any test will resolve all questions regarding a re-

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professional practice, the report may prove inadequate. One study found that despite specific instructions to examiners to report on the issues of competence and sanity, the majority of reports submitted to the court made no mention of either issue. Geller & Lister, *The Process of Criminal Commitment for Pretrial Psychiatric Examination and Evaluation*, 135 AM. J. PSYCHIATRY 53, 58 (1978).

400. MENTAL HEALTH STANDARDS, *supra* note 4, 7-3.11(a)(iii).

401. To qualify as an expert under Standard 7-3.11 three criteria must be established. The professional must meet certain clinical educational and training requirements that are more stringent than merely possessing an academic degree. Thus, the commentary advises that "a mental health professional whose training has been limited to evaluating mental illness should not be permitted to testify as an expert in a case involving a mentally retarded defendant." *Id.* 7-3.11 commentary at 142. Some psychiatrists and other physicians will be qualified in the area of mental retardation, but most will not.

402. *Id.* 7-3.11 commentary at 143. The commentary states: "Standard 7-3.11 attempts to assure that only those mental health and mental retardation professionals who are truly qualified to testify as experts are permitted to do so." *Id.* Of course, a few mental disability professionals will have training and experience that gives them expertise in both mental illness and mental retardation. These professionals are uniquely qualified to assist courts in evaluating defendants who may have both disabilities. *See supra* notes 59-61 and accompanying text.

tarded person's status in a criminal case.[403] Systematic assessment requires the thoughtful selection and administration of valid examination instruments together with careful observation, interviewing, and analysis of all the data by a professional with proper training and experience. The test instruments chosen must meet the minimum criteria for test construction. These include a supportable theoretical base, proper question content, proper item format, standardized administration, standardized scoring, adequate reliability (dependability), adequate validity (a true measurement of what the test claims to measure), and normative data.[404] Few tests in common use can be rated highly in all categories. A determination of how a certain test rates can only be made after thorough analysis of the accompanying test manual and supporting statistical data as well as independent scholarly research performed with the test. This is not to suggest that less than scientifically perfect tests can never be used, but only that the substantial number of tests which do not withstand scientific scrutiny must be used with great care by professionals thoroughly grounded in evaluation skills. Any test battery must be scrutinized by courts in terms of the above criteria and the skills and experience of the examiner.[405]

The legal issues of each case will dictate the relevant tests to be administered. In all cases where the defendant is suspected of being mentally retarded, an individual intelligence test should be administered in order to formulate an estimate of the defendant's general intellectual functioning. Even if a defendant has had IQ tests in the past, a new examination should almost always be conducted in order to provide a comparison to the older test results.[406] This test assures that an examination was conducted in a manner

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403. Courts should similarly reject testimony in which no evaluation was performed. In State v. Bennett, 345 So. 2d 1129, 1138 (La. 1977), the court dismissed the testimony of a psychiatrist and a coroner, each of whom alleged an IQ level for the defendant without performing an examination. The court stated: "The conclusory reports by Drs. Rees and Anthony that defendant was able to assist counsel were not, without supporting information which was lacking at the hearing, entitled to reliance by the court." *Id.* Similarly, in State v. Rogers, 419 So. 2d 840 (La. 1982), a psychiatrist's "intuitive interactions with the patient," absent testing, were rejected as "clearly insufficient." *Id.* at 844.

404. For example, the name of a test may suggest that it will evaluate one aspect of intelligence, while in fact scientific data indicate that it evaluates an entirely different aspect. Similarly, a test may require such subjective judgment on the part of the examiner that adequate reliability between different examiners can never be achieved. In addition, the test may have been standardized on a population of pre-school children and, therefore, normative data for adults have never been collected. HANDBOOK OF PSYCHOLOGICAL ASSESSMENT, *supra* note 399, at 19-37.

405. This is an appropriate topic for cross-examination. *See* 1 J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 200-88 (3d ed. 1981) (discussing the leading psychological tests).

406. Substantial disparities between test scores for the same individual generally indicate a variety of problems that invalidate the scores. It may mean that a test is unreliable, that an examiner did not receive adequate professional preparation, that testing conditions such as physical environment or the rapport with the examinee were improper, or that test anxiety depressed the score. *See* A. ANASTASI, PSYCHOLOGICAL TESTING 23-44 (4th ed. 1976).

consistent with good professional practice, and also that the witness is testifying based upon his own evaluation rather than one whose principal virtue may be that it is conveniently on file.

Many cases also will require one or more of the following: personality assessment, adaptive behavior assessment, moral development examination, speech and language evaluation, motoric functioning evaluation, or academic achievement evaluation — as well as mental retardation forensic evaluations in the indicated legal issues.[407] A professionally competent assessment should provide the court with an indication of the defendant's general intellectual functioning or IQ. However, careful analysis of the defendant's performance on an IQ test may provide more specific information that will be even more valuable to the court. Other information from different parts of the assessment will often elucidate the defendant's ability to understand concepts, use numbers, remember past events and previously learned information, put representative items in proper sequential order, solve puzzles, answer questions, respond speedily, resist coercion, and the like. These are factors an examiner untrained in mental retardation will be unable to evaluate without the assistance of an expert professional. This knowledge, therefore, is central to the court's needs from an expert witness. The evaluation can produce testimony regarding the defendant's abilities and characteristics that the court can apply to the relevant legal test,[408] and about the possibilities for effecting change in the defendant's functioning.[409]

Expert witnesses need some familiarity with relevant legal issues in addition to their professional expertise.[410] The *Mental Health Standards* recognize the existing limitations in forensic training for mental health professionals.[411] Such training appears to be even more rare for mental retardation professionals. Crea-

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407. *See id.* at 180-81.

408. Note that the expert witness is limited in his or her ability to testify to the ultimate legal issue in controversy. MENTAL HEALTH STANDARDS, *supra* note 4, 7-3.9.

409. The next step in the process is designing an individualized habilitation plan for effecting the desired change (such as attainment of competence to stand trial). The outlines of such a plan may be presented to the court for approval. *See* Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375, 389-92 (1985).

410. Although experts may not be permitted to testify about the ultimate legal issues, *see supra* note 408, they will need to understand the legal elements of competence to stand trial or the defense of mental nonresponsibility, for example, in order to present relevant and coherent information in their testimony.

411. MENTAL HEALTH STANDARDS *supra* note 4, 7-3.10. In addition to requiring that the evaluating mental health and mental retardation professional have sufficient professional education and clinical training, the *Mental Health Standards* also require "sufficient forensic knowledge, gained through specialized training or an acceptable substitute therefor, necessary for understanding the relevant legal matter(s) and for satisfying the specific purpose(s) for which the evaluation is being ordered." *Id.* 7-3.10(b).

tion of such training programs is essential if the courts are to have access to a sufficient number of competent professional experts in the field of mental retardation.[412]

Assuming a witness has the necessary professional expertise as well as sufficient forensic knowledge, the mental retardation expert might usefully testify to issues such as the defendant's intelligence,[413] his ability to understand the components of the *Miranda* warning or to waive his constitutional rights,[414] his general level of functioning,[415] his academic attainment and potential,[416] and similar aspects of his disability.[417]

VII. The Right to a Mental Retardation Professional as an Expert Witness

Recently, the United States Supreme Court in *Ake v. Oklahoma*[418] ruled that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one."[419]

The Court reached this conclusion by applying the four-part standard now common in procedural due process cases,[420] factoring the defendant's interest affected, the governmental interest in avoiding the requested procedures, the probable value of the additional safeguard sought, and the risk of erroneous deprivation if the safeguard is not provided.[421] The Court emphasized that the defendant's interest in the accuracy of the proceeding is "uniquely compelling."[422] The Court went on to discuss the pivotal role of

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412. In the absence of such organized training programs, it falls to counsel to be sure that the expert eyewitness in a particular case has sufficient understanding of the relevant legal issues.

413. *See, e.g.*, People v. Bruce, 62 A.D. 2d 1073, 403 N.Y.S. 2d 587, 588-89 (1978) (certified school psychologist testified on IQ testing as well as on defendant's ability to waive constitutional rights).

414. *See, e.g.*, Cooper v. Griffin, 455 F.2d 1142, 1143-44 (5th Cir. 1972) (defendants' special education teacher and their rehabilitation specialist testified that neither boy could understand the *Miranda* warning); Hines v. State, 384 So. 2d 1171, 1177 (Ala. Crim. App. 1980) (special education professor testified that defendant was susceptible to suggestion and could not understand the abstract concepts of the *Miranda* warning).

415. *See, e.g.*, *Cooper*, 455 F.2d at 1143-44.

416. *See, e.g.*, May v. State, 398 So. 2d 1331, 1334 (Miss. 1981) (defendant's special education teacher testified to defendant's abilities in math, language, and spelling; his speech pathologist testified on the evaluation she had performed for school placement).

417. *See* United States v. Masthers, 539 F.2d 721, 730 (D. C. Cir. 1976) (Hastie, J., concurring) ("It should not be too difficult to find someone skilled in working and communicating with the mentally retarded who could and would communicate effectively with him, so that his participation in any further proceedings would be knowing and meaningful.").

418. 105 S. Ct. 1087 (1985).

419. *Id.* at 1092.

420. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

421. *Ake*, 105 S. Ct. at 1094.

422. *Id.* at 1094.

psychiatrists when insanity is raised in a criminal defense, and the impossibility of maintaining an insanity defense without an appropriate expert witness. Finally, the Court found the state's economic interest in avoiding the cost of an expert to be outweighed by the importance of the individual's interest.

Applying *Ake* to the situation of a mentally retarded defendant asserting the defense of mental nonresponsibility must surely produce a similar result. The four-part test yields a virtually identical analysis except that when a defendant is mentally retarded, the necessary expert testimony will be provided by a mental retardation professional whose training and experience conforms to the requirements specified earlier.[423]

While *Ake* dealt only with the insanity defense, the Court's reasoning suggests that a similar conclusion would be reached on other criminal issues to which expert testimony by a mental disability professional was comparably crucial. The procedural due process balancing test produces parallel results when applied to a defendant's request for expert assistance in the context of competence to stand trial or of civil commitment subsequent to acquittal by reason of mental nonresponsibility. In each instance, due process is denied by requiring a mentally disabled defendant to litigate the issue without the assistance of a competent professional with relevant training and experience in the appropriate discipline or disciplines.

The *Mental Health Standards* provide for the right to an independent expert witness in the context of incompetence to stand trial,[424] the defense of mental nonresponsibility,[425] commitment following acquittal,[426] and sentencing.[427] The *Mental Health Standards* thus anticipated *Ake*, and made similar provisions for other adjudications to which mental condition or ability are crucial issues.

VIII. Specialized Training in Mental Retardation

Professionals in the field of mental retardation have long called

423. *See supra* note 398 and accompanying text; *see also* Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 CIN. L. REV. 574, 580-99 (1982) (discussing the constitutional right to expert defense services under the due process clause and the sixth amendment).

424. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.8(a)(i).

425. *Id.* 7-3.3(a).

426. *Id.* 7-7.5.

427. *Id.* 7-9.4. The standards for postconviction commitment and involuntary transfer from prisons to mental facilities provide for the right to call independent expert witnesses. *See Id.* 7-9.9(a)(iii), 7-10.5(a)(iii). Although these standards do not explicitly address the right of indigents to such assistance at state expense, there is nothing in the text or commentary to suggest that this right was intentionally omitted.

for specialized training in mental retardation for all participants in the criminal justice system. Police officers have often been identified as primary targets for this training,[428] because their initial contacts with mentally retarded offenders are crucial to ultimate resolution of the case.[429]

Part II of the *Mental Health Standards* addresses police and custodial rules.[430] The frequent failure to identify potential issues of competence and nonresponsibility prior to trial induced the framers of the *Mental Health Standards* to require that when police officers have reason to believe that an individual is mentally retarded, they should communicate that information to the prosecutor or the court.[431] The ability of police to detect mental retardation in defendants is limited, however, and thus courts cannot rely upon this process to identify defendants who may be mentally retarded.

The *Mental Health Standards* address specialized training for law enforcement personnel as well as for individuals who have custodial responsibilities.[432] It calls for the involvement of mental health and mental retardation professionals in the design of curriculum and training materials for police officials.

Police often perceive individuals who are mentally ill as a greater law enforcement problem than persons with mental retardation. As a result, police departments may err in focusing all of their training upon the characteristics of mentally ill individuals, and ignoring the indicia of mental retardation. A police officer may incorrectly conclude, for example, that an individual has no special medical needs, when in fact he is a mentally retarded person with very low verbal ability who requires regular doses of an anti-seizure medication. Or arresting officers may assume that the individual does not wish to make a phone call, when in fact he cannot remember his mother's telephone number, cannot read the telephone book, or is simply unable to operate a telephone.[433]

The *Mental Health Standards* provide that custodial personnel "should receive training in identifying and responding to the symptoms and behaviors, including self-injurious behavior, associated with mental illness and mental retardation. Emphasis should be placed on those symptoms and behaviors that arise or are aggravated by the fact of incarceration, particularly as they relate to suicide prevention."[434] While suicide prevention is a principal concern during incarceration, attention should also be paid to other

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428. Norley, *The Least Restrictive Alternative and the Police Investigatory Process*, in THE MENTALLY RETARDED CITIZEN AND THE LAW, *supra* note 35, at 525, 525-27.

429. *Cf.* L. TEPLIN, MENTAL HEALTH AND CRIMINAL JUSTICE 157 (1984) (discussing police interrogation with mentally disordered individuals).

430. MENTAL HEALTH STANDARDS, *supra* note 4, 7-2.1 to -2.9.

431. *Id.* 7-2.5(c).

432. *Id.* 7-2.8.

433. *See* Haggerty, Kane & Udall, *An Essay on the Legal Rights of the Mentally Ill*, 6 FAM. L.Q. 59, 60 (1972).

434. *Id.* 7-2.8(c).

forms of self-injurious behavior in which some mentally retarded persons may engage, including self-biting, head-banging, psychogenic vomiting, and the like.[435] The distress, guilt, shame, or confusion of the arrest may trigger such behaviors and the potential danger to the mentally retarded person requires that police officers recognize and effectively manage the situation, preferably with the assistance of competent mental retardation professionals.

Lawyers also need education in the area of mental retardation. The limited ability of most lawyers to recognize mental retardation in their clients has been well documented.[436] The *Mental Health Standards* suggest that educational programs and courses in mental retardation be offered by law schools, bar associations, and other judicial organizations.[437]

There is a similarly acute need for mental retardation professionals to become more knowledgeable about, and thus more effective in, the criminal justice system.[438]

Conclusion

Mentally retarded criminal defendants present substantial difficulties for the criminal justice system.[439] These difficulties are exacerbated by misunderstandings about the nature of mental retardation and confusion about the similarities and differences between this disability and mental illness. The new *Mental Health Standards* fall prey to similar misunderstandings and confusion in a few instances, but generally represent a substantial improvement over current laws and practices. Translating these proposed improvements into the reality of everyday practice will greatly improve the quality of justice that these individuals receive.

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435. *See* AMERICAN ASSOC. ON MENTAL DEFICIENCY, LIFE-THREATENING BEHAVIOR: ANALYSIS AND INTERVENTION 3-278 (J. Hollis & C. Meyers eds. AAMD Monograph No. 5 1982).

436. BROWN & COURTLESS, *supra* note 63, at 1168; *see* Haggerty, Kane & Udall, *supra* note 433, at 59-60 (1972).

437. MENTAL HEALTH STANDARDS, *supra* note 4, 7-1.3.

438. *See id.* 7-1.3(d).

439. State v. Bennett, 345 So. 2d 1129, 1136 (La. 1977). The *Bennett* court observed:

> The mentally retarded offender poses unique problems for the criminal justice system: his reduced understanding challenges traditional notions of criminal responsibility; his physical presence at trial is offset by an abstraction of mind which may be severe enough to invoke the ban against trying a defendant in absentia; his need for specialized care and training argues against his commitment upon conviction to a penal institution ill-equipped to habilitate him.

Id.

0007F
11-28-86

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REPLY TO: Dallas

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

Re: **PRELIMINARY DRAFT OF SENTENCING GUIDELINES**

Dear Judge Wilkins:

I appreciate the invitation of the Commission to study the proposed guidelines and comment. My comments are general in nature because they address the philosophy and approach of the Commission rather than such matters as minute comparisons of offense values, etc.

1. The guidelines are too complex. By attempting to quantify too many variables, the resulting guidelines:

   ..will lead to lengthy sentencing hearings which will further burden judges who are already overloaded. These prolonged sentencing hearings will result from the number of items which can be disputed (i.e. - acceptance of responsibility, degree of cooperation, certain assumptions in the criminal history section).

   ..will lead to unwarranted and frivolous appeals.

   ..will not be any less disparate than would a less complicated system. For instance, the criminal history score is based on time served, not just the fact of conviction. This method of evaluating the criminal history still allows for the disparity as time served is affected by differing parole laws, degree of overcrowding in institutions, philosophy of the Court when the defendant was previously sentenced, etc.

2. The complexity of the guidelines will allow the defendant to focus on the system rather than his own actions as the reason for his ultimate sentence. The more open to debate the guideline outcome, the more the defendant can blame the system for the final outcome. Anything which encourages the defendant to place blame anywhere but on himself thwarts the chances of the sanction serving as a deterrent to similar criminal behavior in the future.

3. Quality supervision, when an offender is placed on probation or released from prison, plays a significant part in protecting the community as well as helping the offender avoid a return to criminal behavior.

   ..the presentence phase of a probation officer's work already takes more time than is necessary for quality sentencing to take place.

   ..these complex guidelines and the resulting hearings will add significantly to the presentence workload of the probation officer.

   ..my experience over the past twenty years tells me that federal probation officers seek out tasks to replace the more difficult and less desirable supervision phases of their work. Consequently, we hear "I don't have time for field supervision, I've got too many presentence reports" or "I've got too much pretrial release work."

   Granted, this is an administrative problem, but the proposed guidelines will magnify that problem.

4. In attempting to quantify so many variables, the Commission has adopted the same philosophy that leads Judges to the disparate results the guidelines were supposed to prevent. When the Court takes into consideration factors other than a few which are basic to the case before the Court, disparity results. The critical factors in sentencing are:

a. The offense itself

b. The criminal history of the defendant.

c. Certain factors which are closely correlated with recidivism:

..drug and alcohol abuse

..employment history

When the Court considers other extraneous factors as mitigation, it leads to disparity. The same disparity will result from attempts to quantify these mitigating factors.

5. The complicated and inconsistent treatment of multiple offenses, as in multi-count indictments and multi-convictions, will lead to confusion, disparity and frequent challenge of the outcome by the defense. Add to this the Commission adopting the concept of "total offense behavior" (called by the Commission "real offense sentencing"), and there is created an immensely complex and, in my judgment, highly suspect mathematical computation to get the final result.

6. I suggest the following is more in line with congressional intent and the needs of the judges, attorneys and court staff.

   a. A simple matrix using a numerical factor describing certain important offender characteristics and a rating of offense severity is all that is needed. From this matrix would come a guideline range and the sentence would not be appealable as long as the Court sentenced within the guideline range. (See Parole Commission release guidelines for an example of this system).

   b. If the Commission chooses not to adopt a simple matrix system, <u>at least eliminate</u> such features of the draft guidelines as:

      (1) Using a numerical factor to rate the level of cooperation with the government. (Chapter 3, Section B321).

(2) Using a numerical factor to rate the degree to which the offender accepts responsibility for the offense behavior. (Chapter 3, Sections B331, 332, 333)

(3) The complicated system of scoring the prior record. (Chapter 3, Part C).

(4) The method of handling the multi-count indictment and the person with separate multi-convictions.

Yours very truly,

Al Havenstrite

Al Havenstrite
Chief Probation Officer

AH:jh

11-28-86

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Reply to: Sioux Falls

November 21, 1986

Honorable William W. Wilkins, Jr.
Chairman, U. S. Sentencing Commission
1331 Pennsylvania Ave., NW, Suite 1400
Washington, DC 20004

RE: Critique of Preliminary Draft

Dear Judge Wilkins:

Once again, thank you for soliciting input from the Probation Service. I was a member of the Probation Working Group that was in Washington in July and, therefore, I have thought a great deal about the Commission's task. Before sharing my observations about the Preliminary Draft, I will offer a suggestion that may sound a bit far out but, nonetheless, I believe it is worthy of consideration.

General Observation

As an alternative to an abrupt transition to an untried sentencing process that will undoubtedly disrupt and possibly overtax the entire federal criminal justice system, it is suggested that the Sentencing Commission recommend to the Congress that a two year phase-in program be considered. In addition to the most obvious advantage of avoiding the hasty implementation, there would be numerous other advantages with few, if any, significant disadvantages.

During the phase-in period, the probation office would be required to score all cases using the guideline scheme. A scoring sheet would be presented to the Court along with the presentence report; the defendant and the government would also get a copy. The Court, in its discretion, could elect to take the guideline score into consideration when formulating a sentence much as it currently does the probation officer's recommendation (obviously keeping in mind, however, that the guideline ranges contemplate no parole consideration). To ensure that the Court gives the guideline score proper attention, the Court could be required to enter on the record whether the guideline score was considered in formulating the sentence. The Court might also be required to indicate on the record why it felt the guideline score was inappropriate, if that were the Court's position. Similarly, the defense counsel and government could also be required to routinely make an assessment of the guideline score vis-a-vis the sentence imposed. In all or in selected cases, a copy of the presentence report, the guideline score

sheet, the Judgment, a summary or transcript of the Court's comments at the time of sentencing, along with assessments made by the defense counsel and the government would then be submitted to the Sentencing Commission for analysis. Obviously, any analysis undertaken by the Commission, and the General Accounting Office as well, would be invaluable to the Congress.

Some potential advantages of a phase-in period are:

- --Probation Officers would develop proficiency in working with a complex scoring instrument.
- --The Court would have the benefit of the guideline score sheets to aid in formulating a sentence.
- --The Sentencing Commission would have invaluable judicial feedback for further consideration of the guidelines.
- --Data would be available upon which to project the impact of the guidelines on the Federal Bureau of Prisons and upon local jail facilities.
- --Because the Court would have the option of considering/imposing a sentence within the guideline range, the defense counsel and the government would be forced to learn the guideline scheme and would be in a position to offer feedback to the Commission.
- --In those cases where the Court considered the guideline score in formulating a sentence, there would be an opportunity to benefit from appellate review.
- --In all probability, subtle pressure on the Court to fashion sentences near the guideline range could be a first step toward addressing the problems of sentencing disparity and lack of certainty in sentencing which seem to be of major concern to the Congress.
- --The U. S. Parole Commission would remain intact during the phase-in program to continue to address the problem of disparity and to continue its other functions.
- --In addition to analysis by the Sentencing Commission and the General Accounting Office, analysis would also be possible by other non-government entities.
- --The phase-in period would undoubtedly attract more public attention to the concept of guideline sentencing and would thereby increase the possibility for additional feedback.
- --The phase-in period would allow additional time to consider what impact guideline sentencing would have on the plea bargaining process.

It might be argued that a phase-in period would unnecessarily subject new defendants coming into the system to unwarranted disparity and would delay much desired certainty in sentencing. It is conjectured, however, that some decrease in disparity would occur during the phase-in period. Moreover, as will be discussed below, the Preliminary Draft itself is not devoid of disparity.

Chapter One - Introduction and Overview

Although the preliminary draft raises a lot of issues that warrant comment, none is as important as the restriction it places on the Court's ability to impose probation. Undoubtedly, the Commission has heard this argument many times, but given the tenor of the Preliminary Draft, it bears repeating. The Sense of the Senate Resolution which accompanied the passage of Crime Control Act clearly

urged that prison sentences be reserved for incapacitation purposes, not deterrence or retribution. Moreover, increased use of restitution, community service, and other alternatives for non-violent and non-serious offenders were advocated. It seems that the only acceptable interpretation of the Congressional intent was that probation (with punitive features) be used more, not less. Ironically, if the Preliminary Draft were to become law in its present form, the Court's latitude to impose probation would be markedly reduced.

The Preliminary Draft provisions seem to affect most dramatically those cases that have a proven track record of success--probation cases. It appears that the Commission has allowed itself to be unduly influenced by statistics delineating failure rates in other jurisdictions. It would seem more appropriate to consider the success rates of probationers in the federal system as a guide. Although the failure rate figures for probationers in the federal system are not included herein, they are readily available to the Commission through the Administrative Office. It is this writer's understanding that the failure rate of federal probationers while under supervision is less than 5%. (Admittedly, there is no data on post probation supervision law violations.) Consequently, the federal court can appropriately boast a 95% success rate with probationers. These figures obviously include many offenders that the Preliminary Draft would exclude from probationary consideration. The costs in terms of unnecessary punishment, tax dollars, and the overall impact on the federal criminal justice system would not, in this writer's judgment, warrant the cost of reducing the success rate yet another 5%.

Moreover, it should be remembered that included in the 95% success rate are a number of less serious violent offenders. Those of us who work with large numbers of Native American offenders know from experience that there are a few violent offenders who, after being removed from their rural ghetto communities and, more importantly, from the influence of alcohol, are frequently able to satisfactorily complete a period of probation. Unfortunately, the old irresponsible drinking and living patterns often occur if and when they return to the reservation communities. It should be noted, however, that this is equally true for those offenders who are released from confinement.

In deference to the Commission, and from an admittedly lay perspective, it is difficult to reconcile the apparent Congressional intent as gleaned from the new 18 USC 3561(a) with the Commission's position relative to the Court's latitude in granting probation. Although 18 USC 3553(a)(4) & (5) and 18 USC 3553(b) require the Court to impose a sentence within the guidelines "...unless the Court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission," it appears that Congress believed that some offenders convicted of offenses with 20 year maximum penalties would still be probation candidates. It certainly appears that the Congress intended to afford the Court latitude to grant probation for much more serious offenders than Section A411 of the Preliminary Draft would allow.

Again, in deference to the Commission, it appears that the Commission's interpretation of 28 USC 994(b) and P.L. 99-363 is unnecessarily restrictive. It would seem that these provisions could be interpreted to pertain only to those cases where the Court has decided to impose a term of incarceration. Inasmuch as probation, by virtue of the Crime Control Act is now established as a sentence in its own right and does not require that anything be suspended, it would seem appropriate that the Court be granted latitude to impose probation as a sentence.

It is strongly urged at the Commission reconsider its interpretation in light of these observations.

The Preliminary Draft seems to minimize the punitive value of a straight probation sentence. Relatively speaking, it is certainly less punitive than a confinement sentence; however, one would have a difficult time convincing most probationers that probation, even without special conditions, is purely rehabilitative. Next to the probationer himself, a probation officer is probably in the best position to understand the punitive nature of probation supervision. In addition to the rehabilitative component, probation involves surveillance, monitoring of conditions, holding people accountable and is frequently a painful reminder to the probationer of his or her antisocial behavior. The probation officer routinely intrudes into a probationer's home; his personal, social, and financial affairs; sometimes his work place; and, not uncommonly, into his attitudes and fundamental beliefs. In this writer's judgment, it would be insensitive to minimize the punitive nature of such intrusions. Moreover, the Court, through the Judgment and through its probation officers, tells probationers what they can and cannot do. And, it should go without saying, no one likes to be told what to do, especially by the "government." Just as rehabilitation is sometimes a by-product of a sentence of confinement, in many instances, rehabilitation is also a by-product of a probationary sentence ordered for essentially punitive purposes. It is not uncommon for a five year probationary sentence to be imposed for a more serious offense when there are no apparent rehabilitative or monitoring needs. All of this to say that probation should not be merely equated with rehabilitation, rather, it should be considered as a lessor form of punishment and be weighted accordingly. By so doing, probation would remain a viable alternative to the Court.

Another significant concern is the effect the guidelines, as they currently stand, would have on prison populations. Without a doubt, they would result in significantly more and longer confinement sentences. To further tax the already overcrowded Federal Bureau of Prisons would be unacceptable. The cost would also be prohibitive. Also, the guidelines would result in a larger number of probationers being required to service periods of confinement in local jail facilities. Just as the Bureau of Prisons would be overtaxed, so would our local jails. Moreover, since the use of local jails is obtained through contractual agreements with local jurisdictions, our needs for jail space are understandably subordinated to local needs. Consequently, it is likely that we could encounter difficulties making jail placements, particularly in commonly overcrowded jail work release programs.

This writer has now scored eight actual cases sentenced in the District of South Dakota, three property offenses and five involving crimes against the person. Although there are no doubt a few minor items that were interpreted incorrectly, I believe I can now use the Preliminary Draft to score presentence reports with a fair degree of accuracy. Moreover, I believe most probation officers would be able to do the same given at least a good week-long training experience.

Observations made about selected chapters of the Preliminary Draft follow:

Chapter Two - Offense Conduct

Part A - Assault and Battery:

One of the presentence reports scored by the undersigned involved a defendant who, while giving a young lady a ride home, took her out to a remote area, assaulted her repeatedly breaking her jaw and conflicting other serious injuries to her head, attempted to remove her clothes but was unsuccessful, and held her against her will for something less than an hour before she managed to get away from him and flee into a field. In the three count Indictment, the defendant was originally charged with Kidnapping, Assault With Intent to Commit Rape, and Assault Resulting in Serious Bodily Injury. Per a plea bargain agreement, however, he ended up pleading to Assault With a Dangerous Weapon. Calculating the score based on Section A221, Assault and Battery, even including the physical and psychological harm that resulted from the assault, there was no way to adequately take into account the sexual assault and the abduction. This is obviously a result of the "Modified Real Offense Sentencing" as opposed to "Real Offense Sentencing."

Part D - Offenses involving drugs:

It is confusing why the Commission elected to use the total mixture weight of a controlled substance rather than drug purity when assigning offense value. It seems inconceivable that two offenders would receive the same offense value if one were apprehended with 500 grams of 90% pure cocaine as opposed to a second offender who was arrested with 500 grams of 10% pure cocaine. Moreover, this practice would seem to favor the more sophisticated offenders who are normally able to acquire higher purity drugs. It is commonly known that they then dilute the high purity drugs and then distribute them.

It is suggested is that the Sentencing Commission consider adopting the practice of using drug purities that are already well established in the federal criminal justice system and are used by the U. S. Parole Commission. Routinely, the Drug Enforcement Administration provides drug purity information in its investigative reports. Moreover, probation officers are accustomed to dealing with drug purities and with scoring them according to the Parole Commission's Guideline scheme. It is a system that seems to be working well.

Parts F & K:

As a general observation, property offenses seem to be weighted excessively high. One example of how this apparent over weighting results in unwarranted disparity follows: An offender who steals property valued between $10,000 and $25,000 would be required to serve between 6 to 12 months in jail whereas an offender who possesses an explosive device in the federal building would be eligible for straight probation. Accordingly, it is suggested that the property value weights be adjusted down.

Chapter Three - Offender Characteristics

Part B, Acceptance of Responsibility:

The concern here is the discretion given the Court as compared to that given the U. S. Attorney. In Section B321, the Court is empowered to reduce the total offense value in an amount up to 20% based on the Court's assessment of the offender's acceptance of responsibility. In Sections B331, B332, and B333, the U. S. Attorney is empowered to cause the Court to reduce the offense value in increments of 20%, 30%, and 40%, respectively, based on the defendant's degree of cooperation as certified by the government. The 20% differential between the maximum amount of discretion the Court has over the final outcome of the sentence as compared to the 40% the government has seems inappropriate, particularly in light of the fact that both the investigating agency and the prosecutor have a considerable amount of influence over the final outcome based on the nature of the charge. This apparent imbalance should be rethought.

As to Section B321 specifically, it would seem more appropriate to confer on the Court the authority to make a judgment as to the defendant's acceptance of responsibility without identifying specific conduct as reflected in Items 1 through 4. Over time, it would seem that a precedence would be established that would require a specific weight be given almost automatically if it could be demonstrated that one of these conditions exist. If this were the case, it would seem that the provision would discriminate in favor of the more sophisticated offenders who are more familiar with the criminal justice system and who know better how to make the proper appearances. Also, the degree of familiarity the defense attorney has with federal criminal practice would also be a factor. Consequently, something other than the offenders actual acceptance of responsibility might be operating. Moreover, as a general rule, it is probably futile to attempt to control all variables in an attempt to accurately assess human behavior. Ultimately, a human judgment is required and, in this writer's opinion, such judgment should be made by the Court. Judges do not need to be given a shopping list of indicators to assess the offender's sincerity.

It seems that Sections B331, B332, and B333 tend to favor the more sophisticated offender who is more deeply entrenched in the criminal world and thereby has more bargaining chips when working out a deal with the government. Certainly, cooperation should be rewarded as the Supreme Court recognizes; however, the amount of the award should more appropriately left with the Court. The certification concept is sound, but the Court is in a better position to consider the cooperation in light of the defendant's role in the offense (especially, because there are normally codefendants in these cases) and his or her other unique characteristics.

It appears that Section B321 will unduly complicate the scoring process because a judgment by the Court is required before a score can be derived. Why require a probation officer to guess what percentage reduction the Court would allow or, alternatively, require the probation officer to recompute the score after the Court has made a judgment. Moreover, if, during the presentence meeting with the defendant, prosecutor, and the probation officer, the defendant disagrees with the probation officer's assessment of the defendant's acceptance of responsibility, the probation officer will be put into a position of defending a position even though the Court may not agree with it. It appears that we are putting the cart before the house. Also, if the probation officer shares with the defendant

and the prosecution his or her judgment relative to the defendant's acceptance of responsibility, the probation officer would be, in a sense, revealing part of his or her recommendation. I am sure the Commission is well aware how this can be a very sensitive issue with many judges.

Criminal History:

The overall approach to weighing criminal history seems workable; however, the following observations are made:

1) Conceivably, more weight would be given to a prior DWI conviction that resulted in a 60 day jail sentence (2 points) than to an embezzler who got 5 years with a substantial fine and restitution (1 point). This would be true even if the prior offense behavior was essentially the same as the instant offense. Perhaps additional points should be assessed for prior felonies that resulted in a period of probation over two or three years. Moreover, perhaps additional weight should be given to a prior conviction that essentially is the same as the instant offense.

2) It seems inconceivable that a single positive urinalysis for cocaine at some time between arrest and sentencing or evidence that an individual was an abuser of cocaine up to ten years ago would be weighted the same (3 points) as would an offender who served up to three years in confinement.

3) For all of the reasons that the Commission has undoubtedly heard before about the deficiencies in our tribal courts, it is firmly believed that tribal convictions should not be counted the same as other convictions. Those of us who have personal experience working with tribal court systems find it difficult to believe that the Commission would even consider assigning the same weight to tribal convictions as it would convictions in other jurisdictions.

Sincerely,

Jack R. Saylor

Jack R. Saylor
Chief Probation Officer

Enclosures: Commentary on individual chapters

JRS/lmo

Chapter Four - Determining Sentence/Conversion of Sanction Units into Sentence Other Than Imprisonment

To satisfy the Commission's mandate from Congress an offender will probably have to score below a preset point before he or she becomes eligible for probation. Operating from the premise that even straight probation is inherently punitive, each year of probationary supervision would be assigned a numerical value. Also, each special condition, including jail work release, CTC placement, house arrest, fines, etc., would presumably be assigned numerical values. If the sanction unit value could be reduced to zero after subtracting the points for probation and the special condition, then probation would be allowed.

For example, if an offender had a sanction unit score of 42, the Court could impose a sentence within the 30 to 36 month range. If, on the other hand, the Court felt probation was indicated, a probation sentence could be fashioned that would offset the 42 sanction units. For instance, if each year of probation equaled five points and the Court felt a five year probationary sentence was indicated, 25 sanction units could be offset with a total of 17 units yet to be accounted for. If the Court felt that a community treatment center placement was also indicated, and if each six month interval of placement was worth three points, then nine points would be reduced leaving a sanction unit score of 8. These points could be offset with other special conditions such as intensive supervision, participating in a drug/alcohol treatment program, fine, house arrest, etc. If the Court elected to impose a jail sentence as provided under 18 USC 3663(b)(11) of up to one year, the sanction units could be reduced accordingly. The remaining sanction units would obviously have to be accounted for by way of special conditions which would reduce the sanction unit value to zero.

Although not discussed anywhere in the Preliminary Draft, the probation service will lose an extremely valuable tool if there is no provision for providing an offender with the incentive of an early termination for exceptional adjustment. If, for instance, a probationer paid a substantial amount of restitution, performed community service, and complied with all other conditions of probation in an exceptional manner, the Court should have the latitude to consider an early termination. Perhaps the Commission would want to require the probationer to have served two-thirds or three-fourths of the period of probation before termination would be considered.

As has been observed by many, cooperation from those individuals serving a period of supervised release may be lacking due to the minimal consequences available because of non-compliance.

Chapter Five - Violations of Probation and Supervised Release

In this writer's opinion, the current practice used in the federal courts for handling probation revocation matters is completely equitable and adequate. Understanding that the Commission is mandated to establish guidelines for policy statements regarding revocation procedures, this chapter will be studied more carefully with an eye towards making a meaningful observation and, hopefully, a recommendation.

Chapter Six - Other Issues

Part A - Fines:

Regardless of the method the commission selects to offset sanction units, the most critical factors in assessing and collecting fines are the adequacy of the defendant's financial picture, as presented to the Court in the presentence report, and the defendant's present and future resources. To impose a fine that the defendant lacks the ability to pay makes no sense and merely creates unnecessary administrative burdens for both the probation service and the Department of Justice as the Commission recognizes. Similarly, imposing a fine knowing that, in all probability, it will be reduced at a later date also wastes probation and Court time.

Given that the ultimate goal should be to ensure that fines are properly assessed by the Court and collected, the Commission could offer the most assistance by ensuring that probation officers (most of whom have social work backgrounds) are adequately training in financial investigating and reporting and are required to use a comprehensive (will vary with each defendant), standardized format when reporting the defendant's financial circumstances in the presentence report. Until that happens, Courts will continue to receive varying benefit from presentence reports.

Assuming the Court has before it adequate information upon which to properly assess a fine, the method the Commission selects to offset the sanction units and satisfy the mandate from Congress to provide "guidance" to the Court in imposing a fine will probably be more of a hindrance than a help. Understanding the Commission's dilemma, however, it would probably be better in economic-type crimes to establish a number of sanction units that are to be offset by a crime but give the Court the option as outlined on Page 160 of the Preliminary Draft.

Part B - Organizations:

The option based upon harmfulness of the organizations conduct and likelihood of detection seems to be the more equitable way to impose fines on organizations. The Court should have the authority to cause an organization to liquidate its assets if need be to satisfy the fine.

Any one of the probation conditions mentioned on Page 163 might be appropriate under varying circumstances and should be permitted. If the organization fails to satisfy the conditions of probation imposed, upon revocation, a fine should be assessed if one was not assessed earlier. As was mentioned earlier, if the fine is not paid, the Court should be empowered to enforce liquidation to satisfy the fine.

November 21, 1986

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

TO: SENTENCING COMMISSION

REFERENCE: U.S. Sentencing Commission Guidelines, Preliminary Draft, Chapter One: Introduction and Overview III, Overview of The guidelines 3006

COMMENT REGARDING: Modified Real Offense Sentencing.

OFFENSE EXAMPLE: An offender enters a bank armed with a hand gun and collects approximately $30,000.00 from three tellers. Upon leaving the bank premises offender encounters local police who have arrived on the scene in response to the bank robbery alarm. Offender fires his weapon, wounding the police officer, and then flees the scene. After a high speed auto chase, lasting several minutes, offender is arrested by police with no further incident.

The offender is charged by federal authorities with "Armed Bank Robbery" and is sentenced (under old law) to the 25 year maximum.

The offender is further charged by state authorities for "shooting with intent to kill" for wounding the police officer during the attempted escape from the robbery. The offender enters a guilty plea to state charges and is sentenced to "life" on the charge.

Under the proposed "Modified Real Offense Sentencing" structure the federal judge would determine this offender's sentence by considering the fact that the police officer was wounded during the robbery attempt, and sanction the offender accordingly. Although the offender was not charged by federal authorities for discharging the weapon and wounding the officer, he will nevertheless be sanctioned for that behavior by the federal judge under the Mofified Real Offense Sentencing.

The circumstances are such that the offender is sanctioned twice for wounding the officer since the state has sentenced the offender to life for this related crime, while the federal judge considered the same offensive behavior and enhanced the offender's federal sentence using the Modified Real Offense Sentencing.

Is it then the intent of the commission, that offenders in many circumstances where federal and state authorities prosecute for different but related crimes, be subjected to sanctions imposed by both authorities for the same crime and/or offense behavior?

Is there no provision to insure that an offender is not sanctioned twice for the same crime by federal and state authorities?

Sincerely,

Kenneth Cheever

Kenneth Cheever
P.O. Box 1000
Leavenworth, KS. 66048

000(1)
12-1-86

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November 26, 1986

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

Attention: Guidelines Comments

RE: Sentencing Provisions

Dear Committee Members:

I am an attorney in Chicago, and dedicate almost my entire practice to defending criminal cases. Unlike many attorneys whose practice consists of everyday "street level" criminals, my practice has developed, to a great extent, onto defending those who never thought that they would ever be the subject of a prosecution. It is this experience that brings me to forward my comments to your commission.

Sentencing is the most involved process of the criminal procedure. Guilt or innocence is a matter of "did (s)he do it, or not", while sentencing determines much, much more than length of incarceration. Make no mistake, I do not discuss rehabilitation in this letter; what I do discuss is what is fair and effective for each individual sentenced.

I.

Effect on Individual

In my experience, I have seen individuals and families brought to the brink of disaster on a mere charge of the most minor offenses. Over a speeding ticket, I have witnessed at least one client become physically ill, while I have seen others laugh in the face of lengthy prison sentences for far more serious offenses.

What is the difference? The individual. Only a Court with discretion to act, weigh, analyze and evaluate can decide the effect any sentence may have upon any individual. It is a mistake to rectify the infrequent sentencing error by handcuffing not only the defendant but the Judge as well.

There are a great many people who are properly sentenced under the law but do not return to commit any further criminal acts. Indeed, far more do not return to crime than those who do. Therefore, we should not change laws for the sake of change.

II.
Court Discretion and Control

Once the Court's discretion is reliquished or abandoned, the Judge's interest in a case and the individual will diminish. Perhaps during the trials, Judges can do more civil work while important witnesses testify, since much of the Court's attention can now be diverted from the previously more important endeavor.

The judgment of an experienced Judge who is qualified to sit on the Federal bench should not be abandoned or diminished even slightly, for it is they who exercise the ultimate control and dominion over the guilty defendant. Who else is qualified to have the power to act, the defense lawyer? No one trusts our judgment. The prosecutor? Can you imagine that, federal enforcement agencies would dictate sentences! What of probation/parole or other agencies? They are inheritantly unreliable. In the past all a government agent must do is say that a conspiracy was a violent crime (which has no meaning) and the case is treated differently from other such cases and the defendant often must spend more time in prison because of the parole authorities perceived the crime differently.

The Judges though, usually force all parties to task and makes all parties support their respective positions including the dasterdly things alleged of the accused. Now is not the time to take the individual, whose perceptions of his own culpability are so varied from one to another, and assign him an arbitrary number to determine a proper sentence.

Don't kid yourselves, Judges are plenty tough these days as the burgeoning jail populations evidence.

III.

Government Control

The United States Attorney has the first word, the last word and almost every word in between.

First Word, the Grand Jury

Before the Grand Jury almost all people tell a truth consistent with that of the FBI (or other interviewing agency). A great deal of "tuning up" occurs in these sessions that often colors the truth if not actually changing it. Leading questions requiring yes or no answer without explanation are most often asked of difficult witnesses.

It is at this early stage of the procedures that prosecutorial discretion commences the erosion of separation of powers. It is at this stage where the power to prosecute and the choice of offenses which have multiplied have overlapped to the extent that multiple counts could be charged a "jay walker". Prosecutors are already armed with sufficient power at this stage; to give them greater power by contributing points (or taking away) on a mandatory sentencing statute is inviting the most incredible abuses imaginable. Indeed, citizens may even be frightened away from writing letters such as this.

The discretion and choices left to the prosecutor remove from the judicial branch and rest into the executive branch massive powers THAT WILL NEVER BE GIVEN BACK. Mandatory sentencing when multiple laws apply and where great prosecutorial input is welcome,is dangerous. In my conversations with an Assistant United States Attorney, the glee at the potential control over persons (witnesses, defendant, lawyers, etc.), the look in his eyes, was freightening. If you could see that which I saw, long letters of comment would be unnecessary.

IV.

The Truly Innocent and the Not Guilty

There are those who are truly innocent and there are those who are not guilty. The truly innocent are those who did not do "it"; the not guilty are often those who were doing something wrong, but not the crime charged,

i.e. manslaughter as opposed to murder.

We cannot rely upon the public, the media, prosecutors or others to protect those people. They won't. Normal pressures of society (the need for law and order, prime time T.V. specials, media blitzes and oncoming elections) generally cause a charge of murder to be lodged and reliance upon the Court to do "the right thing" becomes the order of the day. Add to the equation the potential for injustice, such as the police officer who lies or fudges the facts which is an incredibly frequent occurrence since he knows people want to believe those who put their "lives on the line" as opposed to the biased defendant and his lawyer, and one sees that removal of the Court's discretion prevents Courts from repairing the damage.

It is not uncommon for someone to "put a case" on another. When it becomes one side against another and then a matter of credibility, the potential for injustice becomes greater still. Consider that one party is aided by the government of the United States with massive resources and the other aided only by a lawyer and his wits alone. Too often that's only half of what's available. Now remove the Court's discretion, add potential vindictiveness, the possibility that an innocent person may have a distasteful personality or be ill-tempered or just may look nasty, add disparate characters of participants and witnesses, potential incompetence or lapse of attention by a competent attorney for whatever reason, and real justice as should be dispensed to human beings is lost.

V.

Conclusion

Some of what I said addresses specific issues in the preliminary draft of the guidelines, some does not. But built into our government is a recognition that power must be equally divided, afterall, in the final analysis our governmental system recognizes the ongoing abuse of power which has never varied throughout history. Please do not add to it. We won't win the war on crime by making more laws but by better using the ones we already have. Allow those changes recently made an opportunity to work. Don't pass statutes by which we can't perceive ourselves, one day, being judged.

Respectfully submitted,

GLENN SEIDEN

GS/cw

00078
12-1-86
(corrected copy)

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHARLIE BROWN
ATTORNEY GENERAL

November 26, 1986

United States Sentencing Commission
1331 Pennsylvania Avenue, Northwest
Suite 1400
Washington, D. C. 20004

Attention: Guidelines Comments

Dear Sir or Madam:

Attorney General Charles G. Brown has asked me to contact you on his behalf to respond to your invitation for public comment on the draft guidelines.

The United States Sentencing Commission's Preliminary draft of sentencing guidelines does much to eliminate unfairness inherent in the existing federal criminal justice system. A system too complex results in disparate sentences for similar offenses. A proper posture in drafting is all efforts to revamp the sentencing guidelines should, as the preliminary draft attempts, result in simplifying the system thus removing as much as possible federal judicial discretion.

The preliminary guidelines must be usable and functional. The elements of sentencing rationale must be clear and concise, keeping to a minimum possible distinctions in sentencing allowed in like situations.

There are, however, some assumptions made in offense values that are debatable. The rationale behind making such offense value distinctions is not in question. For illustration purposes, I cite Part D, Section 211, Subsection (C) on Page 57 of the Preliminary Draft of September, 1986. The distinctions drawn in offense values between 200,000 or more doses of all drugs listed and the appropriate offense values and 10,000 to less than 25,000 doses of all drugs listed and the appropriate offense values seem to be arbitrary and artificial. The offense value of 10,000 to 200,000 or more doses would better serve brevity and clarity as a single offense value. Such distinctions throughout the Preliminary Draft would better serve judges at sentencing when intent on the committed illegal

act is coupled with rehabilitation, incapacitation, deterence and punishment.

This comment is by no means exhaustive but may serve as a recommendated policy for future redraft deliberations, and I hope you will feel free to contact me if I can offer further information.

Very truly yours,

Anthony F. Serreno
Assistant Attorney General

AFS:m

STATE OF WEST VIRGINIA
OFFICE OF ATTORNEY GENERAL

DATE 11/26/86

THE ATTACHED PAPERS ARE REFERRED

To U.S. Sentencing Commission

By Anthony F. Serreno

_____ PLEASE NOTE AND FILE.

_____ PLEASE NOTE AND RETURN TO ME.

_____ PLEASE NOTE AND SEE ME ABOUT THIS ___ A. M. ___ P. M.

_____ PLEASE ANSWER, SENDING ME COPY OF YOUR LETTER.

_____ PLEASE PREPARE REPLY FOR MY SIGNATURE.

_____ PLEASE TAKE CHARGE OF THIS.

_____ TO BE SIGNED.

_____ IMMEDIATE ACTION DESIRED.

_____ FOR YOUR APPROVAL.

_____ FOR YOUR INFORMATION.

_____ YOUR COMMENTS, PLEASE.

_____ PLEASE CALL TELEPHONE NO. _____

_____ YOU HAVE AN APPOINTMENT TO SEE

_____

AT _____

REMARKS: Another letter was mailed to you yesterday that contained errors; please replace that copy with this one. Many thanks.

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHARLIE BROWN
ATTORNEY GENERAL

November 25, 1986

United States Sentencing Commission
1331 Pennsylvania Avenue, Northwest
Suite 1400
Washington, D. C. 20004

Attention: Guidelines Comments

Dear Sir or Madam:

Attorney General Charles G. Brown has asked me to contact you on his behalf to respond to your invitation for public comment on the draft guidelines.

The United States Sentencing Commission's preliminary draft of sentencing guidelines does much to eliminate unfairness inherent in the existing federal criminal justice system. A system too complex results in desparate sentences for similar offenses. A proper posture in drafting is all efforts to revamp the sentencing guidelines should, as the preliminary draft attempts, result in simplifying the system thus removing as much as possible federal judicial discretion.

The preliminary guidelines must be usable and functional. The elements of sentencing rationale must be clear and concise, keeping to a minimum possible distinctions in sentencing allowed in like situations.

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committed illegal act coupled with rehabilitation, incapacitation, deterence and punishment.

This comment is by no means exhaustive but may serve as a recommended policy for future redraft deliberations, and I hope you will feel free to contact me if I can offer further information.

Very truly yours,

Anthony F. Serreno

Anthony F. Serreno
Assistant Attorney General

AFS:bbc

00017
12-1-86

UNITED STATES DISTRICT COURT
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November 24, 1986

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

Attn: **Guidelines Comments**

Dear Sir or Madam:

Enclosed are three comments on sections of the preliminary draft of the sentencing guidelines. The comments relate to pages 17 and 18, on the sentencing hearing; to page 54 on the definition of marijuana; and to page 55 on the "any detectable amount" standard as applied to drug violations.

Very truly yours,

James M. Dean
Chief U.S. Probation Officer

JMD/s
enclosure

Comment on Standard of Evidence at Sentencing Hearing

(pages 17 and 18 in Preliminary Draft)

The current federal rules of evidence specifically exclude sentencing. (cf Rule 1101(d)(3)).

The Parole Commission, in determining offense severity at the present time, uses a preponderance of the evidence standard. However, it is clear that the federal rules of evidence do not apply to those proceedings either.

From the discussion of modified real offense sentencing, I concluded that the Commission did not intend to seek the repeal of Rule 1101(d)(3). However, the rule is not specifically referenced and the language in the preliminary draft at pages 17 and 18 is confusing. Specifically, it states "The judge may admit all evidence that is relevant and reliable except for evidence that barred (sic) by evidentiary rules." Since the evidentiary rules are inapplicable to sentencing, that statement leads to confusion.

Submitted by James M. Dean, Chief U.S. Probation Officer, D/VT

Definition of Marijuana

(page 54 in Preliminary Draft)

Marijuana is defined by reference to 21 USC 802(16). However, only part of the statute is quoted in the prelimiary draft and that could lead to some confusion in assessing the weight of marijuana, especially in marijuana growing cases.

I recognize that the 1986 drug law changes may eliminate some of the source of confusion, since they place marijuana cultivation involving one hundred or more plants in a separate category. However, since we have seen prosecutions for marijuana growing wherein the parties have fought bitterly over the weight of the marijuana, I think it would be helpful if the guidelines made reference to the full text of 802(16). Specifically, the statute excludes the mature stalks of the plant, portions that would be relevant to a strict weight analysis if they were included.

Sumitted by James M. Dean, Chief U.S. Probation Officer, D/VT

Comments on Drug Guidelines:
Any Detectable Amount Standard

(page 55 in Preliminary Draft)

Though I recognize that the Congress has recently enacted the any detectable amount standard into the new drug law, I respectfully submit that it is an inappropriate standard for use in measuring magnitude of drug cases. By including the weight of all adulterants, the Commission would inflate the seriousness of relatively minor drug dealers and depreciate the seriousness of more significant ones.

Practitioners, especially in the federal courts where prosecutions of wholesalers have been commonplace and prosecutions of retailers have been relatively few, have, I believe, come to recognize that the percentage of purity of a drug seized is quite relevant to assessing the status of a defendant in the drug industry. (Congress has also implicitly recognized this by treating cocaine base - crack - as a highly refined form of cocaine.) The parole guidelines initially operated, in effect, on an "any detectable amount" standard, leading in my opinion to some substantial injustices. Gradually, they shifted to the present system which converts drugs to 100% purity equivalents, and it appears to me that the system has become much more just and appropriate as a result.

To give one example: Some years ago I worked in New York State, and had an experience with a defendant under the Rockefeller Drug Law. It involved a heroin addict who was attempting to sell his dose of methadone. Methadone at that time was commonly diluted with orange juice. The addict had one dose of methadone, diluted in eight ounces of orange juice. He was charged with attempting to sell eight ounces of methadone.

More important than the inflation of the seriousness of the retailer's offense is the depreciation of the seriousness of the wholesaler's offense. I think the system should have a way of responding to the role that an offender plays within the drug industry. One way of doing that would be to recognize that those who have control of relatively pure controlled substances, especially opiates and cocaine, are generally speaking people who are closer to the production end of the industry than to the retail distribution end. Though I recognize that the Congress has an interest in suppressing demand by prosecuting retailers and users, from a crime control strategy point of view it seems to me that it would be important to avoid a system that would depreciate the seriousness of the role of the producers.

Submitted by James M. Dean, Chief U.S. Probation Officer, D/VT

00080
12-1-86

Testimony of Justice Fellowship
before the
United States Sentencing Commission

Presented by

The Honorable Albert Quie

and

The Honorable Robert Utter

December 3, 1986

Washington, D.C.

We are pleased to have the opportunity to offer testimony to the Sentencing Commission in response to the Draft guidelines issued in September 1986.

Justice Fellowship is a public education and lobbying organization. Our objective is to change the focus of the criminal justice system so that offenders are held accountable for the harm they have caused their victims, rather than solely for the harm they are considered to have caused the state.

We have three goals. One is to reduce the use of prison for property offenders by increasing use of alternative punishments such as restitution, community service and so on. The second is to improve programs of victim assistance and compensation. The third is to insure that prisons are safe and effective in confining those who must be there.

Justice Fellowship was formed in 1983 by Chuck Colson and is affiliated with Prison Fellowship Ministries, a national Christian ministry to prisoners, ex-prisoners and their families.

We are currently focusing our advocacy efforts in six states (Virginia, Indiana, Arizona, South Carolina, Michigan and Delaware), although we have worked with public officials in 26

states so far this year. In addition, we have members in 46 states.

There can be little doubt that there is a crisis in our criminal justice system today. Crime rates, although declining because of demographic changes, are still too high. Prisons are filled beyond capacity, and 38 states are currently under court order because conditions in those overcrowded facilities violate the constitution. Victims are rightly protesting the callous treatment they have routinely received from criminal justice professionals.

Each of these problems is exacerbated by a more fundamental crisis: the failure of society to agree on the purposes and role of the criminal justice system. Since the demise of the rehabilitation model in the last 20 years, there has been little consensus on what should guide criminal punishments.

This is, in part, why the work of this Commission is so important. The guidelines it develops will not simply establish federal sentences, but will also establish a model for states to implement. We understand that Tennessee's Guidelines Commission, for example, is following your work closely.

It is obvious that the Commission has taken its responsibility seriously. We commend the Commissioners and staff for their hard

and thoughtful work. What follows are our recommendations and comments. Some of these, of necessity, question certain directions the Commission has taken. When that is the case, we have attempted to offer constructive alternative approaches.

We stand ready to assist in any way we can as the Commission revises the guidelines for submission to Congress.

Our comments fall into six general categories:

1. Impact on the Criminal Justice System.
2. Sentences Other Than Imprisonment.
3. Modified Real Offense Approach.
4. Relative Values of Offense Scores.
5. Supervised Release.
6. Determining the Criminal History Score.

Impact on the Criminal Justice System

There are many indications that the Draft guidelines would dramatically increase the federal prison population, which is currently operating at around 150% of its design capacity. For example:

o the Commentary notes (page 111) that currently only 15% of those convicted of price fixing receive prison sentences, and that under the new guidelines all who are convicted will serve mandatory sentences.

o anyone convicted of tax evasion involving more than $5,000 will serve some prison sentence (page 44). We understand, however, that the government seldom prosecutes for tax evasion if the amount involved is under $10,000. This means as a practical matter that everyone convicted of tax evasion under the guidelines will be imprisoned.

o everyone convicted of simple burglary resulting in loss of $1,500, would receive a minimum prison sentence of between 18 - 24 months under the guidelines. (The sentence would increase if the building were occupied or were a dwelling, if the burglary resulted in a greater loss, or if the offender had a criminal history.) We understand that under current Parole Commission Rules, such offenders, if

sent to prison at all, serve a median sentence of 11.0 months.

o the increase in prison terms is even greater for the more serious drug, assaultive and robbery offenses. We understand that under the Draft guidelines, these sentences are four to five times longer than current prison terms.

One issue that must be considered, of course, is what length sentence is appropriate for a particular offense. There is no indication in the Commentary of how those decisions were made, and therefore, no way of evaluating the legitimacy of concerns the Commission may have had concerning current sentencing practices.

But another, equally important, issue is whether the criminal justice system can absorb the effects of the guidelines. The legislation setting forth the duties of the Commission states that it shall

> take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed

> the capacity of the Federal prisons, as determined by the Commission. (28 U.S.C. S s 994(g); ital. added)

The Commentary to the Draft indicates (page 20) that because no final decisions concerning the offense values and the mechanism for incorporating mitigating and aggravating circumstances have been made, the impact study has not been completed. We urge the Commission to conduct the study prior to making those decisions, so that capacity can be a factor in selecting final offense values. It was clearly the intent of Congress that the Commission consider the capacity of the Federal prisons in developing the final guidelines.

Sentences Other Than Imprisonment

The Commission has requested comment on "what kinds of sentences, other than imprisonment, should be measured by sanction units?" (p. 142). The importance of this issue cannot be overstated.

We suggest that the draft, taken as a whole, offers a promising approach which could help the Commission structure a guideline table consistent with the Congressional mandate to incorporate sentences other than prison for certain offenders.

The Draft guidelines appear to be reparation-oriented in their definitions of crime and the elements to be considered in determining the sentence, but they revert to imprisonment as virtually the only sanction available to judges. Justice Fellowship believes that a return to a reparation model in criminal justice is essential. Therefore, we applaud the efforts of the Commission to deal with the "real" elements surrounding the offense, and the inclusion of consideration of victim losses (with reservations noted on page 17 of this testimony). But the failure of the Commission to convert the offense values into punishments consistent with the reparation model is a major concern.

If crime is viewed as it has been defined historically in the United States -- as an offense against the State -- then the

focus of the guidelines should be on just deserts, deterrence and incapacitation of offenders who pose a danger to society. One would expect that the guidelines would be built on the offense of conviction, would have little reference to the extent of the injuries to victims (particularly psychological injuries), and would emphasize imprisonment as the principle sanction. Rehabilitation might reduce or channel the sentence in appropriate cases.

Guidelines reflecting an orientation toward reparation -- holding the offender responsible for restoring the victim -- would emphasize a real offense approach, consider the actual injury to the victims and include punishments designed to repay them, and impose only the amount of restraint necessary to prevent offenders from committing new crimes.

There is ample evidence that the reparation model is consistent with Congressional intent expressed in the Commission's enabling legislation:

- imprisonment is clearly viewed as appropriate for those offenders who require incapacitation [see Chapter 58, subsections 994(h), (i), (j), and (k)].

- Punishments other than prison are provided for those

who do not pose this kind of risk [see Chapter 58, subsections 994(j) and (l)].

o The importance of restitution to the victim is currently an important feature of federal law [see, for example, Chapter 227, section 3553(c)].

Unfortunately, while the reparation model is evident in the guidelines' description of offenses, it has not been reflected in the sentencing table. There is no offense which is not imprisonable, in spite of the requirement that the Commission "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" [section 994(j)]. Nor do the guidelines assist a judge in determining "whether to impose a sentence to probation, a fine, or a term of imprisonment" [section 994(a)(l)(A)].

We make the following suggestions:

First, use the base offense values (not including the references to loss, damage or psychological injury) to compute an offense score. This score determines the length of the sentence to be imposed.

Second, use the special characteristics scores relating to loss, damage or psychological injury to determine a reparation score. This score determines the amount of victim restitution or of community service (if there is no victim, if the victims cannot be easily identified, or if the amount of restitution exceeds the amount the defendant will be able to pay).

Third, use the offender characteristics to compute a risk score. These should include not only the ones mentioned in Chapter Three, but also the other offender characteristics mentioned in Section 994(d). This score determines the amount of control over the offender's freedom that must be imposed. Control can range from routine probation through intensive supervision to house arrest, community detention and ultimately to time in prison. The guidelines should be written to impose the least restrictive control required to protect the public.

The judge would determine an offender's sentence by comparing the three scores. The offense score would give the length of the sentence, the reparation score the amount of restitution and/or community service, and the risk score the degree of loss of liberty.

We have not established specific tables, but we would be pleased to work with the Commission in developing one.

Modified Real Offense Approach

One of the biggest problems that architects of sentencing guidelines must address is how to define, for purposes of sentencing, the offense. As the Commentary mentions on pages 11 - 18, the approach usually used is to consider only the charge of conviction. However, this is not always effective in reducing disparity, since two offenders convicted of the same charges may actually have committed vastly different offenses.

The other approach is to consider the "real offense" at the sentencing, and therefore to permit the judge to consider elements which were not proven at trial. In effect, the offender is sentenced for crimes of which he was not convicted (e.g., pistol whipping a teller in the course of a bank robbery).

The Commission has adopted a "modified real offense" system which begins with the offense of conviction and then specifies the "real offense" factors a judge may consider. These additional factors are laid out in what is called a "road map" for the judge to follow while sentencing.

This is an admirable and creative effort to deal with a very difficult issue. Unfortunately, there are flaws in the specific plan laid out in the Draft.

The first is the complexity of the road map. Its specificity may actually create disparity if it is so complex that judges, defense attorneys, prosecutors and probation officers preparing presentence investigation reports do not have a national understanding of which elements apply in specific situations. This will certainly be further complicated by the reality of plea bargaining concerning the elements themselves, and by court practice in different Districts.

While reduction of unwarranted disparity is an important goal, as the Commission notes, limiting discretion at one level generally simply transfers it to another level: limiting judicial discretion expands prosecutorial discretion in charging and plea bargaining. If the effort to limit this transfer of discretion results in too much complexity, the guidelines will simply have created a new reason for unwarranted disparity: confusion.

A solution is to accept the reality of discretion and unwarranted disparity, and build in mechanisms to identify and correct cases of injustice. For example, it should be explicit that judges may sentence outside of the guidelines in the event that imposition of the sentence indicated by the guidelines would result in unwarranted disparity.

Another step toward reducing the complexity of the current draft would be to separate the factors considered into three major

groups: one dealing with the offense score, another dealing with the reparation score, and the third dealing with the offender's criminal history and other aggravating and mitigating circumstances. This would simplify the process of determining the scores for each, and would permit the Commission and the sentencing judge to explicitly determine the interrelationships the three should have with each other. We have suggested one approach on pages 10 and 11.

The second problem with the modified real offense approach concerns the standard of proof required at sentencing. Allowing the judge to consider elements which could not be proven beyond a reasonable doubt, but can be proven by a preponderance of the evidence, poses problems. There are several examples illustrating the road map approach beginning at page 15 of the guidelines. The first involves a judge finding by preponderance of the evidence that an offender convicted of unarmed robbery actually carried and pointed a firearm during the robbery. The judge is instructed to add the offense value for using a dangerous weapon to the offense value for unarmed robbery.

Using this example, let us look at some of the issues this approach presents:

Problem 1: Suppose the defendant was originally charged with armed robbery, but the element of the weapon was not proved

beyond a reasonable doubt. Will the judge make a new finding at sentencing based on a lower evidentiary standard, and sentence the offender for something of which he was explicitly found "Not Guilty"? Or is this excluded as "conduct for which further prosecution is barred" (page 10)?

Problem 2: Suppose the prosecutor concluded that the evidence of gun use could not meet the standard necessary to win conviction on armed robbery charges. There is, however, evidence of gun use that would satisfy the less demanding preponderance standard. What prevents the prosecutor from simply charging the base offense of robbery, and waiting until sentencing to prove the enhancements?

There are several possible solutions to the standard of proof problem. The first is use the modified real offense approach only as part of the plea bargaining process, and to use the charge of conviction system when there has been a conviction following trial.

The second is to retain the modified real offense approach, but to require the additional elements affecting sentence length to be proven beyond a reasonable doubt. This would undoubtedly prove to be prohibitively burdensome to administer.

Relative Values of Offense Scores

It is unclear what factors the Commission has used in assigning offense values to various offenses. The enabling legislation instructed it to consider current sentencing practices as a starting point. But the significant increase mentioned earlier in the numbers and length of prison commitments under the Draft suggests that the Commission has used other criteria in setting the offense scores.

Determining the relative scores was admittedly a monumental task, especially when done in so short a time. Justice Fellowship has not had time to prepare a comprehensive analysis of the relative scores, but we would like to point out several anomalies:

- a first-time burglar who does not enter a dwelling, and who does no damage and takes no property would receive a base score of 24, and serve a sentence of 12 - 18 months. A person who owns or operates a house of prostitution would receive a base score of 12 and serve no time. A person who interferes with another's civil rights would receive a base score of 6 and serve no time.
- a person convicted of importing pure heroin would receive the same sentence as the street dealer who pedaled a substance of the same weight but which contained only a "detectable amount" of heroin.

- the offense values for PCP and LSD are higher than for heroin or cocaine, which is a major departure from current Parole Commission practice.

- the laudable concern for the effect of the crime on the victim is reflected in the wrong way. The effect on the victim should be considered in determining the amount of restitution, not the amount of the prison sentence.

It would be particularly inappropriate to consider psychological injury in calculating the offense score. As civil courts have discovered, emotional distress is difficult to prove, but there is precedence to assist in converting such injuries into damages. It would, however, be virtually impossible to establish clear guidelines for judges in calculating the offense score, thus creating the likelihood of unwarranted disparity.

Supervised Release

Many states with determinate sentencing have developed programs of supervised release. This permits supervision of the newly-released prisoner re-entering the community, and provides a mechanism for that person to receive guidance and support in adjusting to the change from total confinement.

Studies conducted by the State of Massachusetts have demonstrated that recidivism rates for all kinds of offenders are significantly reduced when they are released from less restrictive forms of supervision rather than directly from maximum or medium security facilities.

A substantial number of released prisoners need supervision. We understand that at least 25% of those leaving federal prisons are heroin addicts, and at least 50% have had a history of drug abuse. For these and other prisoners, supervised release can both assist the prisoner and protect the community.

The enabling legislation provides that supervision will be done by federal probation officers, as it currently is. However, it also phases out the Parole Commission. This body has not only determined the length of prison terms (no longer necessary when the guidelines are adopted), but also conducts parole revocation hearings. Responsibility for these revocation hearings will be

transferred to the courts which will treat them as contempt of court proceedings.

There are at least two problems with this approach. First, it could create a tremendous caseload burden on the courts. Second, there is likely to be disparate treatment of similar offenders in revocation hearings as each judge conducts them.

Therefore, we recommend that Congress either create a new national body or modify the Parole Commission, to handle revocation petitions. This would permit uniform handling of cases and relieve the caseload in the courts.

This body should have other options available to it in resolving revocation matters, such as increased reporting requirements, residence in Community Treatment Centers and drug testing programs.

Further, since the amount of time needed for the supervision will generally increase with the length of time the prisoner has served, we suggest that the guidelines provide that a specific portion of the sentence (for example, the final quarter of the prison term) be served on supervised release. This would preserve the determinate feature of the guidelines, provide for needed supervision, and reduce considerably the overwhelming

impact of the current draft on overcrowding of Federal Bureau of Prisons facilities.

Determining the Criminal History Score

The Commission Draft weights the seriousness of prior convictions based on the length of prior imprisonment. This simply perpetuates the effect of unwarranted sentencing disparity which may have affected the offender in the past. This is particularly a problem because the criminal history score considers state as well as federal convictions and sentences.

A Bureau of Justice Statistics report, "Time Served in Prison", issued in June 1984, illustrates this problem. It reviewed the average time actually served in prison by felony offenders in eleven states, and found considerable variation from state to state. For example, the average time served for burglary ranged from 13.8 months in Oklahoma to 30.5 months in Iowa. The average for rape ranged from 25.5 months in Delaware to 63.7 months in Maryland.

Enhancing federal sentences because of the length of time served for previous convictions would be unfair since that appears to be dependent as much on where the defendant committed those crimes as on the crime itself. Therefore, we recommend that criminal history scores should be based on the charge of conviction, not on the sentence served.

Second, inclusion of juvenile records could result in similar disparity, since state laws permitting disclosure vary. An offender with a lengthy juvenile record could serve less time (because the state of conviction would not disclose that record) than another with a much less serious, but disclosed, juvenile history.

Third, the decay factor which proposes ignoring convictions of offenders when there have been at least 10 years (out of prison) since the last conviction is excellent. However, this should apply to all such ancient convictions, including violent or drug offenses. The purpose of looking to prior history is to determine whether the defendant has demonstrated a pattern of criminal activity which suggests a risk of future crimes. If a crime-free life for 10 years is sufficient evidence for other crimes, it should be sufficient for violent and drug offenses as well.

00081
12-1-86

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
NEW YORK, N. Y. 10007

CHAMBERS OF
JUDGE MORRIS E. LASKER

November 26, 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:

I write to comment, as your Commission has requested, upon the preliminary draft of the Commission dated September, 1986. Since I have already joined in other commentaries, including a letter to your Commission from judges of the Second Circuit and a report of the ad hoc committee of the Association of the Bar of the City of New York of which I am a member, as well as in personal conversation with you and your fellow members at your evening meeting at the Bar Association here in New York, this letter will express my general concerns and will not attempt detailed criticisms of which I know you will have received many by this time.

Since, to my regret, this letter will be critical, I do want to express to you and your colleagues my deep appreciation for the very hard work that you have done and the signal accomplishment of creating some type of ordered structure out of the chaos of intangible factors which are inherent in the sentencing process.

Prior to the enactment of your governing statute, I testified with conviction both before the House and Senate Committees advocating the establishment of a guidelines system and a guidelines commission. I continue to believe in the concept of guidelines as an approach to curing the ills which result from disparate sentencing. It is, therefore, with great disappointment that I have concluded that the September draft prescribes an unmanageable plan. The proposal is unmanageable because

1. it is too rigid;

2. it is too complex;

3. it is too severe.

1. Because the plan has established values for every normally foreseeable factor and because those values are fixed, judicial discretion is all but eliminated. If this is the Commission's purpose, it has been accomplished. My understanding of the statute, however, is that it is not intended to eliminate judicial discretion but rather to minimize it to appropriate instances. I conclude that the statute's structure and details describe a formula more rigid than the statute requires or contemplates. Since discretion will always and must reside in the system somewhere (unless Congress prescribes mandatory sentences, which it has not) the result will be simply to transfer discretion from the court (which is likely to be more objective in its view of the case) to the prosecutor (who is likely to be more subjective).

2. The complexity of the plan may turn out to be only a minor burden for judges if enough support personnel is supplied and trained to do the work necessary to compute sentences. Even with that level of support personnel, however, the judge, who is ultimately responsible for the sentence, must satisfy himself of the correctness of the computation. It seems to me inevitable that this process will require more manpower and will impose a noticeable addition to the budget of the judiciary. Moreover, it will cause probation officers to be spending considerable periods of time at the mechanistic process of sentence computation rather than at the creative work of preparing pre-sentence reports or the important role of supervising probationers.

3. I understand that the severe sentences which are specified in the September draft are not intended to be final proposals. While I am pleased that this is so, I nevertheless must register my view that the sentences contained in the draft are shockingly severe and, I believe, substantially more severe than sentences being imposed on the average by the federal judiciary at the present time. On this subject, we all await the analysis which the Commission is doing of the 10,000 cases in its computer bank to illuminate this question. If I am correct in my belief that the proposed sentences are distinctly more severe than those being imposed today, I find no authority in the statute for such a radical quasi-legislative determination by the Commission.

In sum, as a result of the rigidity, complexity and severity of the proposal, I foresee the following major difficulties which in their totality render the plan unmanageable.

1. An infinite number of court hearings as to the factual premises of sentences.

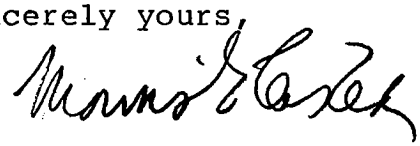
2. Considerable plenary litigation as to whether provisions of the guidelines are authorized by the enabling statute and as to what the provisions mean, aside from litigation as to constitutional questions which may or may not arise from the guidelines.

3. A drastic drop in the number of guilty pleas resulting in a drastic increase in trials and appeals. As a result, of course, there would be a substantial need for more judges, assistant United States attorneys, criminal justice defense counsel and prison space.

I have no reason to believe that anything stated in this letter has not been brought to your attention many times by now. Nevertheless, I believe that as one deeply interested in the subject and who hopes for the success of your Commission, it is proper for me to state these views.

With renewed thanks to you and your colleagues for your efforts in such a difficult undertaking, I am

Sincerely yours,



MEL/cw

0002
12-1-86

DATE: November 24, 1986

TO: Chief Judge Patrick A. Conmy
District of North Dakota

Commissioners
U.S. Sentencing Commission

RE: PRELIMINARY DRAFT OF SENTENCING GUIDELINES

Due to time constraints, the tentative nature of the preliminary draft of sentencing guidelines and my philosophical differences, not with structuring judicial discretion per se, but, with the model developed by the Sentencing Commission, my comments will tend to be general expressions of concerns rather than specific comments of the U.S. Sentencing Commissions' proposed guidelines. First of all, let me say, I recognize and appreciate the difficult task the Sentencing Commission has undertaken as well as the public manner in which they've gone about their work. Effective sentencing guidelines that promote sentencing equity and fairness is no small task given the heterogeneity of the American criminal justice system. I support the development of guidelines in the federal system, but feel the Sentencing Commission has taken its mandates to the extreme by essentially usurping the discretion of sentencing courts to the point that sentencing will become a ritualistic application of guidelines. My view, perhaps incorrectly, is that guidelines aren't presumptive but are intended to assist the judiciary, not to replace it. Broadly speaking, my concerns with the Commissions' preliminary sentencing guidelines are:

1. The manifest endorsement of just punishment and incapacitation over rehabilitation. It's the Commissions' emphasis on the offense with little consideration given to the offender that I find troublesome. The enabling legislation is eclectic in purpose by design as far as I can tell, giving no specific endorsement to any one of the traditional purposes of sentencing.

The Commission's just punishment approach to sentencing, making the punishment fit the crime is attractive, but not without its problems. From my prospective, the Sentencing Commission even as a small collegial body isn't able to decide on a just punishment penalty for each type of offense. The current guidelines are so punitive that if they were to be enacted it would require a federal correctional system several times as large as the present one which is already overcrowded. Keeping in mind the United States has one of the highest per capita incarceration rates of any western nation with approximately one percent of the total population in some form of custody, raising taxes to pay for new correctional facilities isn't likely to be accepted by the public. Additionally, a sentencing guideline system that significantly increases penalties even for major offenses, for instance where a gun is used or significant drugs are involved, haven't markedly affected the punishment they were intended to increase. These laws are vitiated by charge of plea bargaining. Notwithstanding the Commission's modified real offense sentencing approach charge bargaining will provide a means of circumventing sanctions based on a defendants total offense behavior.

Integrating incapacitation into the sentencing guidelines on the basis of prior criminal conduct is objectionable because we cannot predict with certainty who will commit crimes at a higher rate if released. Based on the research to date, I refer primarily to Peter Greenwood's, research on selective incapacitation for Rand Corporation, serious doubts exist about the statistical and predictive accuracy of information contained in the Rand Study as well as the prospective application of sanctions on the basis of predicted future criminality. It should be noted that legislatures in many states and countries have repeatedly tried to create the equivalent of selective incapacitation by enacting habitual offender laws which permit extremely long or even unlimited confinement upon the second or third conviction for serious crime. Such laws have repeatedly been discredited, because they resulted in many instances of long incarceration for persons whose offenses although numerous were not particularly serious. One of the dangers inherent in a guidelines system is the networking effect. Prison populations will grow rather than be reduced.

In summary, just punishment and selective incapacitation as the primary determinants of sentences rather than the basis only for the maximum permitted penalty isn't necessarily fair, nor does it protect society or increase public confidence in the administration of justice.

In terms of intensive probation supervision, special offender case loads, innovative use of electronic monitoring devices and differential supervision models, probation has demonstrated its viability an a sentencing option while at the same time protecting the public and changing in a prosocial way the conduct and behavior of offenders. The Commission as a part of its mandate is obliged to review criminal justice research. Just as there's no consensus within the Sentencing Commission on the purposes of punishment, there's no agreement among criminal justice researchers on the relative merits of just desserts, selective incapacitation, and rehabilitation as a sentencing function. Nevertheless, the literature is rich with empirical research on successful probation programs for felony offenders. One of the more vociferous and outspoken critics of the rehabilitation model, Robert Martinson, sociologist and co-author of The Effectiveness of Correctional Treatment, conceded there are probation programs that work.

The Commission's preliminary sentencing guidelines suggest an unduly harsh approach to sentencing that forecloses probation as a sentencing option, except in cases involving minor violations. Title 18 at section 3561 makes it clear probation is a sentencing consideration in all offenses except class A and B felonies. I'm not saying there isn't a case to be made for just punishment and incapacitation, or that probation should be the preferred sentence. However, probation is cost effective, it promotes both specific and general deterrence, promotes a sanctions commensurate with the seriousness of the offense and minimizes the criminalization influence of incarceration. Probation should be part of a graduated range of sanctions for all cases except Class A and B felonies.

2. In my view, the computations required to arrive at a total offense value which then translates into a guideline range is unnecessarily complex, plus it offers the pseudo-appearance of allowing for some discretion. If judges are capricious in their present sentencing practices what's to keep them from applying different discount values in cases involving defendants with

similar backgrounds and offenses? Perhaps the discretion isn't as great, but it still exists. The Commission's effort at factoring in all relative sentencing factors, i.e., offense, prior record, degree of culpability, etc., while laudable, is unwieldy. Surely given the experience of several of the other state jurisdictions when designing guidelines such as Minnesota and Pennsylvania, a less complex sentencing guidelines system can be developed.

3. Interjurisdictional comity will suffer if the federal guidelines remain as harsh as proposed. Prosecution of concurrent jurisdiction cases will be influenced by which jurisdiction is harder or more lenient depending on the dynamics of the case. This is already happening in Minnesota on drug cases where federal jurisdiction has been asserted because Minnesota's guidelines are perceived by law enforcement as too lenient.

4. While surely not intended, racial discrimination in the form of sentencing disparities will result if the Commission insists on counting the tribal arrest records of Native Americans. Approximately forty-two percent of the defendants involved in criminal actions in North Dakota in the twelve month period ending June 30, 1986, were Native Americans. Most of these defendants had tribal records causally related to alcohol abuse, the number one social and legal problem on reservations, for such offenses as public intoxication, DUI, resisting arrest, assault, and failure to support dependents.

Indian reservations, in North Dakota as permitted in the Indian Civil Rights Act of 1968, make no provision for appointment of legal counsel for indigent defendants even in those instances where the possible penalty is a period of confinement in tribal jail. 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, made it essential for sentencing purposes to determine whether or not a defendant was represented by counsel or waived counsel on any prior conviction when the right to counsel applied. To factor in a Native American's criminal history as required in Part C of Chapter 3, of the proposed guidelines would result in increased penalties for Native American defendants who without due process protection have tribal convictions. Such a procedure will result in racial disparities in sentencing.

5. I strongly disagree with the opening paragraph on Page i, of the Preliminary Draft. Selecting an appropriate sentence is perhaps the most important decision in the entire criminal justice system aside from determination of guilt or innocence. Federal judges at sentencing have a wealth of information available primarily developed from the presentence investigation which is the basic working document in judicial and correctional administration. A presentence report sets out in detail the offense, the offender's culpability, victim impact, salient features of the offender's background and current circumstances, provides sentencing data useful to the court in seeing how similarly charged defendants were sentenced both within the district and nationally. In my experience, judges consider the instant offense, prior record and victim harm as important variables for consideration.when sentencing. These same areas form the crux of the Sentencing Commission's sentencing considerations.

Traditionally, while not a part of the sentencing process, in an effort to promote sentencing equity and to assist judges in one of their more difficult functions, periodic sentencing institutes are held where judges are updated on correctional case law, visit a federal institution where they meet with inmates and staff, participate in workshops where hypothetical cases are presented for discussion. Department of Justice funded research in the mid-seventies entitled Predicting Sentences in Federal Courts: The Feasibility of a National Sentencing Policy, indicated that while there was geographical variability in federal sentencing, there was congruence between sentences imposed in individual districts and national patterns. I submit to the Commission that while disparate sentencing exists, it is the exception rather than the rule and is amenable to correction far short of the rather drastic and punitive measures the Commission would impose with the proposed guidelines.

6. Prosecutorial discretion as a part of plea bargaining should be constrained by the Commission. Guidelines should be developed directing prosecutors when plea bargaining may reduce charges down no more than one offense severity level in exchange for a plea of guilty. I don't see how the Commission can restrain the charging authority of the government; however, the Commission's emphasis on modified real offenses might combat this to some extent.

7. Applying the proposed sentencing guidelines to nine randomly selected cases representative of the types of offenders and offenses commonly sentenced in this district was made. The results were eye-opening. In only two cases, one involving a drug defendant convicted of possessing fifteen pounds of marijuana for sale and a farmer convicted of illegal sale of grain mortgaged to the Commodity Credit Corporation, were the sentence imposed and the sentencing guidelines in agreement. In the other seven cases, all of the defendants were placed on probation, however, under sentencing guidelines they would have served anywhere from sixteen to ninety-six months in confinement. With the exception of two of these seven defendants they were all what is commonly referred to as white collar offenders who as conditions of probation were fined, ordered to pay restitution, or contribute a given number of community service hours. For many offenders, fines, restitution and community service is of more deterrent value and less criminalizing than incarceration. Furthermore, probation is usually estimated to cost one-tenth as much as prison.

8. Consistent with the sense of the sentence resolution found in Section 239 of the Crime Control Act of 1984, prison space should be used for violent and serious offenders who need to be incapacitated. Therefore, in order to minimize criminalization, defendants who have a stake in conformity, who are non-violent or who are especially young, lengthy incarceration seems most likely to be criminalizing and the least efficient of the punishment options.

9. Unless the proposed guidelines are made less severe, it's highly likely sentencing courts will sentence within the guidelines when the case fits, but won't hesitate to go below the guidelines when in their view it's merited. The result will be that the circuits will make the ultimate decision as to what is permissible and in the process will establish sentencing norms within each of their respective circuits. Less restrictive

and more flexible guidelines that nevertheless systematizes the sentencing process are far more likely to be found acceptable by sentencing courts.

Sentencing reform is highly complex and highly charged, politically, ethically and legally. From my perspective, the proposed guidelines are overly punitive, will lead to further prison overcrowding, do not necessarily promote fairness in and of themselves, and attempt to fuse punishment philosophies that aren't compatible, and don't have similar sentencing objectives. Nevertheless, there's much that is worthwhile and worth retaining in the proposed guidelines: modified real offense sentencing as a primary element; use of generic offense categories and in particular, Chapter 2s, systemic approach to assessing offense conduct.

In conclusion, as a community corrections pragmatist, I recognize the need for a more uniformed and systematic approach to sentencing both to maximize the deterrent effect of sanctions applied, and to incapacitate those whose criminal records indicate they are serious offenders. I appreciate this opportunity to comment on the U.S. Sentencing Commission's Preliminary Draft Guidelines.

Respectfully submitted,

William D. Broome

William D. Broome
Chief Probation Officer
District of North Dakota

cc Judge Gerald W. Heaney
Eighth Circuit Judge

Judge Donald E. O'Brien
Northern District of Iowa

Donald L. Chamlee, Chief
Division of Probation

00083
12-1-86

Testimony before the
United States Sentencing Commission
on Proposed Sentencing Guidelines

by

Dr. Edward J. Burger, Jr.
Member of Board of Directors
Council for Court Excellence
Washington, D.C.

December 2, 1986

Mr. Chairman and members of the United States Sentencing Commission, I appreciate the opportunity to consider with you the Preliminary Draft Sentencing Guidelines prepared by the Commission. My name is Dr. Edward J. Burger and I appear before you as a member of the Board of Directors of the Council for Court Excellence in Washington, D.C. The Council for Court Excellence was founded in 1982 to encourage a fuller public understanding of the workings of the local and federal courts in the District of Columbia, to provide assistance to the courts and, from time to time, to advocate changes in the functioning of those courts in behalf of improving the administration of justice. The Council comprises members of the judiciary, representatives from the legal and business communities and civic members. I am one of the civic members.

Sentencing, including sentencing disparity and sentencing reform, was chosen early in the Council's history as an issue for special attention. The Council for Court Excellence was instrumental in bringing to the attention of the local courts, the prosecutors and defense lawyers and the District's legislative council, in systematic fashion, the fund of experience across the nation concerning sentencing reform efforts and the relationship of sentencing practices to broader matters including parole and prison capacity. I served as chairman of the Sentencing Committee of the Council for Court Excellence. Following closely upon the Council's educational efforts, the Superior Court for the District of Columbia

established its own Sentencing Guidelines Commission whose recommendations are anticipated shortly.

At the outset, let me say that the United States Sentencing Commission is to be congratulated for having developed a very useful and constructive first draft. It goes appropriately far in the direction of providing guidance to replace formerly unfettered judicial discretion. This, in itself, should reduce sentencing disparity and make sentencing more predictable. In addition, and importantly, it will consolidate sentencing authority where it belongs, in the court. This should serve the vitally important role of making the sentence served correspond to the sentence imposed - an absolutely essential ingredient in establishing public confidence in the criminal justice system.

I would like to enumerate for you a short list of items where the Council for Court Excellence believes additional work is needed in order to ensure both a true reform and the public's confidence in that reform.

1. <u>Lack of evidence of reliance on a body of research or existing empirical data</u>.

The Commission's draft report is, in many places, very detailed. Several of the sentencing proposals are highly specific. The value of those proposals would be enormously enhanced by referring the reader to the body of research on past experience with sentencing reform efforts to document the reasoning and expected implications of those

recommendations. The decade of the 1970's saw a wide variety of efforts to modify sentencing practices and establish new sentencing procedures and institutions. Fortunately, much of that experience has been systematically and critically reviewed so that, at this writing, one can have a measure of confidence as to what works or works well and what does not. Although I am certain that the Commission was fully aware of this work, it is not clear how its own recommendations build on this past experience.

Similarly, there is not a clear linkage between the Commission's sentencing guidelines and the existing pattern of sentencing practice. Accordingly, one cannot refer the Commission's particular policy choices and sanction numbers to the present setting. I fully appreciate the importance of evolving "prescriptive" guidelines rather than merely "descriptive" ones, built simply on the basis of past practice. Yet, in order both to justify the proposals and ensure public confidence in them, this linkage should be made explicit.

2. Overly specific recommendations

The present draft appears excessively specific and detailed in some of its recommendations. For example, sanctions proposed for securities offenses, offenses involving drugs and those concerned with tax evasion are in the form of detailed numerical schedules whose

justification on the basis of empirical or other data is not clear. Public understanding and confidence in this process require that this specificity have some basis in a body of experience and systematically collected empirical data. This aspect of the guidelines seems to be somewhat overly ambitious for a first draft of guidelines and perhaps should await further, well monitored experience in their use. As a recommendation, these detailed schedules might be replaced, in this first version, by a shorter series of categories representing qualitative degrees of infraction.

3. Modified real offense sentencing

The concept adopted by the Commission of modified real offense sentencing appears appropriate. This does have the advantage of making more explicit the sentencing practice used and the body of information relied upon. It preserves the role of the judge in sentencing in relation to that of others who may influence the disposition process. However, as discussed in the Commission's own Overview, it does represent something of a pragmatic compromise. Further refinement may ultimately be desireable. However, the concept should be tested in practice. Most important, in order to determine how well and equitably it provides for sentencing, careful and full monitoring of sentencing experience must be undertaken and the results of that monitoring must be used to guide further changes.

4. Offender Characteristics.

The Commission has specifically invited comment on how or whether a series of "other offender characteristics," such as age, education, family or community ties,should be considered as mitigating or aggravating factors in reaching sentencing judgments. Perhaps the most prominent argument against their use concerns the issue of sentencing disparity. That argument observes that sentencing disparity has been prominent and that it relates to factors of race, education or economic status. That is, so goes the argument, consideration of many of the "other offender characteristics" in practice has generally had the effect of aggravation and has led to unfair sentencing bias. Further, as has been pointed out by others, very limited confidence can be placed in those variables as predictors of future criminal behavior. Yet to circumscribe the information to be considered by the court would appear to fetter its proper functioning. Furthermore, to limit the information to which a judge may refer in sentencing may threaten a rearrangement of other aspects of the disposition process which, in turn, might further compromise the administration of justice. Accordingly, there may be virtue in electing the Commission's own second option of citing these factors explicitly as aggravating or mitigating factors where appropriate. An alternative would be to limit consideration to only prior convictions in

reaching sentencing decisions, but make available all factors for consideration of the conditions of probation. We firmly believe that this important issue deserves additional study and further public discussion.

5. The issue of fines and restitution

Fines occupy a more prominent role in sentencing in federal courts than in other jurisdictions. This is not reflected in the present guidelines which speak essentially only to incarceration. A related point concerns restitution as a part of the criminal court sentence. The Draft Federal Guidelines appear to give little focus to this alternative to incarceration, either from the crime victim's standpoint or from the position that it is the offender's responsibility to make amends for his wrongful action. We would favor the Commission's addressing the restitution issue, at least by way of an advisory footnote.

6. Effect on prison use

Prison capacity and prison overcrowding have become prominent national problems. It is essential to consider what any changes in sentencing practices and procedures may imply for prison use. This, indeed, is one of the charges to the U.S. Sentencing Commission. This question is of great importance to the District of Columbia which, as is the case of several other jurisdictions, faces a crisis of prison capacity versus pressures for incarceration. The present guidelines offer no indication that an analysis has been performed estimating what if any the effect these proposed guidelines may have on prison overcrowding. These

analyses should be done. I say this while mindful of the finding of the National Academy of Sciences Panel on Sentencing Research that the substantial increases in prison populations in jurisdictions that have adopted sentencing reforms have not been attributable to the reforms but simply continued long term trends in rates of incarceration.[1]

There is a related pragmatic concern of ours as citizens of the District of Columbia. Each year, an average of 1500 "local" offenders, convicted and sentenced in the D.C. Superior Court, serve their time in the U.S. Bureau of Prison facilities. The reason for this is penal space limitation in the D.C. Department of Corrections facilities. This jurisdiction is particularly sensitive to any short-term or transient relationship which might exist between changes in sentencing practices and demand for prison use. Were the U.S. Sentencing Commission to promulgate sentencing guidelines which affected federal prison usage, it is likely that prison capacity available to the District of Columbia would also be affected. Accordingly, it is particularly important to devise a system at the outset to monitor the functioning and effect of these guidelines in practice.

7. <u>Accommodation for departures</u>

Finally, the guidelines appear to be silent on the matter of departures from the guideline prescriptions.

Systematic procedures for occasional departures are essential in the functioning of others' guidelines, such as those in Minnesota. While these departures are unusual, they require on occasion some accommodation coupled with a recognized avenue of explanation and accountability.

1. National Academy of Sciences, Research on Sentencing = The Search for Reform, Panel on Sentencing Research, Committee on Research on Law Enforcement and the Administration of Justice, Washington, D.C., 1982.

12-1-86

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November 28, 1986

United States Sentencing Commission
1331 Pennsylvania Ave., Suite 1400
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Attn: Guidelines Comments

RE: Consideration of Federal Prisons' Capacity In Guidelines Promulgation

Dear Commissioners,

I am a federal prisoner serving a seven year term of imprisonment at the Federal Correctional Institution at Tucson, Arizona. I have approximately two years remaining to serve until my mandatory release pursuant to 18 U.S.C. Section 4163.

I have reviewed the preliminary draft set of guidelines as published in its entirity in the October 1, 1986 issue of The Criminal Law Reporter. At this time I am very concerned that the Commission may have undervalued the requirement of the Sentencing Reform Act that: "The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission." See 28 U.S.C. Section 994(g).

A recent issue of the Bureau of Prisons' publication Monday Morning Highlights dated November 10, 1986 indicates that the Bureau's facilities are already populated at 19% over operational capacity; it is my understanding that operational capacity is the maximum level that a facility can be populated at. For example, F.C.I. Tucson has approximately 190 cells designed for use by one man. These cells have all been doubled for more than a year. And for the past two months up to 50 cells have been populated with three men. This is the kind of situation where a facility is operating above operational capacity.

In reviewing the preliminary draft guidelines I do not see where the population of the prisons, and the already overtaxed facilities, have been taken into consideration as required by 28 U.S.C. § 994(g). While some of the suggested guidelines seem fair, the proposed guidelines for drug offenses are, to say the least, outrageous. Considering the large population of drug offenders and this continuing problem, the proposed guidelines would most certainly further exacerbate Federal prison overcrowding.

The Congress specifically mandated the Commission to consider prison population in devising the guidelines. Apparently the Commission has not taken this requirement to heart. However, those of us who will be adversely affected are deeply concerned.

Therefore, the Commission should seriously consider the issue of prison population before submitting a final draft to Congress. The present "preliminary"

guidelines are way out of line. I am no statistician, and I have not done a study on the problem, but common sense and a review of the proposed guidelines bode for only worse overtaxation of the Federal prisons' maximum capacities.

If the Commission choses to ignore the clear wording of 994(g) those of us who are going to be adversely affected will take the necessary action to see that the law is obeyed by the Commission.

Please advise me of any study that the Commission has made on this problem; from what I can tell none has been made. Also, please advise me of the Commission's position on this issue.

I await a prompt response to this letter of comment and inquiry. Thank you for your review of this matter.

Very truly yours,

Barry Jay Feldman

Barry Jay Feldman

12-1-86

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November 26, 1986

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Attn: Guidelines Comments

Dear Sirs/Mesdames:

We are attorneys in a small private law firm that does a large amount of federal criminal defense work. This includes representing defendants in sentencing hearings in federal court. We have read and studied the proposed United States Sentencing Commission Guidelines and, while we applaud the Commission's goal of certainty and fairness in sentencing, we have some very serious concerns with the Guidelines, as they now stand.

Pursuant to your request, comments relating to specific guidelines sections will be typed on separate pages. Before commenting on specific guidelines, however, we have some overall suggestions that reflect some of our greatest concerns with the current Guidelines.

GENERAL SUGGESTIONS

1. Notice of Factors Parties Will Attempt to Rely Upon

In order to promote fairness and efficiency in the sentencing hearing, both parties should be required to give advance notice of the factors or guidelines that they will urge the judge to take into consideration. Specifically, for example, the government could be required to give notice twenty days before sentencing and the defendant to respond with notice ten days, thereafter. As part of this notice either party should be required to provide discovery at least equal to that now required to be disclosed under Rule 16 of the Federal Rules of Criminal Procedure.

2. General Rules of Application -- Rule of Construction

It is our suggestion that the Guidelines be construed, where there is ambiguity, in favor of the defendant. Particularly in the beginning there will be some confusion as to the interaction of various guidelines. Just as criminal statutes are strictly construed in favor of the defendant, and against double enhancement, it seems appropriate that the guidelines themselves should be construed in favor of the person whose liberty is at stake.

3. Application Instructions - Instruction 6 (Consecutive Sentencing)

Based upon our experience in this District it is extremely rare for federal judges to give defendants consecutive jail terms. Rather, a defendant whom the court believes requires incarceration, will be given imprisonment on one count and his or her sentence on other counts will be suspended under 18 U.S.C. Section 3651. In other words, there is a strong presumption against consecutive sentencing. However, the guidelines change this by directing judges to the total offense value for all offenses.

This is very troublesome for two reasons. First, this, in itself, will result in much longer sentences, and therefore overcrowded prisons, unnecessary disruption of families and careers, and unduly harsh punishments.

Second, consecutive punishment seems inconsistent with several other Guidelines. In some cases, consecutive sentencing will be inconsistent with the Commission's decisions to base the guidelines on the "real conduct" the offender engaged in and to

avoid giving the United States Attorney an undue say in determining the amount of time to be served. In many cases, the government will divide one scheme to defraud into a number of separate counts of mail fraud or wire fraud. The "real offense" is really one scheme. Yet, the Commission Guidelines would seem to direct judges to total the offense value for each mailing. At the same time, the prosecutor will be, in effect, determining the length of sentence. At the least, we strongly suggest that the guidelines provide for that the offense value of various counts should NOT be totaled, where two or more offenses are part of the same course of conduct.

In other cases, the Guidelines already provide for a higher offense value, where more than one crime is involved. For example, there is a higher offense value where there are multiple victims in fraud cases. Also, for example, in tax evasion cases, the court is directed to total the amount of tax evaded. It should be absolutely clear that a defendant's sentence should not be enhanced twice -- both through a raised offense value and a

separate conviction. We assume the Commission intended to make this clear, but we suggest a clarification in the guidelines.

We think that the best approach, however -- more in keeping with past practice, Congressional intent, rehabilitative potential and sentencing flexibility -- is to continue the presumption against consecutive sentencing in federal court. For example, the Commission could provide for sentencing on only the most serious conviction, unless special circumstances warranted otherwise.

4. Provision for Reconsideration

As the Commission is aware, at the same time that Congress modified the Criminal Code to create the Sentencing Commission, Congress also modified Rule 35 of the Federal Rules of Criminal Procedure, which at the present time allows the Court to reconsider a defendant's sentence within 120 days of sentencing or the denial of an appeal. This allows the Court to consider information which, for some reason, it failed to consider when the defendant was originally sentenced -- for example, a defendant suffering from a serious illness which neither he, nor his lawyer, nor the Court, were aware of, at the time of sentencing or a defendant who shows his rehabilitation through restitution or cooperation. It is our strong suggestion that the Commission recommend to Congress that Rule 35 not be amended and that the court should continue to have the power to reconsider its sentence.

The Sentencing Guidelines also raise an additional issue and problem. Obviously, sentencing the defendant under the

Guidelines will necessitate a number of factual findings by the trial judge. There may be little chance for either the defendant or the government to prepare to rebut evidence that the other party wishes to put before the court in support of various findings. The court itself may rely upon factors that surprise the defendant and his counsel.

Without any provision for reconsideration of these findings by the trial judge, the appellate courts will find themselves in the unpleasant and often impossible position of attempting to correct simple factual errors that should be corrected, in the first instance, by the trial court. Therefore, we respectfully suggest that, regardless of whether Rule 35 is or is not amended, there be a specific provision in the Guidelines for reconsideration by the trial judge of Guideline findings, within 30 days. Obviously, the time for filing a notice of appeal must commence from that date, if such a motion for reconsideration is filed.

Section A251 - Psychological Injury

This standard adds a significant number of points to the base offense value. Our objections to this standard are that (1) determinations of psychological injury are likely to be imprecise, speculative, and extremely subjective; and (2) the problem with speculation is even worse in determining "significant psychological injury" because the guidelines allow such injury to be proved by a preponderance of the evidence by "any competent testimony," rather than expert testimony.

We would suggest eliminating this standard or, at the least, limiting this factor to "extreme psychological injury," that has been proved by expert testimony and lowering the number of points that this factor adds to the base offense value.

Section B251 - Property Table

This section specifies the offense value to be added to the base offense value for property offenses. Our objection to the property table is that it simply adds too much imprisonment time to almost every property offense. For example, any property crime involving a property value of over $5,000 virtually guarantees some imprisonment. It seems to us that where, for example, the court is faced with sentencing a first offender who has received stolen property of amount of $5,000 or more, and there are no aggravating characteristics, the court should at least have the option of placing that person on probation.

Standard C211 - Tax Evasion

The guidelines presume that unreported income was obtained unlawfully, unless the taxpayer establishes otherwise. Moreover, the application of the amount table is to be based upon deficiency plus the amount of any unreported, unlawfully obtained, income. This seems inconsistent with the Sentencing Commission's view that uncharged conduct should not be considered in establishing the sentence. If, in fact, the government wants to charge and proves that a defendant gained money illegally, for example, through selling drugs, the government may certainly do so. However, to allow the government to enhance the sentence through such unproved allegations and, in fact, put the burden on the defendant to show otherwise, raises serious issues of fairness.

Section D211 - Unlawful Manufacturing, Importing, Exporting or Trafficking of Drugs

The base offense value tables for the drug offenses are incredibly high. Distribution of the smallest amount of any drug is going to practically guarantee incarceration, even for first offenders.

Section D221 - Unlawful Possession of Drugs

Again, the base values are simply too high. Anyone caught with even a small amount of narcotics, for example, cocaine or heroin, including an addict who possesses the narcotic due to illness which compels daily use, must be incarcerated, regardless of the circumstances.

Moreover, if the offender has one or more prior convictions for possession, the base offense is doubled. Accordingly, any narcotic addict who had been caught once before would be required to serve a minimum of two years in jail. We simply can't believe this is appropriate use of our federal prisons.

Section E-211 - RICO

It appears that the Commission intends that, where the government charges and a defendant is convicted of a substantive crime that is a component of a RICO charge, the defendant should only be punished once for that offense. However, the Guidelines, as they now stand, say that if any underlying racketeering activity has resulted in the imposition of a final sentence "prior to" sentencing for the current offense, the Court should not add the offense value. This certainly makes sense. However, the Guidelines should make it clear that this also applies where a defendant is being sentenced concurrently for both RICO and an underlying offense.

Section E-212 - Travel Act

This section is not going to work by simply assigning the base offense value, according to the unlawful activity for which the travel occurred. Often, the travel was to further a state crime, for which no value has been assigned in the guidelines.

Section F-211 - Fraud and Deception

The base offense value table for fraud offenses is based on actual gain (by the defendant) or loss (to the victim). This appropriately avoids the very speculative undertaking of trying to determine what the potential impact might have been.

However, the many multipliers and combination of factors is going to result in what we believe will be an unreasonably high offense value. The combination of specific offense characteristics, dollar amount, and consideration of whether it was a single occurrence or transaction or more than one transaction and/or more than one victim, is going to guarantee incarceration in almost all fraud cases. For example, any fraud involving more than $20,000, even if it is only one occurrence and one victim, will guarantee imprisonment. Conversely, any fraud consisting of a scheme to defraud more than one victim will guarantee imprisonment, regardless of the dollar loss or gain.

We also suggest eliminating the addition of 8 points to the

base offense value, where the offense caused one or more victims to sustain a substantial loss. The guidelines already include loss as part of the base offense value. The Guidelines should avoid aggregating twice on the basis of precisely the same factor.

Section A-312 - Role In The Offense

The Guidelines require multiplying the total offense value by 1.2, where the offender used a special skill, trade, training, education, or public position, or where the offender directed or supervised another person or persons. This, again, will often lead to double aggravation, on the basis of the same factor, unless the Guidelines make clear, that this should be avoided. For example, a police officer who commits fraud would have his offense value aggravated by the fact that he had abused the public trust (F211 a. 8). The offense value should not be raised again by the fact that the defendant used a special public position to facilitate the commission of an offense. For another example, a defendant convicted of engaging in a continuing criminal enterprise should not have his offense value of 120 multiplied by the fact (inherent in his conviction) that he directed or supervised others. In short we think that the guidelines should be clear that the same factor should not be used twice in calculating an offense value.

B-231 - Acceptance of Responsibility

We think it is very important that an offender who accepts responsibility for his action, whether by voluntarily surrendering, or making substantial restitution before sentencing, or admitting involvement, or in any of the ways suggested, be given recognition of this important step towards rehabilitation, at the time of sentencing. We also agree that the judge is in a unique position to evaluate whether this post-offense conduct is sincere or self-serving.

However, limiting the amount of potential reduction to 20% of the adjusted offense value, would seem to severely hamper the ability of the judge to take account of this factor. We strongly suggest that, if the judge finds this kind of post-offense conduct, he should be allowed to reduce the defendant's offense value by up to 50% Since any one of a number of aggravating factors can essentially double a sentence, allowing up to a 50% reduction in sentence for significant acceptance of responsibility, seems absolutely appropriate.

Section A411 - The Imprisonment Guideline Table

A major criticism of the guidelines as a whole is that they provide for incarceration in far too many cases and for sentences that are simply too long. The only cases in which the guidelines don't call for incarceration is where the total of units is less than 14.

These guidelines provide for much lengthier sentences than are being given at this time. At the same time, the 1985 Sentencing Reform Act has eliminated parole, and reduced good time credit so defendants will have to serve much more of their sentence, than is currently being served.

Many, if not most, criminal defendants that appear in federal court have legitimate sources of income and are productive members of society. Removing them from their jobs and their families for a long period of time will only serve to interrupt, if not end, their productive and law-abiding careers. Their families may be put in a position where they are dependent upon social welfare or private charity for their support.

In addition, as the Commission is undoubtedly aware, only a small minority of the defendants that appear in federal court present any physical danger to the community. Rather, federal crime tends to be white collar crime in which the major role of incarceration is deterrence of current and potential offenders. This deterrent purpose can often be served with fines, restitution and/or short periods of incarceration.

At the same time, the Commission must consider whether the public is really willing to bear the cost of housing the numerous additional additional prisoners that these Guidelines will undoubtedly produce.

We do not suggest that no federal criminal defendant should serve a lengthy sentence. However, the Guidelines as they stand would require incarceration for a large number of defendants who at the present time are receiving probation. The Guidelines would result in lengthy periods of incarceration for defendants who at the present time are receiving short prison sentences.

As the Commission is aware, it was the Sense of the Senate

Resolution, in enacting the 1985 Sentencing Reform Act, that Congress wanted to avoid overcrowding of Federal Prison space and to use alternatives to incarceration for non-violent and non-serious offenders (18 U.S.C. Section 3551 foll). The almost uniformly lengthy prison sentences provided for in the Guidelines is directly at odds with this Resolution.

Although incarceration is certainly appropriate in a number of cases, it is not appropriate, nor affordable, nor desireable, nor desired by either judges, prosecutors, Congress, or the public, in a vast number of cases. We strongly suggest a broader range of stiuations in which no prison or short prison terms are available under the guidelines.

We appreciate the Commission's consideration of these comments.

Very truly yours,

Patrick A. Tuite

Nan R. Nolan

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David S. Mejia

Mary L. Mikva

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Brent D. Stratton

cc: Ms. Suzanne Conlon

00086
12-1-86

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Mr. Paul K. Martin
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Dear Mr. Martin:

I presented testimony by invitation at the Atlanta regional hearing of the Sentencing Commission. I enclose my written submission in connection with that testimony for distribution to the Commissioners and staff.

Thank you for your assistance in this matter.

Very truly yours,

Lucien B. Campbell

LBC:ip

Enclosure

WRITTEN SUBMISSION

OF

LUCIEN B. CAMPBELL

FEDERAL PUBLIC DEFENDER

WESTERN DISTRICT OF TEXAS

FOLLOWING THE

UNITED STATES SENTENCING COMMISSION HEARING

OCTOBER 29, 1986

ATLANTA

November 26, 1986

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I. INTRODUCTION

My name is Lucien B. Campbell. I have been Federal Public Defender for the Western District of Texas since 1975, and I was a Texas prosecutor previously. The Federal Defenders appreciate the opportunity to participate in the process of developing sentencing guidelines, and to address the Commission at this hearing.

I have focused my attention on Chapter Four of the Draft Guidelines,[1] "Determining the Sentence", where the Commission has identified certain issues as particularly appropriate for comment. I will speak to the issue of choosing between sentences of imprisonment and sentences other than imprisonment. I believe my remarks will address the dilemma identified by previous witnesses and some of the Commissioners, namely, how to achieve a proper degree of flexibility within the statutory framework.

I would first like to make some preliminary general comments on the Draft.

A. The Draft produces unduly harsh results.

First, the numbers. I know the offense values and modifiers in the Draft are tentative, and that impact analysis is premature, but I feel I must register my view that the results of

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[1]Preliminary Draft Sentencing Guidelines, United States Sentencing Commission, September 1986 (hereafter "Draft").

the Draft would be unduly harsh. The language in 28 U.S.C. § 994(m) that ". . . in many instances, current sentences do not accurately reflect the seriousness of the offense . . ." should not be read as meaning the incidence of, and length of imprisonment must increase. The Senate Report[2] does not so interpret that language. It says the Commission may well find some sentences are too high.[3] It says explicitly that it is not the expectation of the Committee that average sentences will be materially different under guideline sentencing, but instead that for the most part the average time served should be similar to that served today in like cases.[4]

The harsh results of the Draft are especially acute at the top and the bottom of the guideline table. At the bottom, more persons would be imprisoned for a short time; at the top, more persons would be imprisoned for life. This is a very powerful notion, moving from a system where most sentences are at least legally parolable after ten years. Lowering the offense values and modifiers, however, is only a partial solution to the harsh effect of the present Draft. The lack of flexibility in application must also be addressed.

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[2]S.REP. NO. 98-225, 98th Cong., 1st Sess. (1983) reprinted in 1984 U.S. Code Cong. & Admin. News 3182-3717 (hereafter "Senate Report").

[3]Id. at 61.

[4]Id at 116.

B. The Draft Guidelines are unduly complex.

I am concerned also with the complexity of the system. Because the guidelines will be used by all participants in the system (defense counsel, prosecutors, probation officers, and judges--most working independently in early stages of the case), the guidelines must lead to consistently reproducible results. I am not convinced that they do so in their present form. There is virtue in a system which though difficult to set up, is easy to use in the field.

The form of the Draft implies that the initial effective version will attempt an extraordinary degree of detail. I do not perceive any requirement that guideline sentencing be hatched out full-grown. While the concept of presumptive guideline sentence is revolutionary to the federal system, its development might best proceed in an evolutionary manner. The interest of achieving the fullest measure of certainty in sentencing must be weighed carefully against the need to avoid unfair results. Excessive detail in the first version of the guidelines, with no base of experience to draw upon, carries the greatest risk of unforeseen or inadvertent unfairness.

II. CHAPTER FOUR - DETERMINING THE SENTENCE

Presumptive guideline sentencing is a very powerful mechanism, which argues for great care and circumspection in its implementation. In the Draft the decision to incarcerate has

been reduced to a formula of numbers which will often turn on factors which are of little significance in themselves. The choice of probation or imprisonment may turn on whether a person transported four, or five aliens; ten, or eleven aliens (with a 20% discount for acceptance of responsibility); or whether $5,000 or $5,001 was stolen; or whether a "pound" of marijuana was a few grams over or under weight. The degree of detail in the guidelines which might be proper in a precatory guideline system may not be desirable in a mandatory guideline system.

In non-capital cases which carry possible imprisonment, the prime decision is whether to incarcerate. That prime decision has been reduced to a cipher in the Draft. The Commission has placed probatable sentences in the bottom range of the sentencing guideline table,[5] the guideline whose ranges may not exceed 25%.[6] What I am going to suggest is that the probation decision does not belong in the imprisonment guideline table at all, but instead must be the subject of a separate guideline. It would necessarily be a more subjective guideline, probably taking a narrative form.

It is clear, of course, that the "determination whether to impose a sentence to probation, a fine, or a term of imprison-

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[5]Draft at 140.

[6]More precisely, the maximum of the range may not exceed the minimum by more than 25%. 28 U.S.C. § 944(b), as amended by Pub.L. 99-363 to except six month ranges at the bottom and the range including life at the top.

ment" must be the subject of a guideline.[7] It is interesting to note that 28 U.S.C. § 994(j) suggests that the guidelines should call for a sentence other than imprisonment, in the case of a non-serious, non-violent first offender. In addition, the Senate Report contains numerous references to Congressional expectation that there be guidelines calling for probation in appropriate cases.[8]

The Commission has not done so in this Draft--the lowest guideline range which is probatable is also punishable by up to six months actual imprisonment. This seems a distinct departure from current practice, because it implies that only in a case where today a defendant might be considered for a symbolic (parolable) sentence no higher than eighteen months, may he also be considered for probation. Real sentencing today--not unwarrantedly disparate sentencing, but sound sentencing--considers a broader range than that. The new law considers a broader range to be legally probatable, since it only excludes A or B felonies, offenses expressly excluding probation, and cases where the defendant is otherwise sentenced to imprisonment.[9] It would be necessary to move the probatable sentence range further up the imprisonment guideline table to match current sound, proper sentencing practice, but of course this is mathematically impossible

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[7]28 U.S.C. § 994(a)(1)(A).

[8]Senate Report at 75 n. 162, 92, 172-175; see also 59, 76-77.

[9]18 U.S.C. § 3561(a).

under § 28 U.S.C. § 994(b)--only the range with a six month ceiling can have a zero floor. It may be that the Commission resisted the notion of a published guideline calling for probation in fear that such guidelines might diminish the deterrent effect of the penal statutes. This potential problem is avoidable, as explained below.

All of these considerations suggest to me that the probation decision does not belong in the imprisonment guideline table. I believe it is not only desirable that the probation versus imprisonment decision be the subject of a separate, threshold guideline, I believe the statutes require it. We should not lose sight of the fact that the first stated purpose of this Commission is to establish policies and practices which will "assure the meeting of the purposes of sentencing".[10] Those purposes are summarized as just punishment, deterrence, incapacitation, and rehabilitation.[11] The Senate Report makes it clear that one object is not favored over another.[12] In a given case, one object may have more bearing than the others, and in some cases, there may be only one identifiable object to be served in imposing a criminal sanction.[13]

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[10]28 U.S.C. § 991(b)(1)(A).

[11]See 18 U.S.C. § 3553(a)(2)(A) through (D).

[12]Senate Report at 68, 76-77 and n. 166.

[13]Id. at 77.

The court is required to consider those core purposes of sentencing, among other things,[14] in determining the sentence to be imposed. I submit it is not possible to reduce those purposes of sentencing which lie at the heart of the scheme to a mathematical computation. Put another way, it is not possible for the Commission to subsume all of those mandatory goals into a formula of numbers.

One of the core purposes of sentencing, which carries equal weight, is rehabilitation. References to the "outmoded rehabilitation model" in the legislative history only mean that imprisonment cannot be expected to rehabilitate an offender.[15] The sense of the Senate Report is that the sentencing purpose of rehabilitation is still important in determining whether a sanction other than imprisonment is appropriate in a particular case; however, rehabilitation is to be sought out of the prison setting.[16] I do not believe that the sentencing judge's assessment of a defendant's rehabilitative potential, based on face to face contact and discourse in open court, can be supplanted by a number calculated in advance. Conversely, whether a defendant needs to be isolated can be hinted at by numbers, but I am not

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[14]The other things are: the nature and circumstances of the offense and history and characteristics of the defendant; the kinds of sentences available; the guidelines; the policy statements; and the need to avoid unwarranted sentence disparities. 18 U.S.C. § 3553(a).

[15]Senate Report at 38; see also 28 U.S.C. § 994(k).

[16]Senate Report at 76-77, 91.

satisfied that it can be more reliably determined in that manner than by direct judicial assessment informed by a pertinent guideline.

The first listed purpose of sentencing, summarized as just punishment, also includes the component of promoting respect for the law.[17] The Senate Report gives the example of an offense of little notoriety, not frequently committed, with little likelihood of recidivism, thus presenting the paramount purpose of rehabilitation, as a case which "may well almost mandate a sentence to probation."[18] I note that none of those factors lend themselves to numerical quantification.

Another purpose of sentencing is deterrence.[19] If it is within the knowledge of the sentencing judge that a particular type of crime is increasing rapidly in a particular area at a particular time, that judge may well wish to give more weight to the purpose of deterrence than a prefabricated guideline might permit.[20]

My fundamental objection to regulating the probation versus imprisonment decision by the mathematical formula of the Draft is that it fails to consider any non-numerically quantifi-

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[17] 18 U.S.C. § 3553(a)(2)(A).

[18] Id. at 92.

[19] 18 U.S.C. § 3553(a)(2)(B).

[20] See Senate Report at 92.

able factors--indeed, by definition, it is incapable of doing so. Yet the achievement of the specified purposes of sentencing (which I suggest do not lend themselves to numerical measurement) is one of the principal goals of the system.

The purposes of guideline sentencing can best be achieved by a threshold guideline which informs the determination of type of sentence, as between incarceration and probation in the first instance. It should explicate the purposes of sentencing as set out in the statute, emphasizing that no one goal is paramount--that instead, the selection of a type of sentence requires the judge to identify which goal or goals of sentencing may be served in a particular case, and to rank those goals as to priority. This guideline could be augmented by one or more policy statements providing more detailed guidance as to its application.

While such a guideline will not produce a number result, it is nowhere written that all guidelines must yield mathematic precision. Some guideline subjects may be amenable to such treatment; the determination of whether to imprison a person is not. To govern the imprisonment decision by mathematic formulas is to risk the appearance of trivializing the most important decision to be made in a non-capital case which carries the possibility of any imprisonment.

III. RESPONSE TO JUDGE BREYER'S QUESTION

During the Atlanta hearing, Judge Breyer questioned whether the imprisonment decision can be handled any way other than the Draft solution, in light of the provisions of 28 U.S.C. § 994(b).[21] Put another way, how may the guidelines say on the one hand that if an offender is imprisoned for eight years, that term of imprisonment may not vary outside its 25% range, but on the other hand the offender may be placed on probation.

The answer must first be sought in the language of § 994(b) itself. The 25 percent rule applies only if the sentence specified by the guidelines includes imprisonment. If Congress intended to impose this degree of restriction upon every sentencing decision, it certainly knew how to say so. Instead, the remaining first sentence of § 994(b) speaks to the full spectrum of sentencing options in this way: "The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." Thus, the Congressional mandate is that the guideline scheme as a whole comply with Title 18, and that sentences of imprisonment within the guidelines comply with the 25 percent rule. The rigidity of

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[21]Section 994(b), of course, states in part: "If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 per centum."

the imprisonment rule should not be gratuitously extended to other sentencing decisions which are not amenable to such treatment. As discussed above, whether an offender is to be imprisoned is such a decision.

The proposal in this paper for a type-of-sentence guideline is faithful to § 994(b) by effectuating the first sentence of that subsection. It would require that the sanction type be selected in accordance with 18 U.S.C. § 3553(a), the most pertinent section of Title 18. Such a guideline, necessarily more subjective than most others, would still be a guideline, subject to review for "incorrect application".[22] If reversals for incorrect application of the type-of-sentence guideline would be infrequent, this is inherent in the nature of the sentencing judge's decision. Subsections (3) and (4) of 18 U.S.C. § 3553(a) would seem to require the judge to consider what the length of the imprisonment term would be if it were selected. It would be proper, at any rate, for the guideline or the policy statement to require the judge to consider the length of the indicated imprisonment term in deciding whether to imprison an offender.

IV. OTHER OBSERVATIONS ON CHAPTER FOUR

A. Probation is a sentence.

In current practice, probation is sometimes thought of as an alternative to a sentence. Under federal guideline

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[22] 18 U.S.C. § 3742(a)(2).

sentencing, probation is a sentence, rather than the absence of a sentence or the suspension of a sentence.[23] Probation is, of course, an alternative to imprisonment, and a powerful one.[24]

The manner in which probation is imposed under the new law is significant. Under current law, there are two forms of probation: sentence imposed but execution suspended, and imposition suspended.[25] The former is more common, and when the sentence imposed is less than the maximum, this constitutes a form of leniency because the sentence may not later be increased. Under the new probation law, every sentence to probation will take the form of deferring the selection of the imprisonment sanction which means the full maximum statutory range will be available upon any revocation. Any intervening misconduct which formed the basis for revocation may worsen the person's position in the guideline. This enhances the deterrent effect of probation.

Unlike the very general treatment of conditions of probation in current law,[26] the new law is quite specific.

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[23]18 U.S.C. § 3551(b).

[24]The Senate Judiciary Committee did not consider a sentence of imprisonment to be the only form of sentence carrying deterrent or punitive weight. "It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose." Senate Report at 92.

[25]18 U.S.C. § 3651.

[26]18 U.S.C. § 3651.

First, for any offense, it is a mandatory condition that the defendant not commit another offense,[27] and, for a felony, it is a mandatory requirement that the defendant pay a fine, or restitution, or do community service as a condition of probation.[28] For the first time, nineteen discretionary conditions are specified by statute.[29] Also new is a provision for custody in intervals, such as nights or weekends, as a condition of probation.[30]

The Draft has called attention to other alternatives to straight imprisonment which may imposed as conditions of probation, such as community confinement and home detention, community service, restitution, and order of notice to victims.[31]

B. Fines are an enhanced alternative to imprisonment.

Until the Comprehensive Crime Control Act of 1984, fines played a more limited role as criminal sanctions. The Act has not only increased fines to a meaningful level,[32] it has greatly enhanced the collection process. It has created the

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[27]18 U.S.C. § 3563(a)(1).

[28]18 U.S.C. § 3563(a)(2).

[29]18 U.S.C. § 3563(b).

[30]18 U.S.C. § 3563(b)(1).

[31]Draft at 147-49.

[32]18 U.S.C. § 3571.

civil remedy of a lien,[33] a provision for plenary resentencing upon knowing failure to pay a fine,[34] and a new criminal offense for willful failure to pay a fine.[35]

The Senate Report makes it clear that the Congressional intent was to create a full range of sentence options.[36] The bill requires the judge to consider all sentences, and it is neutral on what sentence is appropriate for a given offense,[37] except as explicitly stated.[38]

V. TECHNICAL PROBLEMS IN CHAPTER FOUR OF THE DRAFT

Certain portions of Chapter Four of the Draft do not comport with the statutes governing guideline sentencing, as detailed below.

A. Conditions of probation.

Guideline § A412.c, Conditions of Probation, is couched in mandatory language: "When a term of probation is imposed, the court shall impose the following conditions of probation in each case".[39] There follow fourteen of the nineteen discretionary

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[33]18 U.S.C. § 3613.

[34]18 U.S.C. § 3614.

[35]18 U.S.C. § 3615.

[36]Senate Report at 59.

[37]Senate Report at 78.

[38]See, e.g., 28 U.S.C. § 944(h), (i) and (j).

[39]Draft at 143.

conditions of probation specified in 18 U.S.C. § 3563(b). However, 28 U.S.C. § 994(a)(2)(A) states that conditions of probation are to be the subject of policy statements rather than guidelines. Furthermore, § 3563(b) itself states that discretionary conditions may be added only to the extent they are reasonably related to certain of the statutory sentencing factors and only to the extent that they involve only such deprivations of liberty and property as are reasonably necessary for the § 3553(a)(2) sentencing purposes. The Senate Report states that it is certainly not intended that all the conditions suggested in subsection (b) of § 3563 be used for every defendant, but rather that conditions be tailored to each defendant to carry out the purposes of probation in his case.[40] This is certainly the soundest approach, since pointless and vexatious conditions diminish respect for the law and can be counterproductive to the goals of a sentence of probation.

B. Conditions of supervised release.

Whether to impose supervised release, and the length, are proper subjects for guidelines.[41] However, the conditions of the term of supervised release, which are governed by a guideline in the draft (§ A413.c[42]) are to be the subject of a policy

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[40]Senate Report at 95.

[41]28 U.S.C. § 994(a)(1)(C).

[42]Draft at 146.

statement instead.[43] Moreover, discretionary conditions of supervised release are not to be imposed automatically in every case as the Draft guideline would require, but only if they meet the multipart test of 18 U.S.C. § 3583(d).

VI. CONCLUSION: THE BALANCE BETWEEN CERTAINTY AND FAIRNESS

The challenge of guideline sentencing is to achieve greater certainty without compromising fairness. The twin goals of certainty and fairness are mentioned twice in the statutes,[44] and they are coupled together both times. The Draft Guidelines would achieve a great measure of certainty, but at considerable expense to fairness.

The purpose of guideline sentencing is to "avoid unwarranted sentencing disparities",[45] not to eliminate all apparent disparity, which is neither possible nor desirable. The Senate Report's section analysis of 18 U.S.C. § 3557 on sentence review says that the "procedures introduced by this bill are designed to eliminate from Federal criminal law the plainly disproportionate sentence."[46] Elsewhere, the Report states that "[t]he Committee does not intend that the guidelines be imposed

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[43] 28 U.S.C. § 994(a)(2)(B).

[44] 28 U.S.C. §§ 991(b)(1)(B) and 994(f)

[45] 28 U.S.C. § 991(b)(1)(B).

[46] Senate Report at 86, emphasis added.

in a mechanistic fashion."[47]

The enunciation of the purposes of federal sentencing for the first time[48] is a significant improvement. This, coupled with the requirements that the sentencing judge consider them, and state the reasons for imposing a particular sentence,[49] and the advent of sentence review, will in themselves achieve significant reduction of unwarranted sentencing disparities. The Commission should resist the idea of going further than the law requires, by imposing the strict mathematic precision (or pseudo-precision) of the imprisonment guideline table on all judicial decisions. To do so risks the sacrifice of fairness in pursuit of certainty.

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[47]Senate Report at 52.

[48]In 18 U.S.C. § 3553(a).

[49]18 U.S.C. § 3553(c).

WG01
12-1-86

UNITED STATES GOVERNMENT

memorandum

DATE: November 7, 1986

REPLY TO ATTN OF: Ivan T. Green, Supervising
United States Probation Officer
Central District of California

SUBJECT: Sentencing Commission's Preliminary Draft

TO: The United States Sentencing Commission

These comments are limited in nature and deal with only a few aspects of this complex proposal. At the outset, it is clear that Congress' intent and the Commission's stated goals, which essentially revolve around reducing sentencing disparity, are long overdue. However to accomplish this purpose, the draft guidelines place primary reliance on incarceration as the desired sanction, almost to the exclusion of supervised release. Rehabilitation is included as the fourth sentencing "purpose," yet, it has not received meaningful consideration. The element that emerges as the ultimate intent of this law and the draft is incapacitation.

It seems that Congress has, at this point, given up on rehabilitation as a realizable goal, and although this is Federal law exclusively, it has traditionally been acknowledged that Federal legislation represents a benchmark for states to study and emulate. Hopefully, individual states will not limit their sentencing policies so narrowly and punitively.

Arguing against the negative comments above, there is one significant component of this system as outlined (consistent with the reduction of disparity), namely, certainty in sentencing. Offenders would soon come to know that sure consequences would follow certain crimes, were they to be apprehended and convicted. This could be a deterrent to crime, if we assume offenders think far enough ahead of the possible outcomes of their acts.

Returning to the first point, the over-reliance on institutionalizing offenders, it is believed the proposal neglects giving sufficient weight to personal, non-criminal characteristics (favoring instead concentration on the offense and prior criminal behavior), with the end result that the Judge is prevented from balancing mitigating factors against negative elements. What would result would be the regular imposition of lengthy sentences, excessive prison populations, and consequently, a minimum of emphasis on rehabilitative programming for inmates.

The draft proposal mentions the "Judicial assessment" role in the imposition of the sentence, but in effect, the computation of the sentence does not allow for a meaningful amount

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of discretion on the part of the Judge.

The Criminal Justice System, including probation and parole, has not come up with credible rehabilitative programs. Although these are far less expensive than confinement and can under certain circumstances ensure public safety, they have not been given sufficient attention. Hopefully, the current pro-incarceration trend can be modified to allow other alternatives, including non-traditional intensive supervision.

TG:sb

00080
12-1-86

TO : The United States Sentencing Commission

FROM : Charles Stearns, Supervising
United States Probation Officer
Central District of California

SUBJECT: Preliminary Draft of Sentencing Guidelines

Having just completed the reading of the Guidelines Draft, I can appreciate the time and effort the Commission and their staff has devoted to this very difficult task. Along the way, the Commission has been good enough to keep us apprised of their activities and suggestions have been made. However, the full impact is never realized until the finished product, such as this, is seen in totality. I must say, however, whether it was the legislative intent of Congress or the unique bias of the Commission, I find myself diametrically opposed to the approach and the underlying philosophical orientation.

As the Commission aptly stated in the conclusion on Page 169, it is immensely difficult to capture in a single set of guidelines the vast range of human conduct likely to be relevant to a sentencing decision. The work only is beginning. An iterative process will refine, modify and improve the guidelines. What I perceive as folly is the belief on the part of the Commission that these guidelines will meet the enunciated purposes. I believe that what we have captured here is an elaborate Sentencing Guideline scheme that will be neither cost effective nor impact significantly on the reduction of crime. Instead, we have standardized penalties to remove unwarranted disparity and opted for custody as the punishment of choice. Lip services is given to the concept of rehabilitation, but there really is no substantial belief in the capacity of people to change. In an artificial way, we have ascribed a measure of seriousness of offense, afforded adequate deterrence, but it is unlikely that we have protected the public from further crime other than that provided by a respite while the offender is incarcerated. It is unlikely that these guidelines will lead to advancement of knowledge of human behavior. Instead, we are thrusting forward to place individuals in numerical cubbyholes with little discretion accorded the courts for individual differences.

Having verbalized my general disenchantment with the entire guidelines process and recognizing that I must be in a small minority by believing still that people can change and that custodial sanction should not be the first or primary choice of disposition, I will devote the remainder of this critique to concerns raised by the Commission and how the guidelines impact on the probation service.

First, although the guidelines direct the Court in the appropriate sentence to impose, it is unlikely that our overburdened judges are going to take the time to do the scoring. It is obvious that this responsibility will be delegated to the Probation Officer. As such, there is a critical need for training to meet effectively the challenge of equitably administering the guidelines. It is incumbent upon the Commission to bring such pressure to bear as is necessary for the Congress to allocate adequate funds to provide necessary training. Similarly, it is important that this new, complex and different function be recognized in a pecuniary way by increasing the salaries of probation personnel charged with implementing the system.

Real Offense Sentencing

Regarding standard of proof and real offense sentencing, I agree with the Commission that the standard of proof should be a preponderance of the evidence. Also, real offense sentencing takes into account and more accurately reflects offense behavior. It does appear, however, that in offenses like multiple robberies in which the defendant is permitted to plead guilty to one count, there would be no weighting in the sentence for the additional unadjudicated counts. Explicit cross-references would meet better the test of parity of sentence since judges would be using the same standards. Procedural issues might best be resolved by a conference process between prosecution and defense with the Probation Officer serving as arbitrator. This would reduce the substantial costs inherent in open court resolution of issues. Only in those cases where agreement cannot be achieved should the court be intimately involved. There is a concern, however, that by utilizing a real offense sentencing standard, there might be fewer guilty pleas leading to substantial increases in costs and the need for more judges to timely administer a growing criminal calendar. I doubt also that the Commission is realistic in expecting that factual disputes will be readily resolved by juries or the court.

Offense Conduct

It is unclear from the Preliminary Draft how offense values were established since the Commission indicates it will consider from nine principal resources final offense values. It is surmised that the present offense values were derived from an historical perspective on past sentencing practices. Such a reliance has no validity base to it. Although I am in no favored position to evaluate the values attached to the offenses, nor is the Commission, some of the cross-references will be difficult to determine by the time of sentencing. For example, the issue of psychological injury to a victim may not yet be present by the time of sentencing. Similarly, the distinction between extreme psychological injury and significant psychological injury would be difficult to ascertain. Finally, the Commission has attempted to quantify criminal behavior and its affects resulting in a prescription for precise weighting of issues previously never measured in any quantifiable way. I am sure that courts have considered items such as psychological injury and aggravation of sentence but without specific values for gradation of injury. It is incredible to me that the Commission believes it is in a position to affix accurate or meaningful standards to offense conduct. What the Commission has created is a complex scoring device that will result in more offenders serving longer sentences thereby exacerbating an already costly and overcrowded prison system. I have offered before and say again that as a national strategy we need to develop appropriate sanctions that are not steeped in a "lock them up" philosophy. Instead, they should be strategies that will impact on the offender, protect the community and reduce the incidence of crime. There just has to be a better way than warehousing people. The Commission in its perception of the legislative mandate has adopted a philosophy that incarceration is the best answer. I heartily disagree.

Offender Characteristics

Although it is commendable that discretion be built into the system to differentiate among offenders for factors in aggravation or mitigation, it is interesting that the Commission departed from a numerical weighting to one of percentage of offense value. It would seem that if there is an offense value and the guidelines provide for discretion within the guideline limits, such an elaborate

scoring device is confusing and confounding and opens the door for challenge and costly court time. It would be better to leave to the total discretion of the judge the panoply of choices within the guideline range. The judge then takes into consideration the role of the offender in the offense, past offense conduct and cooperation. Under the proposed guidelines there are provisions allowing the judge the discretionary responsibility to reduce the sentence by a sum not exceeding 20 percent. It provides also for the prosecutor to certify credit amounting to a 40 percent reduction. Combined, there is the possibility of a 60 percent reduction which can only defeat the Commission's interest in reducing disparity. Under the examples of acceptance of responsibility there appears to be a class distinction bias which will serve to the benefit of the "have's" and to the detriment of the "have not's." Additionally, plea negotiations already will impact on the bottom line time to serve.

So far as criminal history is concerned, what is primarily measured is incarceration history. It would appear more appropriate to consider convictions and affix sanction units based on the grade of felony and in an effort to simplify the process, exempt misdemeanor convictions from consideration. I still argue against the utilization of a decay factor. An argument could be made that having been through the criminal justice system previously, the choice to commit crime was a more informed one. Also, offenses for which dismissals are entered upon satisfaction of certain conditions should be counted as prior convictions. In considering the impact of criminal history score, I prefer the alternative approach although in both indexes, the base offense value is the significant measure. So far as other offender characteristics are concerned, it makes sense to allow the court the discretion to consider these characteristics and to utilize the 25 percent range to accommodate sentencing thereby adjusting for offender characteristics.

Determining the Sentence

It seems that the Commission is wed inextricably to the concept that incarceration is the option of choice. As a system, the need for incarceration for 14 or more sanction units will prove costly both in dollars and human waste. What is obvious is that more people are going to be locked up for longer periods of time. Already, we incarcerate at a level higher than most

civilized countries. Incarceration has not worked, and in all probability, will not work. We need to think of sanctions not necessarily focused on jail but, rather, on punishing equitably in ways that bring offenders to feel a sense of responsibility, to dissuade them from their self-centered orientation and to compensate the victim for their losses. Incarceration needs to be reserved for the offenders who pose a serious threat to the welfare of the community or whose persistent behavior demonstrates that they need to be isolated from that community. 18 USC 3553(c) which requires the judge to explain specific reasons for imposing a sentence at a particular point in the guideline range negates true discretion to sentences within the guidelines and will result in expensive challenges to the mental gymnastics of the judge in deciding an appropriate sentence. I would prefer to see a sanction system that applied only if incarceration is ordered and would thus allow a judge, for whatever reasons deemed appropriate, to grant probation except where specifically statutorily prohibited. It would preferable not to consider converting sanction units into sentences other than imprisonment. I know that it is comforting to have a handy-dandy numerical equivalent for everything, but I think to attach sanction units to nonimprisonment conditions will be burdensome, time consuming and confusing. It is better that we calculate a range of imprisonment and leave the imposition of other sanctions to the total discretion of the judge.

Probation

In reviewing this section, there appeared to be too many conditions enumerated as general conditions of probation and terms like promptly and immediately need operational clarity attached to them. Certainly the requirements on the Probation Officer are such that substantial training needs to be provided. It is obvious that the major responsibility for computing guidelines determination will rest with the Probation Officer. Such a vital responsibility argues for compensation commensurate with that level of responsibility. The Commission is employed to bring about such budgetary adjustments as are necessary to meet this new challenge. The issue of community confinement and home detention might be appropriate sanctions for those offenders not requiring closed facilities. Again, however, funds need to be allocated to provide the hardware and software necessary for program implementation and enrichment of staff to meet the mandate.

Imposition of a condition of supervised release sets forth general concepts in the code but deals ineffectively with the implementation. Many questions remain unanswered but undoubtedly will grow out of the experiences of implementing the program.

Violations

The Commission's approach to the handling of violations tries to prescribe the nature of the action to be taken by the court. Again, the mind set is custody oriented. Jail is not always the best solution. In response to the Commission's request for comment on issues related to violation of probation and supervised release, the grading of less serious and more serious violations vary based on the eye of the beholder. It seems that all violations should be reported to the judge as the final decision maker. The proposed sentences for application to revocation of supervision focuses on punishing the violation rather than the original offense. Credit should not be afforded offenders for time spent on supervision or compliance with conditions if in the final analysis, they fail to meet their responsibilities and violated their psychological contract with the court. Since custody sanctions do not apply to organizations, failure to meet the condition should result in action that forecloses the organization from being in business or in establishing new businesses in an effort to evade responsibility.

Fines

I am not sure where the Commission got the idea that judges avoided fines because they were not in an amount sufficient to punish or deter. That certainly has not been my experience. Regarding whether the proportionate approach or the harm based approach is best is difficult to determine since there are aspects of both that make sense. It seems to me that we need to weave into the decision making process elements both of ability to pay and that of a harm based deterrent. If part of the fine purpose is to offset the system expenses, consideration might be given to allocating a portion of the revenue collected by the Probation Service to offset training and implementation expenses. So far as organizations are concerned, fines ought to be imposed in relation to the harm done or the difficulty of discovering the crime. It may well be that offender organization should be forced out of business. Yet on the other hand, organizational fines should relate to the income or wealth of the organization so that the fines would not be viewed simply as cost of doing business.

00087
12-1-86

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

ROBERT M. LATTA
CHIEF PROBATION OFFICER

600 U. S. COURT HOUSE
312 N. SPRING STREET
LOS ANGELES 90012

November 26, 1986

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

Re: Comment on Preliminary Draft of Sentencing Guidelines

Dear Judge Wilkins:

The comment contained in this letter is directed specifically to the section of the Preliminary Draft on Sentencing Guidelines which pertains to supervision of offenders. These opinions are based upon my experience in Federal Probation as a Probation Officer and Supervisor with direct responsibility for supervising probationers and parolees; and my observations, while serving as Region Probation Administrator, of supervision practices throughout the Western States.

Simply stated, I believe that it is inappropriate to impose rigid guidelines for probation which reduced supervision to a mechanical exercise. While the use of guidelines for initial sentencing may respond appropriately to the need for accountability and punishment, probation is granted, in part, for rehabilitative purposes. Accordingly, any problems which arise during probation should be assessed in terms of the offenders overall response to supervision. Serious violations, such as new offenses, should result in certain action from the Court. However, technical violations should be placed in the context of overall performance and not simply quantified for some predetermined response. More emphasis should be placed on resolving or working through problems if probation is to have any rehabilitative effect. In order to do so, Probation Officers and Judges will need greater discretion than proposed in the guidelines to consider the individual circumstances of each case.

I also have the following comments on specific sections of the Preliminary Draft:

Page 144, Item H: Although granting authorities have routinely included the requirement to maintain reasonable hours as a condition of probation or parole, for the most part, such a requirement is difficult to define and unenforceable when stated in such general terms.

Page 144, Item I: Prohibition against possession of firearms or dangerous weapons should be made as a condition of probation in felony cases only. While such an order may be imposed in certain misdemeanor cases, prohibition against firearms possession should not necessarily apply to all misdemeanor cases.

Page 144, Item K: The prohibition against acting as an informant or special agent of any law-enforcement agency should allow for Court permission of exceptions for reasons of national security and investigation of major organized crime.

Page 147, Section A 414(c): Community confinement should not be restricted to six months since many of the best residential drug treatment programs require nine months to one year in residence.

Page 149, Section A 418: Forfeiture should not be ordered as a condition of probation but as an outright judgement to be enforced by the U. S. Attorney.

Page 154, Section 4: No clear distinction is made between "lesser" or "serious" technical violations. Such a distinction may be difficult. In addition, there are so many possible technical violations that setting determinate points for mandatory reporting to the Court would be impractical. Technical violations include not only the more frequent problems of failure to pay fines or restitution, drug abuse, or possession of a firearm, but also include such minor items as failure to notify a Probation Officer promptly of change of address or employment, failure to answer inquiries by a Probation Officer, failure to follow the instructions of the Probation Officer, maintaining reasonable hours, and answering monthly reports in a truthful manner. Some consideration must also be given to duration in time between commission of such technical violations. With the possible exception of fine payments, restitution payments, and drug abuse, all other technical violations should be left to the discretion of the Probation Officer and the Court as to when to initiate violation proceedings.

Page 154, Second to Last Paragraph: The guidelines should not require issuance of a warrant for all violations since there are many cases in which a summons or a citation would be sufficient.

Page 155, Second Paragraph: Association restrictions, rehabilitation programs, and submission to urinalysis testing are not increased sanctions but part of the structuring and treatment process of probation supervision.

I trust these comments will be useful to you in determining your approach to supervision under Sentencing Guidelines.

Sincerely,

Richard J. Westman

RICHARD J. WESTMAN, Supervising
U. S. Probation Officer

RJW:vr

cc: Robert M. Latta, CUSPO

00090
12-1-86

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
PROBATION OFFICE
POST OFFICE BOX 61207
HOUSTON, TEXAS

LOUIS G. BREWSTER
CHIEF PROBATION OFFICER

November 26, 1986

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

Re: PRELIMINARY DRAFT OF SENTENCING GUIDELINES

Dear Judge Wilkins:

I wish to thank the Commission for making the preliminary draft available and for your willingness to accept my thoughts on this matter. After reviewing the guidelines, I find that I support the modified real offense sentencing system. I also support the incorporation of explicit cross references as the guidelines contain. The guidelines appear to sufficiently identify additional conduct that is often associated with most statutory elements charged in indictments.

Regarding Chapter II, I agree with the approach of using generic offense categories rather than the statutory code distinctions. The guidelines provide a simple translation from the U. S. Code section to the generic offense. The translations are reasonable and simple to convert.

In Chapter III, I suggest that consideration be given to require, on guilty pleas, the defense and the government to announce after pleaing, for the Court's consideration, their agreed-upon "multipliers" for Section A311 through A314. It appears that since the defense and the government should be completely aware of what transpired during the commission of the offense, they can agree on the "multipliers" at the time they work out their plea bargain agreements. If no plea bargain agreements are involved, then they would not be required to notify the court of the "multipliers" that they feel the court should consider. Such a suggestion by the defense and government could be of great assistance to the court in determining the proper multiplier.

Regarding Section B321, Acceptance of Responsibility, and a possible reduction of total offense value, my preference is towards an automatic sentence reduction for a guilty plea. I find the range of a possible 20 percent reduction contributes to the disparity that the Commission is trying to eliminate. Nevertheless, I think it will be difficult to decide on the appropriate percentage, and I would favor an automatic reduction in sentence for the guilty plea.

Regarding the criminal history score, I find the instructions adequate although the final score is determined by considering the length of sentences previously imposed. The previously imposed sentences are probably colored by disparity, and we are relying on those same colored sentences. Nevertheless, the guideline instructions are clear and systematically reach the sanction units.

Finally, I simply wish to state that the format is usable and the factors to be applied are realistic. Although I'm sure that there are many adjustments which will be made to the proposed guide before it is presented in final form, I feel that the Commission is headed in the right direction in providing guidelines for sentencing in the federal court system.

Yours truly,

Louis G. Brewster
Chief U. S. Probation Officer

LGB/nl

00597
12-2-86

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

PROBATION OFFICE

H. H. WHITEHILL
CHIEF PROBATION OFFICER

SAN ANTONIO
NOVEMBER 26, 1986

655 E. Durango
Suite 421
San Antonio 78206
Post Office Box 86
El Paso 79941
305 U.S. Courthouse
800 Franklin Street
Waco 76701
307 U.S. Courthouse
200 West 8th Street
Austin 78701
Post Office Box 1034
Midland 79702
Post Office Box 1265
Del Rio 78841-1265
305 U.S. Courthouse
210 E. 4th Street
Pecos 79772

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

RE: **Preliminary Draft Sentencing Guidelines U. S. Commission Comments**

Dear Judge Wilkins:

After reviewing the Sentencing Commission's preliminary draft of September, 1986, and in response to solicited comments by the Commission, the following observations are submitted.

Overall, the Commission has assumed a monumental and difficult task in developing a quantitative sentencing process as mandated by the Congress. In that connection, the Commission has succeeded in developing a workable, realistic framework. In my opinion, the concept of modified real offense behavior is valid and will, hopefully, be accepted as the standard.

The development of base offense values and factoring in special offense and cross-reference characteristics has merit. I especially advocate the approach of generically grouping offenses, not only by behavior, but in the major categories of crimes against the individual, property crimes and victimless crimes.

The approach proposed for determining offender characteristics may be the most difficult area in assessing value. In all likelihood, with modifications, a system (sentence computation form?) will be developed to ease the mathematical computation of sanction units. Whatever system is developed, it must be easy to compute, yet comprehensive enough to cover the necessary criteria. In applying the draft guidelines to recently sentenced cases in our district, we devised a form for computing sanction units (copy attached). Even as simplistic as our computation form was, when two or three probation officers independently applied the guidelines, different total sanction units were compiled. Even though the totals were relatively close, in several instances the differences were significant enough to interpolate into different guideline months of imprisonment. This area then, mathematical computation (assigning point totals

to human behavior variables), would appear to present the Commission with its greatest challange.

There has been considerable comment concerning the Sentencing Guideline Table (Page 140 of the draft) and the lack of judicial discretion available for alternative sentencing for defendants with fourteen or more sanction units. From my perspective this does not pose a difficult problem as the guideline range of imprisonment can easily be shifted or, in the alternative, the Commission could adjust to permit probation sentences if sanction units totaled thirty or less, for example.

In summary, considering the Congressional mandate, the Commission has proposed a realistic and philosophically sound framework. Although some areas require refinement (mitigating-aggravating factors, plea bargaining, multiple crimes, acceptance of responsibility criteria) to sharpen mechanical procedures, this is not viewed as a major obstacle.

I appreciate the opportunity for input and remain optimistic that the final draft will bring into focus many of the areas presently at issue.

Sincerely,

H. H. WHITEHILL
Chief U. S. Probation Officer

HHW:ldh

SENTENCE COMPUTATION
SENTENCING COMMISSION

I. OFFENSE

1. Modified Base Offense Value _____
2. Special Offense Characteristics _____
3. Cross Reference Characteristics _____

TOTAL OFFENSE VALUE (TOV) _____

II. OFFENDER CHARACTERISTICS	Value	Adjusted Value
1. Role in offense (TOV x multiplier factor, add or subtract difference from TOV)	_____	_____
2. Post Offense Behavior		
(a) Obstruction of justice or perjury (TOV x multiplier factor, add difference from TOV)	+ _____	_____
(b) Acceptance of Responsibility (Subtract up to 20% of TOV)	- _____	_____
(c) Cooperation (TOV x multiplier factor, subtract difference from TOV)	- _____	_____
3. Prior Criminal History		
(a) Prior sentence of imprisonment, 5 years or more served, add 5 points for each sentence	+ _____	
(b) Prior sentence of imprisonment, 3 - 5 years served, add 3 points for each sentence	+ _____	
(c) Prior sentence of imprisonment 1 - 3 years served, add 4 points for each sentence	+ _____	
(d) Prior sentence of imprisonment, 60 days to 1 year served, add 2 points for each sentence	+ _____	
(e) Prior sentence of imprisonment 1 - 60 days, add 1 point for each sentence	+ _____	
(f) At time of current offense, if on bond, probation, parole, in custody or escape status, add 2 points	+ _____	
(g) At time current offense occurred, if defendant is within 3 years of release from prison on sentence of 1 year or more, add 2 points	+ _____	
(h) If current offense occurred within 3 years after imposition or commencement of any sentence 60 days to 1 year, add 2 points	+ _____	
(i) If defendant had positive urinalysis for opiates, cocaine or PCP at time of current arrest or during pretrial-presentence stage, add 3 points	+ _____	
(j) If defendant has been an abuser of opiates, cocaine or PCP within 10 years of current offense, add 3 points	+ _____	_____
4. Other Offender Characteristics (not scaled yet)		
(a) Plea Agreements		
(b) Aggravating or Mitigating Factors		
(c) Multiple Crimes		
TOTAL OFFENDER CHARCETERISTICS	_____	_____

III. SENTENCE COMPUTATION

Sanction Units (I + or - II) _____

Guideline Range for Sentence (From Page 140) _____

00072
12-2-86

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES L. BRIEANT
CHIEF JUDGE

UNITED STATES COURTHOUSE
101 EAST POST ROAD
WHITE PLAINS, NY 10601

UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, NY 10007-1581

REPLY TO White Plains

November 25, 1986

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

Dear Judge Wilkins:

Set forth below are my comments in connection with the September 1986 Preliminary Draft Sentencing Guidelines published by the Commission. The views expressed are entirely my own, and do not necessarily represent those of any other Judge in this District. I well recognize the dedicated efforts of the Commission and its staff to fulfill the intention of a badly drafted statute and no disrespect is intended.

1. Creation of a Just and Practical Scheme of Sentence Guidelines in Compliance with this Statute is a Hopeless Task. This stands out from a reading of the Guidelines, and we should all have the courage to go back to Congress and say so. We are in effect throwing away 200 years of experience in discretionary sentencing in return for formulae of doubtful value.

The claims of sentence disparity, upon which this statutory scheme was founded, are and were overstated. The various research projects, including that one done in the Second Circuit a few years ago which purported to show tremendous disparity in sentencing, are not valid. Just as it is impossible to play poker except for real money, it is impossible for a group of judges to engage in hypothetical sentencing of non-existent persons based only on a review of papers, and have that exercise bear any relationship to reality. I am sure that some of the participants engaged in macho conduct and others simply filled in a number, shooting from the hip to complete the exercise. In contrast, sentencing in real life is the product of a great deal of effort and experience in dealing with the particular offender being sentenced, and prior cases. The personal interrelationship established at allocution between the defendant, his attorney, the Court and the prosecutor, and the advice of a skilled and experienced Probation Officer are also brought to bear. No two offenders are alike, and no two crimes are alike, a fact which will be brought home to those who try to use the Guidelines.

If there must be Guidelines, then the philosophy of the Speedy Trial Act should be followed: that statute has now grown to resemble National Prohibition, a period in our national history when the Drys had that law they loved so well, and the Wets had all the liquor they could drink.

The Speedy Trial Act, as a statement of policy, has probably shortened overall delay in criminal cases, but practically any reasonable excuse for an enlargement of time is being honored by the Courts. Sentencing Guidelines, if we are to have such, should be drawn in a similar fashion, with enough loopholes so that justice can be done.

Leaving this general criticism, I now turn to some specific points.

2. The Titus Oates Problem. Our adversarial foxhunting theory of criminal justice, which has served so well in protecting our liberties, depends, in the prosecution of complex federal crimes involving multiple wrongdoers, on the testimony of snitches or so-called "cooperating individuals." Elaborate means of dealing with these persons, who are often the worst, most blameworthy participants in a caper, and at the same time the first to change sides, have evolved. We have the problem of formal immunity and informal immunity, general immunity and use immunity, and, of course, a prosecutor need not sign an indictment of the snitch unless he wishes to do so.

On the other hand, the public generally, including trial jurors, revolts at the idea that a criminal should receive amnesty simply in return for having joined the

choir, taking singing lessons from the prosecutor and giving up his fellow hoodlums by his testimony.

Accordingly, it is usually the practice in this District and in many places, for the snitch to plead guilty, often upon a waiver of indictment, and, because we live in a C.O.D. world insofar as accomplices are concerned, his sentence is deferred until after the trial of the other participants is concluded.

The trial jury thus perceives that the cooperating individual will have to pay his debt to society in an uncertain amount. The trial court can observe the snitch at trial, and if he appears to be lying, either in favor of the government or in favor of the defendants, can enhance his ultimate sentence. There is no conflict of interest created by this situation, and one thing that can be said in its favor is that it has worked successfully.

Under the proposed Guidelines, there is not sufficient flexibility to permit lenient treatment of hoodlums who cooperate with law enforcement officials. As a matter of fairness, it also seems questionable to me to give the prosecutor any absolute discretion or final authority to reduce the sentence by as much as 40% for cooperation; this creates a conflict of interest, which can be disclosed on cross-examination, and will be perceived by jurors as

entitling the accomplice witness to less credibility since his future life will be so easily manipulated by the prosecutor. Similarly, if the Court can reward the prosecutor only with a predictable and precisely determined break in sentencing, fairness will not be achieved, and in many cases the discount proposed by the Guidelines will not be sufficient to induce cooperation at all. We must face up to the fact that snitches often get killed in prisons, even in federal prisons, and their care and protection in some cases places a tremendous burden on the system which is not justified by the concurrent societal benefits, if any, of incarcerating the snitch.

I urge that Judges not be bound by any prosecutorial recommendation or certification in dealing with cooperating individuals, and have a wider latitude to reward cooperation in any case, even if it means the imposition of a non-custodial sentence. The wide range of roles a criminal can play in providing assistance to the authorities warrants a closer examination of the value of the use of mechanical means to assess the benefits of cooperation. A narcotics or organized crime defendant facing lengthy imprisonment will be unlikely to risk his life to join the choir unless the rewards are commensurate with the risk. As noted earlier, an immunized witness may stir up revulsion with the jurors, who may elect not to believe his testimony. If we are to pursue the existing jurisprudence, which is so

highly dependent on the informer, we should not destroy its effectiveness by inflexible guidelines.

3. Pleas of Guilty. We must be realistic about our present system of justice. We must recognize that there is absolutely no institutional motivation for a United States Attorney to prosecute an innocent person or a person against whom there is insufficient evidence. A few exceptions come to mind, including the politically attractive case, such as the prosecution of Attorney General Mitchell and Maurice Stans in the Southern District of New York some years ago, see Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973); the occasional prosecutorial vendetta, e. g. various indictments brought against Roy M. Cohn in the Southern District of New York; see also United States v. Wright, 588 F.2d 31, 39 (2d Cir. 1978); and those rare cases which are brought to redefine significant issues of law.

That the defendants, outside of these minor exceptions and an additional exception for an occasional mistake on the part of a prosecutor, are usually guilty, is a practical consideration. However, all are presumed innocent, and those who are indigent, which includes most of them, are entitled to a free defense paid for by the government. The cost of criminal trials to society and the court system are simply beyond belief, and many of these defendants who go to trial and are convicted do so to their detriment, because

they begin to believe in their own innocence and therefore cannot be rehabilitated or reformed.

We should encourage pleas of guilty to save the time, expense and societal damage of trials, and to get defendants started off on the right road to contrition; also to avoid the occasional risk that a guilty defendant will beat the system entirely. The Guidelines do not provide sufficient reduction of sentence where the judge makes a finding that the defendant has accepted responsibility for the offense. A 20% discount is simply not a sufficient incentive to plead guilty in most cases. If these guilty pleas decline substantially, the criminal caseload will overwhelm the available judicial resources.

Your quest for excessive precision in sentencing also threatens to corrupt the process of obtaining pleas. The specific point values for every increment of harm inflicted, based on the real conduct underlying the conviction, will necessitate time-consuming hearings at the sentencing stage of the adjudication process, even in connection with guilty pleas, and when these hearings are avoided by stipulations between prosecutors and defense counsel, the opportunity for virtually unreviewable collusion will become vast. It is to be noted that in many Districts, including this one, it has not been the practice of the United States Attorney to recommend a specific

sentence, or to agree with the defendant as to a cap on sentence. Perhaps such procedures would be better, but for reasons based in tradition this District and others have never done so.

The correct answer for the plea of guilty is that the Court should impose any lesser sentence which it deems fair and reasonable, giving consideration to the contrition, etc., shown by the defendant.

If we are to have Guidelines, we could live with the current proposals of the Commission if the problems concerning pleas of guilty and cooperators mentioned above are resolved.

Some things cannot be measured. Contrition and cooperation seem to me to be as subjective and as idiosyncratic as anything depending on individuals. The Guidelines should recognize this fact, leaving the issue for the judgment of the appellate courts if the final result is regarded as unfair or unreasonable.

Conclusion. I think we must recognize this statute for what it is: the product of a coalition between persons who believe that current sentencing practices are too free and easy for defendants, and persons who believe that many sentences are too severe and must be evened out.

This clash between what I call the Cream Puffs and the Hard Rocks produced a coalition in favor of a change. A careful reading of these Guidelines, and indeed, almost any guidelines, bids fare to break this coalition asunder. We would be saved but for the fact that the Guidelines will take effect automatically unless the Congress acts affirmatively, and the difficulty of getting Congress to act affirmatively in matters affecting the Courts is well known.

The foregoing is respectfully submitted for your thoughtful consideration.

Very truly yours,

Charles L. Brieant

Charles L. Brieant
Chief Judge

CLB:med

00093
12-2-86

United States District Court
Eastern District of Texas
P. O. Box 682
Beaumont, Texas 77704

Howell Cobb
U. S. District Judge

Telephone
409-839-2622

November 28, 1986

The United States Sentencing Commission
1331 Pennvsylvania Ave., N.W.
Suite 1400
Washington, DC 20004

Gentlemen:

I write concerning the Sentencing Guidelines published September 1986 by the United States Sentencing Commission.

While I recognize the need to examine, and perhaps correct, the disparate sentencing techniques of federal judges which may well have occurred in the past, it is my strong belief that the remedy as proposed by the Commission's preliminary draft is a real and dangerous threat to the independence of the federal judiciary. The discretion of the Article III judges is supplanted, and in effect, usurped by these rules, and that discretion has been placed in the almost unbridled and unfettered discretion of the United States Sentencing Commission and office of the United States Attorney, and his assistants.

First, a party to the action, the U. S. Attorney, can plea bargain on the counts to be filed, to be prosecuted, to be the subject of guilty (or nolo) pleas, and completely hamstring the judge. To permit a party to the action to control the result is inappropriate to say the least. At worst, it allows and encourages backroom dealing between advocates which becomes the actual sentence imposed by the district judge who cannot, except within very narrow and restricted limits, exercise any meaningful discretion.

The guidelines make no differential analysis as to location, background, expectations of the public (and of the judge) as to appropriateness of sentences. Certainly, a drug case in South Dakota is not equal to a drug case in south Texas. The smuggling of illegal aliens is different in southern California than in Pennsylvania. It is different in Sherman, Texas, from Brownsville, Texas. A lone bank robber who displays and fires a sawed-off shotgun in rural East Texas and terrorizes an entire town of about 1,000 citizens can have a different effect than a bank robber in Detroit of in Los Angeles.

The sentences imposed are for crimes, but they are imposed on people. In most cases, the perception of sentence imposed by a federal judge is generally to the public in his District. After all, a substantial majority of U. S. district judges sit in non-metropolitan districts.

The people of the Southern District of New York could not be as attuned to the dangers of the sale or use of prohibited and dangerous chemicals for use on a rice crop in Louisiana as are those who live in southwest Louisiana, and might be tempted to use the same substance on another rice crop.

After all, district judges are products of their background and experience. The framers required that they be able to make unpopular but fair decisions, and thus gave them tenure during their good behavior. Before becoming judges, they are subject to the scrutiny of the Senate, and prior to that, the Executive Office of the President, the Department of Justice, the Federal Bureau of Investigation, the Internal Revenue Service, the American Bar Association, and the individual members of the Senate. It is very right and proper that such is the case.

U. S. District Judges are presumptively fair, honest, impartial and have attained some distinction in their chosen and beloved profession prior to appointment, nomination and confirmation.

The U. S. attorney, on the other hand, is first a prosecutor, the government's lawyer, a four-year appointee who is under the direction and control of the Department of Justice, and is, by and large, a political appointee. He is a member of the Executive Department. He takes his direction from the Attorney General then in office. The policy and philosophy of the Attorney General can vary from the views held by a Ramsey Clark to those of a John Mitchell.

Through the device of the plea bargaining, the executive can de facto exercise the judicial function which has been historically and uniquely reserved to Article III judges.

Second, the Sentencing Commission which sets "guidelines" is a Department of the Executive Branch. It sets "points" to be awarded, added, subtracted, multiplied, divided, totaled, credited and debited, to reach a base number. These points are based upon its research, by its own personnel, advisors, consultants, an revelations. Neither I, nor any other district judge I know have any idea what these factors are based on, by

whom they are authored, the background, experience, bias, prejudice or philosophy of those who promulgatged the formulae, points, etc. But once set, they are always with us. They, then, decide the fate of the individuals we sentence. No latitude of any significance is given to us. These points have the force of law. The Congress has armed it with this power. The Commission's word--its formulae--its interpretation immutably sets what an Article III judge can and cannot do.

I have found the use of a "split" sentence extremely useful and is a very appropriate and flexible tool. I have found on a multiple count indictment or information, the imposition of a sentence or imprisonment on one or more counts, followed by a probationary term on other counts to commence upon release very useful. I have found that in cases of aliens found guilty of smuggling aliens for hire, probation can be very helpful. I have conditioned probation upon deportation to the defendants' country of origin, require the probation to be unsupervised, and conditioned that the defendant make no attempt during that period to illegally reenter the United States. This I can no longer do.

Under the guidelines, all of these options will be denied me or any other judge. I often require restitution as a condition of probation. This, too, will be denied me. Often in white-collar crimes I impose a sentence of imprisonment for a period of six months up to five years, and on another, impose a probated sentence, consecutive, and can impose a fine, and require restitution during the probated sentence as a condition of the probation. If the conditions of the probation are met, the fine is suspended; if not, it is to be paid. It has worked well, so far, but in the future this option will be denied me.

On white collar embezzlements or other crimes, I have stentenced defendants to 12-30 months, required restitution, placed the defendant in a jail-like institution for 15-30 days, and on probation for the remainder of the term. My purpose is to let the defendant know what is facing him or her--the loss of liberty--if he or she violates the terms of probation. It has been effective, but this will be denied me.

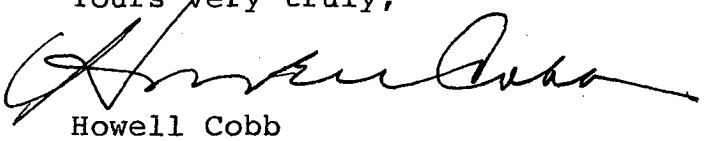
While I am unable to furnish any statistical data based upon complete and exhaustive studies and analyses, I have the strong feeling (and have been told) that the prison population of the Bureau of Prisons will at least double when the full impact of these guidelines take effect and have been in place long enough to fully impact the system. Whether this is a valid consideration, I do not know, but it is or will become a fact of life.

The Federal Prison System, Department of Justice, publishes a weekly newsletter. As of November 24, 1986, the inmate population was 148% of "rated" capacity (designed capacity), and 119% of "operational" capacity (capacity which can be safely and properly handled, though overcrowded). Is this a factor which the Sentencing Commission should consider? Should it take this into account with it makes its recommendations to the Congress in April 1987? Should the judges even be concerned with it? Does prison overcrowding present problems now?

What will be the role of a federal judge who has had to pass on the adequacy of local jails, or state correctional institutions, yet must strictly follow guidelines as to federal prisoners regardless of the adequacy of federal prisons and overcrowded conditions?

For all of these reasons, I urge and implore the Commission to revise its Preliminary Report and permit Article III federal judges to have restored to them a much wider degree of discretion than is contained in the Commission's report. I speak for only one federal district judge, yet I have discussed the matter with many of my peers and I can truthfully and whole-heartedly inform the Commission that all with whom I have conferred have the same deep-seated and genuine concerns which I have attempted to voice.

Yours very truly,



Howell Cobb

cc: Hon. William W. Wilkins, Jr., Chairman
Fourth Circuit Court of Appeals
United States Courthouse
Greenville, SC 29603

cc: Hon. Stephen G. Breyer
First Circuit Court of Appeals
1617 John W. McCormack Post Office and Courthouse
Boston, MA 02109

cc: Hon. George E. MacKinnon
District of Columbia Circuit Court of Appeals
Washington, DC 20001

cc: Hon. George P. Kazen
United States District Court
Southern District of Texas
P. O. Box 1060
Laredo, TX 78040

12-2-86

Board of Directors
Don Taylor
Chairperson
Minnie Loera
Vice-Chairperson
Cindy Scaglione
Secretary.

CHARLES & PAULINE SULLIVAN
#11 15TH ST. N.E. SUITE 6
WASHINGTON, D.C. 20002
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THROUGH CRIMINAL JUSTICE REFORM"

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November 26, 1986

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

Dear Judge Wilkins,

Enclosed is CURE's extensive comments and analysis on the preliminary draft of sentencing guidelines. The enclosed are written by one of CURE's advisors, Maygene Giari.

Another CURE advisor, Daniel Johnson, has also written comments. Mr. Johnson filed his paper with the Commission a few weeks ago.

I'll close with looking forward to seeing you when I testify next Wednesday, December 3rd. I would like to take this opportunity to thank you and the Commission for scheduling CURE to testify.

Sincerely,

Charlie Sullivan

Charles Sullivan

Board of Directors
Don Taylor
Chairperson
Minnie Loera
Vice-Chairperson
Cindy Scaglione
Secretary

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CITIZENS UNITED FOR REHABILITATION OF ERRANTS
"A NATIONAL EFFORT TO REDUCE CRIME
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United States Sentencing Commission
1331 Pennsylvania Ave. N.W., Suite 1400
Washington, D.C. 20004

Attention: Guidelines Comments

Kinds and Purposes of Criminal Sanctions

A People-to-People Alternatives to Prison Crowding delegation to Western Europe last spring found that the Europeans place a different emphasis on the purposes of criminal sanctions than does the United States. Europeans recognize the same purposes: deserved punishment, incapacitation, deterrence, and rehabilitation; but rehabilitation is considered of primary importance in Europe.

Rehabilitation

Like the Commission, the nations of Europe believe a prison sentence cannot be expected to "cure" criminality and should not be imposed for rehabilitative purposes. They are generally in agreement, however, that prisons should do what they can to prepare offenders for law-abiding behavior.

In this connection, the Guidelines' emphasis on the importance of deterrence, incapacitation, and punishment could have unfortunate consequences, especially in the states, where the Guidelines will serve as a model. Overcrowding and budgetary restrictions have already limited the rehabilitative services available in the institutions. Making rehabilitation of secondary importance, applicable primarily to sentences of probation or of supervised release, is likely to be seen as authorization for further reduction in already depleted rehabilitative services. Actually, more--much more--such services are needed.

In today's increasingly limited and competitive job market, the importance of education and job training cannot be over-stated. Many prisoners, perhaps most, have practically no chance of getting a job because they are functionally illiterate and have no job skills. In order to protect the public from future criminality, it is essential to provide opportunities for prisoners to develop literacy and job skills.

In addition, corrections administrators are concerned about the increasing numbers of people who, fallen through holes in the safety net of social

services, are being poured into our penal institutions. Professional journals and professional meetings regularly feature discussions of how to cope with "special needs" offenders, including mentally ill, retarded, drug- and alcohol-addicted people and aggressive juveniles. To protect against future criminality, institutional rehabilitative services need to be greatly expanded.

Better still, provision should be made for non-custodial treatment of such special needs offenders in the community. As executive director of the American Correctional Association Anthony Travisono has pointed out, community treatment would be more effective and less costly than imprisonment for these special needs offenders.

While rejecting rehabilitation as a purpose of imprisonment, the nations of Europe still believe in the possibility of rehabilitation when the offender is kept in the community. The Europeans also recognize that prison can be harmful both to inmates and their families, and that the longer the term, the greater the harm.

Thus Britain's justice department, the Home Office, advises that imprisonment should be "the sanction of last resort," imposed only when the circumstances indicate it is truly necessary. The prison sentence "should be as short as is consistent with the need for punishment," and "the court should always satisfy itself before imposing custody that there is a positive justification in those circumstances for doing so." The British Parliament has provided a wide range of non-custodial penalties, and the Home Office advises that in appropriate situtions, the courts may use non-custodial sanctions for any crime except murder or treason.

The basic principle of correctional policy in Sweden is that the deprivation of liberty should be avoided whenever possible; the Swedish Parliament has endorsed that policy. Sweden's criminal justice policy is aimed at reintegration of the offender into society as a law-abiding person. The prison system is not considered a particularly effective instrument for such reintegration, but rather as a means of protecting society from especially dangerous criminals. Even the supposedly punitively-oriented Germans believe re-socialization is more important than retributive punishment.

Successful reintegration of the offender into society as a law-abiding person, of course, would provide the greatest possible protection against the commission of new crimes.

Deterrence

While prison sentences may to some extent be effective as a deterrent--more so for some crimes than for others--European policy is based on the belief that swiftness and certainty of punishment is a more effective deterrent. Sentences imposed solely for the purpose of deterrence are discouraged. The British Home Office puts it this way: "It would be wrong to impose a custodial sentence in a case where that severe a penalty was not warranted by the crime in question," if the purpose is only to deter that offender or others from committing crimes.

The very high recidivism rate for street criminals in the United States shows that sentences for the purpose of individual deterrence are ineffectual in the very area where such sentences are used the most. Severe sentences imposed for general deterrence promote anger and hostility, not respect for the law. Even a law-breaker recognizes and resents punishment that exceeds the seriousness of the crime.

Longer Sentences for Repeat Offenders As a Deterrent

Lengthening sentences for repeat offenders for the purpose of deterrence would indeed be wasteful of scarce prison resources. As for enhancing the sentence for repeat offenders because new crimes demonstrate recalcitrance--such a policy is not only wasteful, but would be only a rationale for retributive punishment above and behond the harm done by the crime.

Incapacitation

All the European nations agree that incapacitation is justified for the very dangerous offender who poses a serious risk of escape and new crimes; but prison sentences aimed only at keeping non-dangerous criminals off the streets are unwarranted because predictions of who might commit additional crimes are so very unreliable, therefore unjust.

Instead, European governments agree, penalties should be based on the seriousness of the crime and the circumstances of the offender, and not aimed at incapacitation or the hope of deterrence. In other words, the punishment should fit the crime.

Incapacitation is without question necessary for dangerous, violent criminals. Incapacitation of non-dangerous, non-assaultive offenders whose crimes are not so heinous as to make the need for such a measure obvious again does nothing to promote respect for the law, but rather does just the opposite.

The ability to predict who will commit additional crimes is indeed notoriously inaccurate. Attempting such prediction means that many people who would

not have committed new crimes will be imprisoned without adding significantly to public protection. The very fact of imprisonment may promote new crimes that would not otherwise have occurred, because of the handicap of a prison record in finding employment, the break-down of family ties that so often results from incarceration.

Because such a small percentage of criminals are apprehended and convicted, the objectives of deterrence and incapacitation have never been achieved. All that has been achieved is excessively harsh punishment of the few that are caught.

Retributive Punishment

Imprisonment is the most severe penalty that can be imposed throughout Europe. Just as the Comprehensive Crime Control Act authorizes probation as a sentence rather than an alternative to a sentence, European nations authorize non-custodial sanctions as sentences. Such sentences are considered punishment, not as alternatives to punishment.

Because the particular circumstances of the individual offender, as well as the gravity of the individual offense are considered, some of the sentencing options available in Europe are not even intended to be punitive. In Britain, for example, when the crime could be subject to anything up to two years' imprisonment but the personal circumstances of the offender suggest imposing that penalty would be unnecessarily harsh, the sentence can be suspended wholly or in part. If the offense is fairly trivial or excusable in that offender's circumstances, an absolute or conditional discharge is acceptable; the conviction itself is considered adequate punishment.

In Germany, if little harm has been done and there is no public interest in prosecuting, investigation of a crime can be stopped before it goes to court, either with or without a fine.

Perhaps as the result of public frustration over a rising crime rate, prison sentences in the United States--already the longest in the Western world--have become progressively more severe in the last twenty years. As a result, many prison terms far exceed just punishment and thus promote disrespect for the law--without significant impact on the crime rate.

Since the longer terms have been ineffectual in reducing crime, cost-benefit analysis is long overdue. Just punishment would be proportionate to the amount of harm done by the crime, taking into consideration the circumstances of the individual offender. At an average cost of $14,000 per year

per inmate, incarceration for property crimes even up to the value of $10,000 is disproportionate to the harm done.

Recognition of the political advantages to be gained by getting tough on crime has snowballed into avalanche proportions. Much of the supposed public demand for harsher measures has in fact been created by our political leadership. Too many politicians have exacerbated the legitimate fear of crime by perpetuating the misconception that only dangerous, vicious people are imprisoned. If the American public is frustrated about the failure to curb crime, much of that frustration can be attributed to many years of assurances that if getting tough has not worked, getting even tougher will work. But it has not, and will not.

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Attention: Guidelines Comments

Restitution and Community Service

Criminal justice sanctions could have no higher purpose than to repair the harm done to victim and community and to involve the offender in reparation and later restoration to full status in the community. Yet conspicuous by its absence in the Guidelines is any reference to victim/offender reconciliation, to any other form of mediation, or to substitution of services in kind for monetary restitution.

The comment in the Guidelines to the effect that restitution can be imposed if "the imposition of such order will not unduly complicate or prolong the sentencing process" apparently assumes that only the court should be involved in determining restitution. Presumably, unnecessarily complicating or prolonging the sentencing process refers to the time and trouble involved in determining an appropriate amount of restitution, delaying imposition of a custodial sentence.

Fairness in determining the actual value of the victim's losses is of course essential, and could indeed be time-consuming if undertaken by the court. Lacking careful investigation, the figure set could be too high, arousing anger and hostility in the defendant, especially if combined with a custodial sentence. To discard the option of restitution, on the other hand, leaves the victim equally angry and frustrated at having his losses virtually ignored. Such frustration has no doubt contributed to a commitment to more punishment as a solution to crime.

The most effective and successful restitution programs have been those in which victim and offender (or a victim representative, when the victim is unwilling to meet with the offender) have worked out mutually satisfactory agreements on restitution, which may be either monetary or service in kind, or a combination of both. Such mediation programs have been used successfully for many property crimes and even for assaultive crimes.

Imposition of a restitution order by the court is impersonal, distancing the offender from the impact of the crime on the victim and from any real awareness of the actual harm done. Victim/offender mediation can be carried out by trained volunteers without imposing an additional burden on the court. Victim/offender mediation makes the offender recognize the harm done and accept responsibility for that harm. It provides the opportunity to make amends for the crime. It has the added advantage of breaking down the victim's stereotype of the offender as a subhuman monster, as well as the offender's stereotype of the victim as an object rather than as a fellow human.

Obviously, victim/offender mediation is impossible for some types of crimes; but the Guidelines should make reconciliation and reparation the highest priority of criminal sanctions.

Through restitution or community service, the offender truly pays his debt to society. Nothing can be gained by adding a custodial sentence to either sanction. A term of imprisonment in no way repays society for the harm that has been done. The cost of incarceration is punitive to the taxpayer. The victim is doubly victimized, first by the crime, then by the cost of incarceration. The fact of incarceration may be criminogenic.

Concern that failure to impose a custodial sentence in addition to restitution or community service would deprecate the seriousness of the crime reveals a confusion of priorities. Such concern gives retributive punishment precedence over making amends for harm done and reintegration of the offender into the community as a law-abiding, contributing member of society.

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Attention: Guidelines Comments

Recommending Appropriate Modifications
of Criminal Law and Sentencing Procedures

The Commission perhaps misinterpreted its responsibility to recommend modifications of criminal law and sentencing procedures to Congress. Federal sentences have been made progressively more severe over the years, as have those of the states; but the tougher sentences have not significantly reduced crime. Policy-making has been governed by political expediency. In their zeal to show who can be toughest on crime, our law-makers have passed sentencing laws that are too severe.

Some legislators, including California's Assemblyman Richard Floyd and Senator Robert Presley, have publicly acknowledged that this is the case. But they have been equally candid in declaring publicly that they will do nothing to modify the sentencing laws. They are unwilling to risk the charge of being soft on crime.

Nevertheless, our legislators are looking for a way out, as is indicated by the number of states that have set up task forces or blue-ribbon commissions to study what can be done about crowded prisons. Almost without exception, even initially angry and punitively-oriented citizens appointed to such bodies recommend progressive reforms far beyond those for which public officials would expect support. In adopting those recommendations, legislatures shift the onus of being considered soft on crime to the task force.

Such a task force is planned for California. The move is spearheaded by Senator Presley, who has authored many of the measures mandating longer sentences and has carried the bills to put prison construction bonds on the ballot. Senator Presley has said there is "no end in sight" to how many additional construction bond issues will be required under present sentencing laws.

A prestigious body such as the Sentencing Commission, free from political

pressure, could set an example for the states by recommending modifications in the severity of present sentencing laws. Such an example would probably be welcomed (though perhaps not openly) both by members of Congress and by state legislators.

A People-to-People Alternatives to Prison Crowding delegation to Western Europe last spring learned that Europe has taken seriously the reputable international studies that have found no relationship between the rate of incarceration and the crime rate, no relationship between the severity of punishment and the incidence of crime. The Europeans recognize that a prison sentence usually has harmful side effects on inmates and their families, and the longer the term served, the more serious the harmful effects. Through non-incarcerative penalties for non-dangerous offenders, the Europeans ensure that prison space is available for those offenders who are a serious threat to public safety.

Rehabilitation--often referred to as reintegration of the offender into society as a law-abiding person--is considered more important than retributive punishment in Europe. The nations of Europe use non-custodial sanctions much more extensively than imprisonment. The United States would do well to follow Europe's example. As presently written, the Guidelines would accelerate movement in the opposite direction.

To provide a way out for legislators who realize sentences are too harsh --as well as to bring sentencing practices into closer conformity to those of the nations whose values we share--modifications in sentencing laws would include the following:

Shorter Sentences for Less Serious Offenders

Some truly vicious criminals and major drug dealers do, indeed, get off too lightly. That situation should be remedied. The remedy does not lie in sending increasing numbers of non-dangerous, non-assaultive property offenders to prison. Too many people are already imprisoned who could be safely kept in the community. That trend will be compounded by the prison terms presently mandated in the Guidelines for any offender with fourteen or more sanction units. It will be further compounded by the provision that if the Guidelines result in a sentence less than the presently required statutory minimum, the statutory mandatory minimum sentence will apply.

No less an authority than Norman Carlson, Director of the Federal Bureau of Prisons, has said, "The past has clearly taught us that the simple solutions of harsher public policies, longer sentences, and increased sanctions do not decrease crime."

Eliminating Restrictions on Sentences to Probation

Federal statutes that expressly preclude probation as a sentence for specific crimes should be eliminated, with the exception of those that refer to especially atrocious crimes. So should the present restriction in the Guidelines that prohibits probation for any offense assigned fourteen or more sanction units. Setting the cut-off point so low will ensure, in the Guidelines' own words, that only "relatively minor offenses" will be eligible for probation, thus needlessly pouring many offenders into prison who could better be punished through non-custodial sanctions.

The American Bar Association has advised that the sentencing court should be authorized "in every case to impose a sentence of probation or a similar sentence not involving confinement." Limited exceptions might be made, "but only for the most serious offenses such as murder or treason." Such exceptions "should be very few indeed and should be limited only to the most heinous offenses."

The handbook for the courts prepared by the British Home Office (comparable to our Justice Department) also advises that in appropriate circumstances, non-custodial sentences can be used for any crime except murder or treason. If justice is to be served, our courts also need that kind of flexibility to enable them to consider individual differences of the offenders.

Probation is punitive; it limits the offender's freedom. In Europe, probation is also considered appropriate as an aid to re-socialization when the offender's personal difficulties have been a contributing factor in the crime and professional supervision could help to overcome those difficulties. The conditions of probation must be observed, however, and a custodial sanction can be imposed for serious violations of those conditions.

Probation officers in Europe are social workers rather than law-enforcement personnel. In Britain, the probation officer's role is to supervise, advise, assist, and befriend the offender. In Sweden, it is to control, support, and influence. In France, it is to assist and protect, not to punish. The present emphasis in the Guidelines is almost entirely on control.

Caseloads for European probation officers are small--a maximum of forty-five clients, generally. Probation departments are adequately funded; community services are widely used; volunteers supplement the professional officers' work.

The Guidelines' present restrictions on the use of probation are especially troubling in the light of the Rand Corporation study, Prison Versus Probation in California. The researchers found that felony probationers had a lower

recidivism rate than a comparable group who served prison terms. The researchers concluded that "the criminal justice system and public safety would both benefit from a reorientation in thinking about sanctions for serious offenders" in the form of sanctions intermediate between traditional probation and imprisonment. They added, "These alternatives could extend the incapacitation effect to some of the offenders who are presently only nominally supervised on traditional probation." The supervised release provided in the Guidelines, however, is applicable only after serving a prison term.

In addition, the Rand study found a higher probability of recidivism associated with drug and property offenders who had been imprisoned than probationers convicted of the same offenses. If the purpose of sanctions is to protect the public from future crimes, such offenders should not be excluded from sentences to probation. Present restrictions on probation eliminate the possibility of sanctions that would be both punitive and rehabilitative for many offenders who would benefit from them, to the benefit of society as well.

Authorizing Use of Non-Custodial Sanctions As Alternatives to Prison

Just as the Comprehensive Crime Control act authorizes probation as a sentence rather than as an alternative to a sentence, non-custodial sanctions should be authorized as sentences in themselves rather than as add-ons to imprisonment. The belief that only prison is punishment is unwarranted. The Guidelines' comment that rehabilitation cannot be "substituted" for deterrence, incapacitation, and punishment perpetuates the misconception that non-custodial sanctions are alternatives to punishment rather than alternatives to prison. Next to the death penalty, imprisonment is the most severe sanction the courts can impose. Intermediate sanctions are needed.

Meaningful fines are punitive. Community service orders are not only beneficial to society, but are punitive because they restrict the offender's leisure time. Attendance center orders used in Britain are punitive. Offenders are required to report to a disciplined environment for a specified number of hours, depriving them of freedom of action during those hours.

In Europe, these non-custodial sanctions are imposed for offenses otherwise punishable by imprisonment. In the United States, such penalties are already used primarily as punitive add-ons to probation for offenders who would not ordinarily even have been put on probation, or as add-ons after a prison term. The present provisions of the Guidelines permitting restitution and community service only in combination with imprisonment can only compound punishment that is already excessive.

An exception might be made for post-imprisonment restitution for serious crimes. Ernest van den Haag's proposal for substituting fines for a major part even of a life sentence could be modified to provide restitution to the victim. Even violent crimes such as assault, robbery, or some types of homicide do not necessarily require lengthy incapacitation, although they do deserve punishment. Thus van den Haag sees no reason why such crimes should not be punishable by meaningful fines after a short term in prison. The period over which the fine must continue to be paid would be determined by the seriousness of the offense. Substituting restitution for fines would provide badly needed relief for victims of violent crimes.

Work- or study-release in a community setting such as a halfway house would be an appropriate non-custodial sentence for many offenders. The residential requirement is punitive. A sentence to residential or non-residential substance-abuse centers would be an appropriate non-custodial sentence for many offenders, since so many crimes are linked to problem drinking or drug dependency. Such sentences would provide protection against future criminality--better protection than imprisonment.

None of these alternative sanctions are even mentioned in the draft Guidelines.

The Commission's recommendation to Congress that statutes should be revised to permit use of non-custodial options for offenses otherwise punishable by imprisonment would be a major contribution to criminal justice policy-making. Just as hospitalization is not the only possible solution for illness, prison is not the only possible punishment for crime.

The belief that "prison" and "punishment" are synonymous may not be as widespread as is generally believed. The Rand report on probationers and prisoners mentions a poll taken in Maryland. Legislators there were convinced their voters were opposed to community corrections options and "would not consider anything less than imprisonment as acceptable. However, the same poll found that the general public was not especially punitive and was supportive of reform strategies that stressed rehabilitation and 'increasing localization of correctional programs and facilities.'" Such attitudes may well be prevalent throughout the country.

Giving More Discretion to the Courts

Judicial discretion has unquestionably been abused at times. Shifting discretion to prosecutors is no guarantee against continued abuse. Even the American Bar Association has warned that prosecutors too often consider the

number of convictions and the severity of sentences as rungs on the ladder to political office. A body count of the number of people imprisoned is an inappropriate criterion either for judging the effectiveness of the criminal justice system or the suitability for political advancement.

As the Guidelines are presently written, about the only discretion left to the courts falls into two areas: the decision whether to impose imprisonment or a non-custodial penalty for offenders with less than fourteen sanction units; and the determination whether or not defendants are really, sincerely accepting responsibility for their crimes when they plead guilty.

Judges would be unnecessary if these were the limits to their discretion. Almost anyone could add up sanction units and then match those units with a mandated term of imprisonment.

Abolishing the Death Penalty

The provision for capital punishment was eliminated from the new drug laws. This lends credence to the belief that our law-makers recognize criminal penalties are excessively harsh. In addition, harsh punishments--and especially the death penalty--are contrary to the policies of our most respected allies. The Commission could provide an example to the states--a way out of the legislators' dilemma--if they also recommended abolishing the federal death penalty.

The United States stands alone among Western nations in its continued use of capital punishment. Israel, a frequent victim of the most vicious of crimes, terrorism, has executed no one since Nazi war criminal Adolf Eichman was put to death. Britain, France, and Germany--also plagued by terrorism--do not authorize capital punishment even for terrorists. Britain's Parliament overwhelmingly rejected a proposal to reinstate the death penalty in 1983. France, the last West European nation to execute its criminals, abolished the death penalty in 1981. West Germany's constitution forbids capital punishment. Sweden abolished the death penalty as far back as 1920. A Swedish official has characterized government-sanctioned executions as premeditated killings.

The United States is out of step with the very countries whose basic values are most similar to ours. Even Turkey, often criticized for its human rights violations, has substituted thirty years' imprisonment for the death penalty.

Conclusive evidence has never been found that the death penalty is a deterrent. Studies made in the United States have found, on the contrary, that states that execute have an even higher murder rate than those that do not.

Theologian L. Harold DeWolf, like the Swedish official, stresses that "Capital punishment itself is the killing of a human being." DeWolf adds, "By that act, the state expresses its own belief in solving its problems by violence against life. It thus cheapens life and adds to the social climate productive of violent crime."

"A decent respect to the opinions of mankind" prompted our forefathers to issue the Declaration of Independence. The only opinions of mankind that coincide with the United States' as to the death penalty are those whose basic values are least similar to ours: the Soviet Union, Communist bloc nations, South Africa, dictatorships, Third World countries.

The United States is keeping strange company in clinging to capital punishment.

Historian Ysabel Rennie traces recurring cycles of progressively harsher treatment of crime in her book The Search for Criminal Man. Those cycles were eventually broken in recognition that the harsh measures were unsuccessful. Rennie comments, "There is nothing more disconcerting than the realization that what is being proposed now for the better management of crime and criminals--to get tough, to increase sentences and make them mandatory, and to kill more killers--has been tried over and over again and abandoned as unworkable. . . we could never outdo our ancestors in the administration of punitive sanctions, and if they did not succeed with the aid of rack, thumbscrew, and whipping post, what makes us imagine a mandatory fixed sentence will do the trick?"

Breaking out of the present cycle of progressively harsher treatment of crime is long overdue.

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Attention: Guidelines Comments

Determining the Sentence

In our criminal justice policies, the United States is marching to a different drummer than our fellow democracies. Sentencing practices in the United States correspond more closely to the practices of those countries whose human rights violations we most deplore. The Guidelines as they are presently written would perpetuate and increase the disparity between the United States and the very nations whose values are closest to those we profess.

Commission members are undoubtedly aware that the United States has the third highest incarceration rate among the industrialized nations, and that our prison sentences are the longest in the Western world. Only the Soviet Union and South Africa, with their many political prisoners, exceed the United States' incarceration rate.

The very high incarceration rate and lengthy sentences in the United States cannot be attributed solely to our exceptionally high crime rate. The United States is simply more punitive than our fellow democracies.

European governments are no less concerned than the Commission that their sentencing policies should reflect the seriousness of the offense, promote respect for the law, provide just punishment, and protect the public safety. European governments, however, do not regard imprisonment as the best way or the only way to achieve those ends.

The People-to-People Alternatives to Prison Crowding delegation that visited Britain, Germany, Sweden, and France last spring learned that those countries use non-custodial sanctions for the same kinds of offenders that are imprisoned in the United States. When European offenders are sentenced to prison, terms for the same offenses are shorter than our prison terms.

European parliaments have provided a wide range of non-custodial sanctions that, in appropriate circumstances, are applicable even to serious

crimes. European justice departments and political leaders not only encourage the use of non-custodial penalties but urge their even wider use.

In Sweden, prison terms are figured in weeks and months; in the United States, prison terms for the same crimes are figured in years. The usual prison sentence in Sweden is three months; the average sentence for our federal prisoners in 1983 was over three and a half years. (Bureau of Justice, Source-book of Criminal Justice Statistics - 1984.) The major difference between Sweden and the United States does not lie in our long sentences for the danger-ous, violent criminals we all agree must be incapacitated. It lies in our very much longer sentences for the same types of non-violent crimes.

The maximum sentence for theft in Sweden, for example, is two years' imprisonment. The minimum is fifty days' fines, up to a maximum of six months of day fines. The day fines are the more commonly used penalty. In contrast, the average sentence--not the maximum--for theft in our federal system is forty-three months, or more than three and a half years' imprisonment. (Source-book of Criminal Justice Statistics.)

Although the usual prison sentence in Sweden is three months, most of Sweden's offenders are not imprisoned at all. More than twenty-one times as many Swedish offenders were fined in 1984 than were imprisoned. In Germany, about 80% of the offenders otherwise punishable by imprisonment are fined instead. In Britain, 43% of those sentenced for offenses otherwise punishable by imprisonment in 1983 were fined. In the last ten to twelve years in Britain, almost as many offenders have been given community service orders without prison terms as have been put on probation.

Except for the most serious crimes, Europe's parole policies are more liberal--for the same crimes--than those in the United States have been. Con-gressional action to phase out federal parole, together with the Guidelines' restrictions on probation, mandatory imprisonment for all but the most minor offenses, length of term, and authorization of non-custodial sanctions as add-ons rather than prison alternatives take the United States' sentencing policies in the oppo-site direction from the policies of the countries who most command our respect.

The draft Guidelines are contrary to the recommendations of a number of scholarly studies and task forces in this country, as well as to those of at least eight widely respected reports made by the American Law Institute, the American Bar Association, the National Council on Crime and Delinquency, the President's Commission on Law Enforcement and Administration of Justice, the

National Advisory Commission on Criminal Justice Standards and Goals, the New York State Citizens Inquiry on Parole and Criminal Justice, the Committee for the Study of Incarceration, and the Group for the Advancement of Corrections. All of these reports were in substantial agreement that prison sentences should be shorter, and that non-custodial, community-based penalties should be substituted for prison as far as possible.

The draft Guidelines are contrary to the policy recommendations of the American Correctional Association, the prison professionals' organization in the United States and Canada. In its handbook for decision-makers, the ACA endorses "the least restrictive sanctions and controls consistent with public and individual safety and maintenance of social order." With careful screening to select those offenders who can be safely maintained in the community, this policy states that the majority of offenders should receive services in the community.

The draft Guidelines are also contrary to the resolution endorsed by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. This resolution calls for imposing imprisonment only as a last resort, and for the use of non-custodial penalties as real alternatives to imprisonment, not as add-ons to a prison term. The resolution was supported by such countries as the United Kingdom, France, Norway, Denmark, and Canada.

The British justice department, the Home Office, advises that prison should, indeed, be the sanction of last resort. The basic principle of Sweden's criminal justice policy is that deprivation of liberty should be avoided as much as possible; the Swedish parliament has approved that policy. The European nations generally regard the reintegration of the offender into society as a law-abiding person as more important than retributive punishment, which so easily slips over the line separating it from vindictive punishment.

Just why the Guidelines should call for prison as the preferred sanction and relegate rehabilitation to secondary importance is beyond comprehension, more in line with the policies of repressive nations than with our fellow democracies.

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Attention: Guidelines Comments

Conversion of Sanction Units Into Sentences Other Than Imprisonment

Converting sanction units into sentences other than imprisonment is not only impractical but inappropriate. The purpose of non-custodial sentences is--or should be--reparation of the harm done to victim and community and reintegration of the offender into the community as a law-abiding person. The purpose of mandatory satisfaction of all sanction units, on the other hand, would be nothing more than piling punishment on punishment, demanding a pound of flesh simply because government has the power to enforce the demand.

As great as the variations are between crimes in the same category of offense, the variations between the circumstances under which the offense was committed and the situation of the individual offender are even greater. The Commission's recognition of the difficulty in setting up an adequate mathematical formula to reflect these differences is apparent in the Guidelines.

The list of aggravating circumstances has been developed extensively; the list of extenuating circumstances has not yet been completed. The extenuating circumstances presently include only post-offense conduct, although the pre-offense situation of the offender is probably even more important. While a person who commits a crime to feed a hungry family cannot be held blameless, for example, justice tempered with mercy requires that the hungry family be considered a mitigating factor.

The court should not be required to impose a sentence that satisfies all sanction units, nor should any equivalency rates among non-custodial sanctions be set up. Imposing non-custodial sanctions should be left to the court, with no requirement of a minimum term of imprisonment.

Guidelines are by very definition intended to be just that--guides, and not rules to be applied literally, item by item. Guidelines should express the spirit and intent of the judicial process. Justice cannot be automated.

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Minimizing the Likelihood That the Inmate Population
Will Exceed the Capacity of the Federal Prisons

Experts agree that the severe prison crowding in the United States cannot be attributed to the crime rate. Rather, it is the result of increasingly severe sentencing for less serious crimes; mandatory sentences; and restrictions on or elimination of probation and parole. With the Bureau of Prisons already operating at 50% over capacity, current plans for eighteen additional federal facilities by 1993 will not even begin to relieve present over-crowding.

The Bureau's projected population increase from the present 41,300 inmates to 55,200 by 1993 makes no allowance either for the impact of the new mandatory drug laws nor the impact of the Guidelines. Yet the mandatory drug laws, the phasing out of federal parole, and the present provisions of the Guidelines are precisely the kind of measures that have led to present crowding. Clearly, an immense, additional prison construction program will be required if these measures remain unchanged.

According to a study of mandatory drug and gun laws made for our own Justice Department, the belief that mandatory sentences are effective in reducing crime is "difficult, perhaps fundamentally impossible to substantiate." Commission members must surely have been aware of this study when they mandated imprisonment for every crime with an offense value of more than fourteen sanction units.

Since the Guidelines themselves, if unchanged, will contribute to even more severe crowding, the Commission will be put in the position of endorsing a huge construction program that would not be in the public interest. An additional, vast prison expansion program and the operation of those prisons could only be achieved at the expense of other vitally important government services.

Prison crowding has become an international concern. The resolution

passed by the Seventh United Nations Congress on the Prevention and the Treatment of Offenders in 1985 was specifically addressed to reducing the size of prison populations. The resolution recommended that member states should intensify their search for non-custodial penalties to reduce the size of their prison populations. Many of the European nations had already been doing precisely that. Why should the United States take the opposite course and compound prison crowding rather than relieve it?

The People-to-People Alternatives to Prison Crowding delegation that visited Britain, Germany, Sweden, and France last spring found that the governments of those countries had already been taking positive steps to relieve prison crowding. The size of Sweden's prison population was reduced in the 1970's, mainly by shortening prison terms. Sweden now has more prison spaces than prisoners. One institution was closed over the summer because there were not enough prisoners to fill it.

Between 1982 and 1985, the West Germans considered their prisons severely over-crowded. Their prisons were operating at up to 50% over capacity--the same level of crowding that presently exists in the Bureau of Prison's facilities. Germany took steps to relieve the crowding. Failure to pay fines (the most frequently imposed criminal sanction) had been punishable by imprisonment. Fine defaulters were given more time to pay. Defendants sentenced to up to six months were not imprisoned. Prisoners were released after half the sentence had been served.

These were temporary, emergency measures. The German justice department and the parliament subsequently instituted fundamental changes in their criminal sanctions. The temporarily suspended sentences of non-recidivists were officially suspended. Those who had committed new crimes during the emergency suspension of their sentences have now served those sentences. The policy of imprisonment for non-payment of fines was further modified to allow defaulters to substitute community service for the fine.

Waiting lists have been set up for those sentenced to up to a year in open prisons comparable to our halfway houses. Other offenders are allowed to come to prison after working hours. Foreign prisoners (mostly drug dealers) can be extradited before the completion of their prison terms. Germany's habitual-offender laws providing progressively more severe sentences for repeat offenders have been amended; the longer terms are no longer mandatory.

New programs have been set up for probationers and parolees, under an

expanded staff of probation and parole officers. Offenders sentenced to up to two years in prison are eligible for suspended sentences. Eligibility for probation has also been expanded. Release on parole after half the sentence has been served was modified to be applicable to first offenders sentenced to no more than two years. Except for the most serious crimes, other prisoners are released on parole after two thirds of the sentence has been served.

German leaders do not promote imprisonment as the ultimate or only solution to crime. The German public accepted non-incarcerative penalties for less serious, non-violent offenders. "People by and large understand that prison is not effective in controlling crime," an official explained. Prosecutors and the courts have apparently responded to public attitudes and are using the new measures. Fewer prison sentences have been imposed; more sentences have been suspended; sentences to probation have increased. Given a choice of a range of sentences--say one to three years' imprisonment--German judges usually choose the lowest of the range.

Criminal investigations can be stopped before the offender is brought to court in Germany, provided that two conditions have been met: little harm has been done by the offense, and there is no public interest in prosecuting. The number of such investigations stopped has risen from one in six to one in four. The prosecutor's office has the power to stop the investigation. A fine can be imposed, but there is no criminal record in such cases.

The occupancy rate of Germany's prisons has dropped from 50% over capacity to from 85 to 96% of capacity. Clearly, the United States will move even farther in the opposite direction under the Guidelines as presently written.

The Parliament of France first made non-custodial sanctions available to the courts in 1975. As prison crowding developed, the Ministry of Justice urged more extensive use of the non-custodial sanctions, including conditional release, suspended sentences, probation, and restitution. The French Parliament authorized additional alternatives to prison. One of the new measures provided for conditional release for foreigners, combined with extradition.

In 1983, the French Parliament unanimously passed a community service act for the specific purpose of reducing prison crowding. This act is applicable to almost all kinds of offenses, ranging from the least dangerous to repeat crimes. In the first year after the new law went into effect, nearly 62% of the offenders sentenced to community service were burglars. Other offenses for which community service orders were imposed included breaking and entering, assault, vandalism, swindling, check offenses, and offenses against the public

order.

Prisons in France are no longer crowded.

Europeans consider burglary a less serious offense than we Americans do. Polls taken in England show that only a third of the respondents (including victims) favor prison sentences for burglars. Perhaps the difference in our national attitude toward burglary results from our Justice Department's classification of burglary as a violent crime. Burglary does have a potential for violence if the burglar is interrupted in the act; but most burglaries are actually non-violent.

The Commission has assigned twenty-four base sanction units for burglary on the same premise, that burglary is a potentially violent crime. Since the cross references already provide additional sanction units for violence, a considerable reduction in both the base offense value and the "specific offense characteristics" for occupied or unoccupied dwellings would be a reasonable modification. The additional thirty sanction units for burglarizing an unoccupied dwelling, especially, seems quite unnecessary.

The British Parliament has provided the widest range of non-custodial sanctions of the four countries visited by the People-to-People delegation. The British Home Office advises that imprisonment should be the sanction of last resort, and that non-custodial sanctions, in appropriate circumstances, can be imposed for any crime except murder or treason. Nevertheless, Britain, unfortunately, is the only one of the four countries visited that has been unsuccessful in the relief of prison crowding.

Criminal justice policy of the Thatcher government calls for heavy sentences for serious offenders convicted of violent crimes, terrorism, and drug offenses; sparing use of custody for less serious offenders; and building as many prisons as needed to house all those sentenced to custody. At first glance, Britain's statistics suggest the first two objectives have been realized. In 1983, nearly 78% of all defendants sentenced for offenses punishable by imprisonment received non-custodial sentences; only 16% were sentenced to custody; and nearly 7% received suspended sentences.

On the other hand, less than one in five of the prisoners admitted in 1984 had been convicted of crimes involving violence, sex, robbery, or drug offenses. Close to half had been convicted only of medium-serious property crimes. In addition, a fourth of those committed were fine defaulters, even though the non-custodial sanction had been considered appropriate originally

and other non-custodial options for enforcement were available.

An all-party parliamentary committee has charged that the effort to build as many prisons as needed to house all those sentenced to custody defeats the aim of using non-custodial sentences for less serious offenders. The use of non-custodial penalties has actually been dropping in the last decade. Britain's prison crowding results from "this country's excessive use of imprisonment," the committee declared, and the crowded prisons "are intolerable in a civilized society." As fast as new prisons are completed, they are filled up with ever-increasing numbers of additional prisoners, with no possibility of relief in the older, over-crowded prisons. The same thing, of course, has also been happening all over the United States. We cannot build our way out of prison crowding, any more than Britain can.

The all-party parliamentary committee has proposed a ten-point program to reduce the use of prison. Only one of the ten points is a temporary measure, comparable to the Emergency Powers Acts passed by some of our states. It calls for the release of non-violent prisoners up to six months early, to provide breathing space before other, permanent measures can take effect.

The committee pointed out that in 1980, when the Prison Officers' Association went on strike, prison commitments dropped sharply. Much of the drop was attributed to judicial restraint in sentencing. Despite the lower commitment rate, there was no increase in reported crime. This experience showed that it is possible for Britain "to survive with a much lower custodial population than before." But after the strike, the rate of incarceration returned to previous levels and went even higher.

Other recommendations of the ten-point program call for stricter statutory guidelines for imposing a prison sentence to remedy unwarranted sentencing disparities. (This is the opposite of the Guidelines' mandated prison terms.) Because "the overwhelming weight of research now indicates that longer sentences do not produce greater benefits in preventing or reducing further offenses than shorter ones, and that any impact which a custodial sentence may have occurs in the early stages," the committee argued for reducing length of sentences except for "the minority of offenders who are a serious danger to the public." After a short term in prison, such offenders would be put on supervised release.

Another point called for limiting pre-trial detention through quicker trials. Release on bail should be liberalized through the development of jail hostels (halfway houses) and the careful screening of defendants to

determine those eligible for release before trial. (In contrast, the Bail Reform Act passed by Congress has greatly increased pre-trial detention, in its first year resulting in an increase of 1,800 more prisoners per month.)

To ensure that fines are within the offender's ability to pay, the day fine system should be used. Before imprisoning fine defaulters, every other non-custodial enforcement method should be considered; judges should be required to give their reasons for rejecting each of these options. Courts should be encouraged to remit all or part of the fine, or to substitute community service for the fine.

Probation should be more widely used, said the committee, urging continued growth of resources for probation services and expansion of probation and parole hostels (halfway houses), especially for homeless offenders. To further expand the courts' access to non-custodial options, they recommended a crash program to increase the number of daytime attendance centers, and the development of residential and non-residential programs for substance abusers. Non-custodial measures would be appropriate, said the committee, for many drug-dependent offenders and for those whose offenses are linked to problem drinking.

The committee also recommended the development of a reparation (restitution) program through which offender, victim, and a mediator would draw up a contract agreeing on the amount and nature of compensation, which could be financial, direct service, or community service. (The contract would be drawn up through mediation, not mandated by the court.)

Also recommended was "day detention," which would require suitable offenders to attend day detention centers for up to eight hours on a set number of Saturdays over a six-month period.

Clearly, these recommendations are aimed less at retributive punishment (which can so easily become vindictive punishment) than at resocialization of the offender. The United States seems to be alone among our allies in feeling that any penalty except a prison term deprecates the seriousness of the offense.

Although Britain's incarceration rate is less than a third of that of the United States, its rate is one of the highest in Western Europe. The Swedish National Council for Crime Prevention, the Swedish government's expert board on criminal policy, has made a comparison of Britain, as an example of

severity, to Sweden, as an example of leniency. The recidivism rates of the two countries are about the same. The Swedish Council is convinced no connection can be found between severe penalties and less criminality.

Western Europe is endeavoring to make more selective use of incarceration, reserving its scarce and costly prison resources for the dangerous and violent offenders who are a real threat to the public safety. The United States would do well to follow Europe's example. The crowding in our prisons is also "intolerable in a civilized society." The words of the British Home Secretary (opposite number of the U.S. Attorney General) are just as applicable to the United States as to Britain:

"If we are to keep in prison for a proper time those who must go to prison, then we must keep out of prison those minor offenders for whom alternative punishments will suffice." The Home Secretary defined "minor offenders" as "those convicted of the common, less serious and non-violent offenses, which comprise the vast majority of all recorded offenses."

Maygene Giari

Maygene Giari
Advisor to CURE

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CITIZENS UNITED FOR REHABILITATION OF ERRANTS
"A NATIONAL EFFORT TO REDUCE CRIME
THROUGH CRIMINAL JUSTICE REFORM"

Public Official Sponsors
Cong. John Bryant
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Cong George (Mickey) Leland

United States Sentencing Commission
1331 Pennsylvania Ave. N.W., Suite 1400
Washington, D.C. 20004

Attention: Guidelines Comments

Fines

Meaningful fines are effective both as punishment and as a deterrent. Fines (without imprisonment) are the most widely used criminal sanction in many European countries. Judging from Europe's experience, the "day fine" based on seriousness of the offense and the offender's ability to pay is the most effective for both purposes. Sweden, West Germany, and Austria all use day fines. Setting a fine that is beyond the offender's ability to pay is not only unfair, but may lead to further criminality in order to pay it. Or an exorbitant fine may simply invite default and encourage disrespect for the law.

The advantage of imposing a fine instead of imprisonment is that the offender is not exposed to the criminogenic influences of the prison. In addition, by continuing to hold their jobs, offenders can pay taxes and support their families. Imprisonment not only results in the loss of tax revenues, but often adds welfare costs for the offender's dependents to the taxpayer's burden.

The British justice department, the Home Office, advises that if an offender is unable to pay an appropriate fine, "What the court should not do in these circumstances is impose a custodial sentence, whether suspended or immediate. If the court's initial assessment is that custody was not required, but a fine would meet the case, it is contrary to established sentencing principles then to substitute a custodial sentence simply because the offender lacks means."

"The proper course will often be to fine the offender a small amount, but to make it clear in passing sentence that this is not an indication that the offense is regarded as trivial, but a recognition that even the small fine imposed is a substantial penalty for this particular defendant."

In this connection, it would be helpful if the Guidelines were more

specific with regard to the size of the fine appropriate when the offender has a very limited ability to pay. The statement that in order to avoid demeaning the seriousness of the offense, "the guideline punishment for stealing $10,000 could never be a fine of $1,000" could be subject to widely varying interpretations. Perhaps the Commission could specify how much disparity between the seriousness of the offense and the appropriate fine could be permitted, depending on the circumstances of the offense and the situation of the offender.

A provision in the Guidelines for the court to explain the reason for a relatively small fine, comparable to that recommended by the Home Office, would be desirable. As presently written, the Guidelines could be interpreted to mean that a fine must always equal or closely approximate the seriousness of the offense. Such an interpretation would be discriminatory, making no allowance for the offender of limited means.

Non-custodial options should be available for enforcing payment of fines: extending the period over which the fine is to be paid; permitting payment by instalments; substituting community service for the fine; or remitting the fine in whole or in part when default results from changed circumstances such as the offender's loss of employment or serious accident or illness. Britain also authorizes attachment of earnings for fine defaulters. Imprisonment for default should be authorized only when the failure to pay is the result of wilful refusal or all other methods of enforcing payment have been found unsuccessful.

Giving priority to restitution over a fine is highly desirable. Reparation of the harm done to the victim should take precedence over a fine.

Fines Substituted for Part of a Term of Imprisonment

Ernest van den Haag, who definitely believes in punishing criminals, has suggested that fines might be substituted even for the major part of a life sentence. After serving, say, two years in prison, "the convict could be allowed to serve his punishment outside, by surrendering to the authorities most of his income above the minimum he needs to live." Recognizing that incapacitation is necessary for some violent offenders, van den Haag goes on to say that in many cases it is unnecessary. He sees no reason why "even major crimes, such as assault, robbery, or some kinds of homicide should not be punished by [meaningful] fines" after a short term in prison. The period over which the fine must be paid would be based on the seriousness of the offense.

How Punitive Should a Fine Be?

The Commission has invited comment on whether a fine should be based on an offender's ability to pay or whether it should deprive the offender of "all assets and income, including home and most basic possessions." Perhaps one of the major problems of the criminal justice system is that we Americans have never decided how much punishment is enough. This indecision has resulted in what one expert has described as "legislatively authorized over-punishment."

Conceivably, some few crimes might be so atrocious as to justify depriving the offender of all assets and income, but such cases would be exceptional. To use such deprivation as standard practice for most fines would be unwarranted and unjust both to the offender and to the offender's dependents. Lowering offenders' standard of living also affects their dependents, but to a much lesser degree.

Exceptions:
Cases in Which Confiscatory Fines Should Be Permitted

On the other hand, confiscation of property or considerably larger fines would be appropriate for major drug traffickers or for corporate offenses involving life, health, or safety. Crime <u>does</u> pay when such offenders are allowed to keep the profits from their offenses, when a fine is so small that it is considered simply a cost of doing business.

Maygene Giari

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Attention: Guidelines Comments

Two Standards of Justice

Commission members have expressed their concern at the public perception of two criminal justice systems in this country, one for the affluent and influential and another for everyone else. The Guidelines as presently written can only perpetuate that perception.

Sanction units assigned to economic crimes in the white-collar category are far more lenient than those assigned to street crimes. A comparison of the sanction units for fraud and for burglary reveal how wide this disparity is:

Base offense value:
Single fraud transaction involving one victim - 6 sanction units.
Burglary - 24 sanction units.

Special offense characteristics added to the offense value:
Fraud - 4 to 12 sanction units.
Burglary - 30 to 40 sanction units.

Sanction units added for monetary value of the offense:

Fraud	Burglary
$5,000 or less - 2 units	Up to $1,000 - 4 units
$5,001 to $10,000 - 4 units	
$10,001 to $15,000 - 5 units	
$15,001 to $20,000 - 6 units	$1,001 to $2,000 - 6 units
$20,001 to $50,000 - 8 units	$2,001 to $5,000 - 8 units

The rationale that the harm caused by street crimes is so much more serious than that caused by white-collar crimes is difficult to understand.

Even more crucial to the public perception of two criminal justice systems is what provision the completed Guidelines will make for corporate offenses presently punishable only as regulatory violations, usually misdemeanors. Many of these regulatory violations cause far greater harm than street crimes in terms of sickness, injury, or death; but they are treated far more leniently than street crimes.

The Eli Lilly case illustrates such leniency. This pharmaceutical firm pleaded guilty to ten counts of failure to report that its arthritis drug Oraflex had been linked to a number of deaths. The Food and Drug Administration had reported forty-nine such deaths in the United States and several hundred abroad. But the company was only fined for the regulatory offense of failing to report the deaths. No one was held responsible for the decision to continue marketing the drug after the company knew there had been fatalities from its use. Similar cases involving decisions to continue unsafe practices that result in sickness, injury, or death are also only regulatory violations.

The new federal statute authorizing a fine of up to $500,000 for a felony or misdemeanor resulting in death still does not remedy the inequity in the treatment of street killers as compared to corporate killers.

A murderer who intentionally kills one person faces a death sentence or life in prison. A mass murderer who killed forty-nine people would almost certainly be sentenced at least to life. The victims of corporate regulatory offenses are just as dead as the street killer's victim. Granted, corporations do not intend to kill anyone; but corporate decisions are made with the knowledge that death will be the result of their policies. Since the Guidelines provide a base offense value of twelve for negligent homicide and a base value of thirty for reckless homicide, murderers would receive less consideration for killing someone unintentionally than corporate officials receive.

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Vita

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Education: B.A., Stanford University, 1940
B.S., Columbia University School of Library Science, 1942

Research-related work experience:
Research librarian, National Health Library, New York City, 1942
Middle American Research Institute, Tulane, 1943
Researcher, Stanford School of Education, 1944
Office of War Information, San Francisco, 1945
Time/Life, Shanghai, 1947
Paramount Pictures, Hollywood, 1948

Criminal justice related activities:

Member, penal studies committee, League of Women Voters of Oklahoma 1973-1974

State chair of penal studies, League of Women Voters of Oklahoma, 1976-1978

In this capacity, I worked closely with the Director of Corrections and the Board of Corrections. Appeared before legislative committees, public meetings, and private organizations. Prepared press releases.

This experience gave me insight into and sympathy for the problems of correctional administrators who attempt to make needed changes.

Researched and wrote studies on sentencing and parole. Before publication, these studies were reviewed by Federal District Judge Marvin Frankel, and the Director of Corrections in Oklahoma, as well as the chair of the House Committee on Public Safety and Penal Affairs, Oklahoma.

Chair, task force on prisoners' rights, American Civil Liberties Union of Oklahoma.

Screened prisoner grievances for the ACLU attorney in a prisoners' rights suit that brought the entire system under federal court order. Correspondence with over 100 inmates gave me insight into the conditions in prisons of which the public is generally unaware and the consumer's view of the prison system.

Member, corrections subcommittee, Oklahoma Criminal Justice Standards and Goals Project.

This year-long study produced recommendations for improvements in Oklahoma's criminal justice system.

Member, California Taxpayers Against the Prison Construction Bond, 1982.

Served as resource person for the coalition. Appeared before a legislative committee and on radio and television programs. Met with editorial directors and their staff (radio, television, and newspaper) to discuss the bond issue.

Delegate, People-to-People Criminal Justice tour to China, 1982.

This tour was organized by the National Council on Crime and Delinquency and sponsored by the Chinese Ministry of Justice. Delegates met with Ministry of Justice officials, attended a trial, and visited Chinese penal institutions.

Member, People-to-People Alternatives to Prison Crowding delegation to Western Europe, 1986. (See "Professional Purpose Statement")

Membership proposed on a task force to study solutions to prison crowding in California.

Memberships:

American Correctional Association
National Council on Crime and Delinquency
National Moratorium on Prison Construction

Research and study:

Fifteen years of study, including the major books published on criminal justice since 1970. Also, the reports of special commissions, associations, and task forces; court cases involving prison-conditions suits; testimony before congressional committees; and articles from newspapers, periodicals, and professional journals such as Corrections Magazine, Crime & Delinquency, Augustus (formerly Institutions, Etc.), and Corrections Today.

Institutional tours:

In addition to visiting most of the state institutions and several of the local ones in Oklahoma, I have visited about twenty federal, state, and local correctional facilities in California, Pennsylvania, and Canada; adult and juvenile institutions in China, England, Germany, France, and Sweden.

Publications:

League of Women Voters of Oklahoma, Oklahoma Penal System Part Three, Sentencing, 1978.

League of Women Voters of Oklahoma, Oklahoma Penal System Part Four, Parole, 1978.

"In Oklahoma, Building More Prisons Has Solved No Problems." Crime & Delinquency, October 1979.

The foregoing article has been reprinted in The Dilemmas of Punishment: Readings in Contemporary Corrections, edited by Kenneth C. Haas and Geoffrey P. Alpert. Waveland Press, Inc., 1986.

Current activity:

I am presently writing a book, "The Same Wrong Roads": A Concerned Citizen Looks at the Criminal Justice System.

PEOPLE TO PEOPLE
ALTERNATIVES TO PRISON CROWDING DELEGATION
TO NORTHERN EUROPE

Ms. M. Kay Harris, Delegation Leader

Professional Purpose Statement

A delegation of American professionals in fields relating to criminal justice will travel to London, Stockholm, Berlin, and Paris in the Spring of 1986 to study and observe European prison overcrowding alternatives. These specialists will include judges; legislators; criminal justice administrators and practitioners from all levels of government; media representatives; researchers; academicians; citizens actively concerned with corrections; and representatives of relevant professional and private organizations.

The purpose of the delegation is to encourage bilateral technical exchanges between American professionals and their European colleagues with regard to the problematic question of prison overcrowding. Concerns regarding the accelerated growth of populations in correctional facilities have taken on international importance. In order to learn about and gain an understanding of European practices, the delegates would like to discuss with their counterparts a variety of issues related to prison crowding alternatives. They would like to examine more closely the concepts and practices the Europeans have instituted regarding measures being taken to avoid or reduce prison and jail crowding. In addition to the technical exchanges, the delegates are interested in observing trial procedures and inspecting traditional, as well as alternative, correctional facilities.

To accomplish this, the delegates would like to meet with penal system officials; probation officers; court personnel; representatives of training and education programs for correctional facility professionals; alternative correctional institution officials; researchers; and other judicial and correctional systems representatives.

It is our sincere hope that through this series of technical discussions, professional observations, and site visits we will further promote better understanding and foster professional relationships between criminal justice specialists of the United States and their counterparts in Europe.

PEOPLE TO PEOPLE
FOSTERING INTERNATIONAL FRIENDSHIPS



DWIGHT D. EISENHOWER
Founder
People To People International

The roots of the Citizen Ambassador Program reach back to 1956 when President Dwight D. Eisenhower founded People to People. Eisenhower's perspective as Supreme Allied Commander and President led to his belief that private citizens reaching out in friendship to the people of other nations could make a significant contribution to world peace. In his "Report to the Nation" following the Geneva summit talks, President Eisenhower called for "increased visits by citizens of one country to another to give each the fullest opportunity to learn about the people of other nations . . ."

Amid the tensions of the cold war, President Eisenhower sought a means of encouraging friendship between Americans and the people of other nations. In June 1956, he called a White House conference of American leaders from many different fields to explore new approaches for advancing international understanding outside the limits of official diplomacy. Their aim was to devise a program that built on common interests among citizens of all countries, rather than the differences of national self-interest.

With the formation of People to People, 30 committees were organized to bring Americans together with their counterparts overseas. The ship HOPE was incorporated as the People to People Health Foundation and made the first of many voyages around the world. The Music Committee and the Sports Committee organized international events. Through the Sister Cities Program, Americans established lasting ties with communities throughout the world.

People to People was administered by the State Department until 1961, when it became a private, nonprofit organization. At that time, Mr. Joyce Hall, founder of Hallmark and a personal friend of President Eisenhower, agreed to provide financial assistance and other aid to help People to People International become financially independent. International headquarters were established in Kansas City, Missouri, and a board of trustees, composed of professional, business, and cultural leaders, was formed. President Eisenhower served as the first chairman of the board. Over the years, Presidents Kennedy, Johnson, Nixon, Ford, and Reagan have served as Honorary Chairman of People to People International.

Since its inception People to People has developed more than 40 separate activities to establish and maintain interpersonal communication between members of the world community. Young Americans have been involved in furthering President Eisenhower's ideals through their participation in such activities as the High School Student Ambassador Program, the Agricultural Youth Exchange, the National Student Chorale, and the Pen Pal Program. Members of People to People community chapters located throughout the United States promote awareness of international relations, offer hospitality to citizens of other countries, and provide assistance to foreign students. Another program, Meeting the Americans, provides homestays in the United States for foreign diplomats, journalists and business representatives. As thousands of individuals have reached across national boundaries to their counterparts in other lands, People to People national committees have flourished in more than two dozen countries around the world.

After nearly three decades, the efforts of individual citizens continue to further President Eisenhower's dream: that personal communication and mutual respect among men and women of many cultures can be powerful forces for peace.

CITIZEN AMBASSADOR PROGRAM

A PROGRAM OF PEOPLE TO PEOPLE INTERNATIONAL

CITIZEN AMBASSADOR PROGRAM

ADVANCING INTERNATIONAL COMMUNICATION

The Citizen Ambassador Program, under the auspices of People to People International, promotes friendly relations among all countries through the medium of scientific, professional and technical exchange. Because no one country has a monopoly on talent in any field, communication among specialists working at the forefront of their disciplines is essential to professional and scientific advance. Face-to-face communication allows colleagues from different countries to discuss common problems, compare recent findings, and evaluate areas for further study and collaborative effort. The informal exchange of ideas that is characteristic of such meetings enables counterpart professionals to bridge political and cultural differences and gain an understanding of each other's perspectives.

International exchanges administered by the Citizen Ambassador Program focus on specialized disciplines within the fields of medicine, energy and resource development, agriculture, engineering, industrial technology, building science, law, administrative and financial management, and the basic sciences. Each project is developed around an outline of specific professional objectives and major discussion topics, and delegation members are then selected on the basis of areas of specialization. During the planning phase, delegates' biographies and expanded subjects for discussion and presentation are provided to the sponsoring professional societies, ministries and scientific organizations in the host countries, laying the groundwork for effective dialogue during the project itself.

Just as the level of technology in a given field varies from one country to another, so do the methods of meeting specific needs. In some projects delegates share technical knowledge and its application with their colleagues in developing countries; other exchanges bring together counterparts from comparably advanced nations. The overall intent of the exchanges is the one-to-one sharing of information, ideas and experiences. These exchanges take several forms: organized meetings and briefings; roundtable discussions; seminars and symposia for presentation of papers; inspection visits to major facilities and institutions; and informal gatherings with counterpart professionals.

The impact of these projects can be measured not only in the direct exchange of information which inevitably takes place, but also in expanded ongoing communication among the international colleagues who take part in the program. Such communication can result in collaborative research, cooperative ventures and academic exchange, as well as lasting friendships.

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12-2-86

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November 26, 1986

REPLY TO: MIAMI, FL

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

Dear Judge Wilkins:

Enclosed for your review is a number of comments and observations in reference to the Preliminary Draft of the Sentencing Guidelines. Pursuant to the instructions contained on page four of the manual, separate pages have been copied. As you will note, references to the manual have been copied on yellow sheets of paper, while my commentary has been transcribed on blue sheets of paper.

The immense magnitude as to this project is obvious. The Commissioners and staff of the U. S. Sentencing Commission have done an outstanding job in approaching this extremely important task in a fair and reasonable manner. I appreciate the opportunity to have contributed to this project in some small fashion.

Sincerely,

John M. Shevlin

John M. Shevlin, Supervising
U. S. Probation Officer
PSI Unit SD/FL-Miami

JMS/mds

cc: Mr. L. Russell Burress
U. S. Probation Officer
United States Sentencing Commission
Washington, D.C.

Mr. Carlos Juenke, Chief
U. S. Probation Officer
SD/FL - Miami, Florida

d. to the extent consistent with the objectives of protecting the public and providing just punishment and deterrence, promote rehabilitation of the offender in the most effective manner;

2. provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among offenders with similar characteristics who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

3. to the extent practicable under the circumstances, reflect advancement in knowledge of human behavior as it relates to the criminal justice process. See 28 U.S.C. § 991(b).

Conforming with the Congressional mandate, the guidelines adopt no single, overriding purpose for or theory of sentencing. Rather, in formulating the guidelines, the Commission has sought to take into consideration whether and to what extent each of the four stated purposes -- just deserts, deterrence, incapacitation, and rehabilitation -- applies in any given case, realizing that different forms of conduct are made criminal for different reasons.

Commentary

The Statement of Purpose reflects the Commission's commitment that the guidelines satisfy the multi-faceted Congressional mandate set forth in 28 U.S.C. § 991(b).

Clause 1 and the last paragraph make it clear that no single purpose of sentencing has been given preeminence. By relying on rehabilitation as a rationale for sentencing only "to the extent that it is not inconsistent with other purposes," the Statement of Purpose acknowledges that the Commission is of the view that while the promoting of rehabilitation is an important goal of sentencing, it cannot be considered a substitute for the other goals of sentencing (i.e., reflecting the seriousness of the offense, promoting respect for the law, providing just punishment and deterrence, and protecting the public from future criminality). The Commission believes that rehabilitation must be secondary to these other goals, especially that of protecting the public. As suggested by 28 U.S.C. § 994(k), rehabilitation is not to be accomplished through imprisonment, but rather through educational or treatment programs that are conditions of probation or supervised release. Thus, under the guidelines, rehabilitation can be a primary sentencing consideration only for relatively minor offenses where other statutory considerations do not mandate imposition of a substantial penalty. However, rehabilitation may be an additional consideration beyond punishment in any appropriate case.

Clause 2, reflecting 28 U.S.C. § 991(b), states that the guidelines are designed to reduce unwarranted sentencing disparity among similar offenders who have been found guilty of similar conduct. This statement is to be read in conjunction with the remainder of Chapter 58 of Title 28 and Chapter 227 of Title 18, including the need for guideline sentences to fulfill the purposes stated in 18 U.S.C. § 3553(a). Because of the many considerations that enter into assessing seriousness of offenses,

COMMENT - Page 7

Commentary.

There is a disturbing tone in the Sentencing Commission's Guidelines in reference to probation/postrelease supervision. Specifically, the United States Sentencing Commission in its guidelines may not be taking into account the potential for community based supervision to provide deterrence, punishment, and respect for the law as is mandated by the Comprehensive Crime Control Act of 1984. Historically, community supervision was advanced as a means to correct behavior and help offenders to overcome their problems. This approach has been identified as "rehabilitation".

Unfortunately, this vision of offender rehabilitation is seriously flawed in the present day criminal justice system. The language used in the Comprehensive Crime Control Act of 1984 acknowledges that probation can no longer solely retain this position. Certainly much of the criticism that has been directed towards probation is justified in this respect. Those who would dispose of or dilute community supervision maintain that deterrence, punishment, and prevention of criminal behavior cannot be elements in community corrections. However, clearly the Congress did not agree with this perception. The collective opinion of the United States Congress was that probation should be a sentence in its own right. As a result, the United States Sentencing Commission coupled with those practitioners in the field of probation must be willing to develop and, more importantly, implement, conditions of probation and postrelease supervision that provide punishment, deterrence, and respect for the law. This is not made clear on page 7 of the text, nor in the other references to probation and postrelease supervision.

RECOMMENDATION:

The Sentencing Commission should reassess its position as to the punitive aspects of probation supervision.

CHAPTER THREE - OFFENDER CHARACTERISTICS

OVERVIEW

Chapter Three identifies offender characteristics that aggravate or mitigate a sentence. These adjustments are applied to the total offense value determined by Chapter Two. If more than one adjustment is applicable in a given case, follow the procedures set forth in Chapter One, Part VI, Application Instructions.

Part A provides aggravating and mitigating adjustments based upon the offender's role, level of relative involvement, and, if applicable, the nature of the criminal group or enterprise involved.

Part B identifies several aspects of an offender's post-offense conduct that aggravate or mitigate a sentence. Sentencing enhancements are provided in Section 1 for an offender who engages in or suborns perjury or obstructs justice in connection with the investigation, prosecution, or sentencing for the underlying offense(s). An offender who accepts responsibility for his or her conduct and takes objective steps toward rehabilitation may be eligible for a sentencing reduction under the provisions of Section 2. An offender may also qualify for a sentencing reduction if he or she provides assistance to authorities in accordance with the provisions of Section 3.

Part C provides for an enhancement of sentence if an offender has a prior history of criminal involvement. The adjustment takes into consideration the extent, seriousness, and recentness of the offender's prior criminal conduct.

Part D is reserved for the subject of plea agreements. The public is invited to comment and submit proposals on the policy issues relating to plea agreements presented in Chapter Six, Part C.

Public comment is also requested in Chapter Six, Part F, on the treatment of serious aggravating and mitigating factors that occur infrequently, such as brutal behavior or serious mental disability not rising to the level of a defense.

PART A - ROLE IN THE OFFENSE

§A311. If the offender was in a position of control over a criminal enterprise or organization, multiply the total offense value from Chapter Two by a number between 1.5 and 2, depending upon the size of the enterprise and the nature of its criminal activities. If the offender is convicted under 21 U.S.C. § 848, the total offense value from Chapter Two should be multiplied by 2.

COMMENT - Page 120, Part A

Role in Offense.

Under Section A-311, the Sentencing Commission very appropriately takes into consideration the offender's role in a multidefendant case. However, the Commission should consider the very real obstacles that the court and the United States Probation Office will encounter in attempting to implement this consideration. The Sentencing Commission stipulates that an aggravating circumstance should be "a. Derivation of all or most of the income or resources of either the offender or the organization from illegal activities."

It is becoming a common response on the part of defense attorneys, particularly those involved in narcotic cases, to direct their clients to refuse to provide any financial information to the probation office for purposes of preparing the presentence investigation. As professional advocates, defense attorneys are well aware of the fact that the court very well may aggravate a sentence due to the fact that the offender has derived a great portion of his income from illegal activities. Also, there is a very real consideration that the defense attorney is protecting the source of finances that will eventually pay for his services.

At sentencing, if the issue is brought out in court, the most common response of the defense attorney is that the court should not enhance the punishment of the defendant as a result of the client following the instructions of his attorney. Such a consideration, of course, places the sentencing judge in an extremely ackward dilemma.

RECOMMENDATION:

The Sentencing Commission must build into the guidelines an appropriate sanction for defendants refusing to provide financial data to the probation officer during the course of the presentence investigation.

Section A311 applies only if the criminal organization and the offender's position are relevant to the offense of conviction. For example, a leader of a motorcycle gang that is involved in the trafficking of narcotics, firearms, and stolen property would not be subject to this sentencing adjustment by reason of a conviction for an offense unrelated to gang activity.

Section A312 applies to an offender who is the most or more culpable member of any group that commits a crime, without regard to the size or nature of the group. A manager or supervisor in an otherwise legitimate business, or one of several casual acquaintances who directs or supervises the commission of a crime, qualify for this sentencing enhancement. Titles are not controlling. It is the offender's role in the offense that is significant. Objective factors of leadership may include recruitment of other offenders, planning of the offense, exercise of decision-making authority, use of a particular expertise (criminal, professional, or occupational), or right to claim a larger share of the fruits of the crime than other participants.

Section A312 also enhances the sentence of an offender who uses a special skill, training, education, trade, or public position to facilitate the commission of a crime. Thus, a pilot who smuggles cocaine from Colombia in a private plane, a doctor who prepares phony medical reports in an automobile accident insurance fraud, or a deputy sheriff who conspires with private citizens to commit a civil rights violation would be subject to this provision. A sole participant in an offense who uses professional expertise for criminal purposes qualifies for this adjustment.

Section A313 applies to a sole participant in an offense and to offenders who have comparable roles in the offense.

Section A314 applies to an offender who has a limited role in an offense that is planned, directed, and controlled by another person or persons. A minor participant is one who is not in a position to make decisions affecting the offense or to benefit substantially from its commission. In determining the appropriate numerical multiplier, the sentencing judge shall evaluate and make findings regarding the nature of the offender's role and conduct in relation to other participants.

* * * * *

PART B - POST-OFFENSE CONDUCT

1. OBSTRUCTION OF JUSTICE AND PERJURY

§B311. If the offender obstructed or attempted to obstruct the administration of justice, multiply the total offense value from Chapter Two by a number between 1.1 and 1.4, to be determined by the nature of the conduct.

The appropriate numerical multiplier shall be determined by the sentencing judge upon findings that may include, but are not limited to, the following considerations:

a. whether the offender knowingly and intentionally destroyed or concealed or attempted to destroy or conceal material evidence;

b. if the offender directed or procured or attempted to direct or procure another person to destroy or conceal material evidence;

c. if the offender knowingly and intentionally offered untruthful testimony concerning a material fact, or knowingly and intentionally produced or attempted to produce an altered, forged, or counterfeit document or record before a grand jury proceeding, during trial, or during a sentencing hearing;

d. if the offender directed or procured or attempted to direct or procure another person to offer perjured testimony, or to produce an altered, forged, or counterfeit document before a grand jury proceeding, during trial, or during a sentencing hearing.

§B312. Section B311 shall not be applied to enhance a sentence if the United States Attorney states an intention to prosecute for the same conduct. An offender cannot later be sentenced in an independent prosecution for conduct previously used as a basis for application of this section.

Commentary

This section provides an aggravating adjustment for an offender who engages in conduct calculated to unlawfully mislead or deceive authorities and/or those involved in a judicial proceeding. Before a sentence may be aggravated under this section, the sentencing judge must find the specific conduct present by a preponderance of evidence and determine the appropriate multiplier according to the nature of the conduct and its impact on the administration of justice.

The aggravation of a sentence because of perjury or obstruction of justice is in recognition of a basic principle that no one has a right to lie or deceive or direct others to do so or to destroy evidence of a crime. While no offender is obligated to give a statement, testify, or produce evidence, an offender should not present a fabricated defense or suborn perjury. For example, this provision applies to an offender who alters records or other evidence or procures false alibi testimony. A defendant's denial of guilt is not a basis for application of this provision.

* * * * *

2. ACCEPTANCE OF RESPONSIBILITY

§B321. If the offender demonstrates by a preponderance of evidence that he or she recognizes and sincerely accepts responsibility for the offense(s), the sentencing judge may reduce the offender's sentence by an amount the

COMMENT - Page 122

Clarification on B311-a.

The Sentencing Commission should consider the possibility of clarifying Section B311-a. The instruction is not clear as to whether or not this conduct only applies after arrest. For example, does this additional sanction apply to offenders who attempt to destroy evidence (eg. narcotics) during the course of apprehension. A common occurance is for drug smugglers to throw the narcotics from their boats during the course of chase by Coast Guard and Customs officials. Would the additional sanction apply in these instances?

RECOMMENDATION:

Clarify the instruction with a rewording of the text and additional examples.

a. whether the offender knowingly and intentionally destroyed or concealed or attempted to destroy or conceal material evidence;

b. if the offender directed or procured or attempted to direct or procure another person to destroy or conceal material evidence;

c. if the offender knowingly and intentionally offered untruthful testimony concerning a material fact, or knowingly and intentionally produced or attempted to produce an altered, forged, or counterfeit document or record before a grand jury proceeding, during trial, or during a sentencing hearing;

d. if the offender directed or procured or attempted to direct or procure another person to offer perjured testimony, or to produce an altered, forged, or counterfeit document before a grand jury proceeding, during trial, or during a sentencing hearing.

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* * * * *

2. ACCEPTANCE OF RESPONSIBILITY

§B321. If the offender demonstrates by a preponderance of evidence that he or she recognizes and sincerely accepts responsibility for the offense(s), the sentencing judge may reduce the offender's sentence by an amount the

judge deems appropriate, provided the reduction does not exceed 20 percent of the total offense value from Chapter Two.

Acceptance of responsibility for the offense(s) may be established by conduct that includes, but is not limited to, the following:

1. voluntarily surrendering to authorities before charges are filed or an arrest warrant is issued;

2. voluntarily making restitution of a substantial nature before sentencing;

3. voluntarily admitting actual involvement in the offense(s);

4. voluntarily providing assistance to authorities in the recovery of fruits and/or instrumentalities of the offense(s); or

5. any other conduct that establishes by a preponderance of evidence that the offender sincerely accepts responsibility for the offense(s) and has undertaken objective steps toward rehabilitation.

§B322. **An offender may qualify for a reduction under this section without regard to whether the offender's conviction is based upon a guilty plea or a finding of guilty by a court or jury. An offender who enters a guilty plea is not automatically entitled to a reduction under this section.**

Commentary

The reduction of a sentence available under §B321 recognizes a number of societal interests. The offender who sincerely accepts responsibility for wrongdoing, who takes affirmative steps toward disassociation from past criminal conduct, and who attempts to rectify the harm done to others is entitled to receive recognition for these socially desirable actions. This conduct also is a sound indicator of rehabilitative potential.

The sentencing judge is in a unique position to evaluate whether the offender's post-offense conduct is sincere or merely self-serving. For this reason, the sentencing judge is not required to find that conduct such as that described actually justifies a sentencing adjustment. If the sentencing judge finds that the offender is entitled to a reduction, the amount of the reduction is totally within the discretion of the sentencing judge. However, in no event may the reduction exceed 20 percent of the adjusted offense value for an offense.

While a plea of guilty may be some evidence of the offender's acceptance of responsibility for the offense(s), a guilty plea does not automatically entitle an offender to an adjustment. The availability for the reduction under §B321 is not governed by the plea entered by the offender.

Offenders who plead guilty currently receive substantially lower sentences than those who are sentenced after a trial. The rationale for this disparity is that a

guilty plea "is the first step toward rehabilitation," that such pleas conserve the resources of the criminal justice system, and that witnesses (particularly victims) are spared the stress of a trial. The Commission requests comment whether this practice should be perpetuated by providing an automatic sentencing reduction for a guilty plea or whether the approach suggested by Part 2 should be followed.

* * * * *

3. COOPERATION

§B331. If the United States Attorney certifies that the offender provided truthful and significant information regarding the criminal activities of another person or persons, multiply the total offense value from Chapter Two by .8.

§B332. If the United States Attorney certifies that the offender actively assisted authorities in an ongoing investigation or provided truthful and significant testimony before a grand jury or in a court proceeding, multiply the total offense value by .7.

§B333. If the United States Attorney certifies that the offender provided exceptional assistance to law enforcement authorities, multiply the total offense value by .6.

Commentary

The Supreme Court has recognized that an offender's willingness to cooperate with authorities is a valid consideration at sentencing. Cooperation by knowledgeable offenders is particularly valuable in the investigation and prosecution of major narcotics offenses and other organized criminal activity.

Sections B331, B332, and B333 are mutually exclusive; the United States Attorney shall select the most appropriate category if an offender's cooperation overlaps several categories. The certification of the prosecuting United States Attorney is required before the offender is eligible for the adjustments set forth in §§B331, B332 or B333, either at sentencing or for a reduction of sentence under the new provisions of Rule 35, Federal Rules of Criminal Procedure that become effective simultaneously with the guidelines. These provisions apply whether the offender's cooperation is in the same case, a related case, or wholly unrelated to the offense committed by the offender.

Section B333 provides for a 40 percent sentencing reduction for exceptional cooperation, such as the offender who provides valuable information and assistance in the early stages of a major investigation or who performs undercover work or testimony under life-threatening or personally dangerous circumstances.

COMMENT - Pages 123-125

Acceptance of Responsibility

To possibly reward individuals who exercise their right to trial in the same fashion as those who choose to enter a plea of guilty is neither fair nor equitable. In this manner, there would appear to be a major disparity in the instruction contained in Section B322.

The argument could be made that those who elect to exercise their right to trial should not be punished more than those who elect to enter a plea of guilty. This may be a valid point. However, the reverse argument is much more critical. Those who enter a plea of guilty should be rewarded in some fashion and not punished in the same manner as those who choose trial. As a result, to provide a provision for rewarding individuals who elect to go to trial under this section of the Sentencing Guidelines Manual would seem totally inappropriate and unfair. Also, there is the very practical consideration that unless an individual has some inducement to enter a plea of guilty, a great many offenders must elect the route of trial by jury. This can only place a greater burden on an already overcrowded court system.

RECOMMENDATION:

The Sentencing Commission should provide for an automatic reduction for those defendants who enter a plea of guilty. Any other system will simply promote a universal reduction for all defendants in the guideline range.

guilty plea "is the first step toward rehabilitation," that such pleas conserve the resources of the criminal justice system, and that witnesses (particularly victims) are spared the stress of a trial. The Commission requests comment whether this practice should be perpetuated by providing an automatic sentencing reduction for a guilty plea or whether the approach suggested by Part 2 should be followed.

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COMMENT -Page 125

Cooperation.

The Commission validly recognizes that occasional disputes may arise over the existence, level, or quality of an offender's cooperation. In this realm, there are multiple instances where the goal of sentencing will not be reached as a result of improperly imposed reductions in sentencing as a result of cooperation. For example:

-The sentencing guidelines may be subterfuged by a Plea Agreement which stipulates that the government will advise the court that the offender provided exceptional assistance to law enforcement authorities when, in fact, this was not the case.

-There is the simple practical fact that a newly appointed prosecuting attorney, unfamiliar with the sentencing guidelines, may through inadvertent error stipulate to a level of cooperation that is in reality untrue.

RECOMMENDATION:

It is suggested that these issues be resolved by an implementation of the following practice. It shall become the responsibility of the investigating probation officer to validate the level of cooperation as described by the defense attorney and the government. In this manner, the court will be assured that the level of cooperation described is "real" as well as the fact that improperly described levels of cooperation may be corrected.

1. CRIMINAL HISTORY SCORE

The sum of the criminal history points from items A through E below provides the criminal history score. The definitions and instructions in Subpart 3 apply to the determination of criminal history points.

A. Score at least 3 points for each prior sentence of imprisonment for a maximum term of more than one year. For each such term:

1. score 3 points if the offender served less than three years;

2. score 4 points if the offender served three or more years but less than five years;

3. score 5 points if the offender served five or more years.

B. Score 2 points for each prior sentence of imprisonment for a maximum term of 60 days or more that is not counted above.

C. Score 1 point for each prior sentence that is not counted above.

D. Score 2 points if the offender committed the current offense:

1. while under any form of criminal justice control, including probation, parole, or supervised release, custody or escape status, or any form of release pending trial, sentencing, or appeal; or

2. within three years after any release from imprisonment on a sentence counted in (A) above; or within three years after the imposition or commencement of any sentence counted in (B) above.

E. Score 3 points if the offender had a positive urine test for heroin or any other opiate, cocaine, or PCP either at the time of arrest, during the pretrial release period, or during the presentence release period; or score 3 points if the offender is determined to have been an abuser of heroin or any another opiate, cocaine, or PCP within ten years of the current conviction.

2. SPECIAL CONDITIONS: POLICY STATEMENTS

C321. If the offense of conviction is a violent offense or a controlled substance offense and the offender has at least two prior felony convictions, each of which is either a violent offense or a controlled substance offense, then the sentence shall equal the maximum term of imprisonment authorized for the offense. This policy statement implements 28 U.S.C. § 994(h). Violent offenses are the state and federal counterpart of offenses in Chapter Two, Part A, Offenses Involving the

Criminal History Score 1-E.

The United States Sentencing Commission properly points that repeated studies and research projects have validated the point that those offenders who are engaged in the consumption of narcotics are more likely to engaged in repeated criminal behavior than those who are not. In this manner, the Commission stipulates that there should be enhanced sanctions for those who test positive for drug usage during presentence proceedings. However, there should be an enhancement of points for those individuals who do not submit a urine sample during the course of the presentence investigation as directed by the probation officer.

The Southern District of Florida processes an exceptionally large number of offenders who are engaged in the sale and usage of controlled substances. As a result, it is common practice for defense attorneys to instruct their clients not to submit to urinalysis during the course of a presentence investigation. At sentencing, the court is advised that the defendant should not be punished more severely for following the well-intentioned instructions of the attorney. The alternate approach is for the defense attorney to establish a "stall". In this manner, the defense will advise the probation office that the client is not prepared to submit a urine sample at this time. However, the defendant will be willing to return to the probation office at a time of his (the defense attorney's) choosing and at that time submit a urine sample. This, of course, provides the defendant with an opportunity to cleanse his system of any controlled substances.

RECOMMENDATION:

It is therefore recommended that, based on all available research, the Sentencing Commission retain an enhancement of criminal history points for not only positive urinalysis results but a refusal to submit to urinalysis at a time specified by the probation office.

because the offender escaped or because the prison portion of a sentence has not yet been completed.

Sentences to Imprisonment. A sentence to imprisonment refers to an executed sentence of imprisonment, not one that has been suspended. If part of a sentence of imprisonment has been suspended, the term "sentence to imprisonment" refers to the part that has not been suspended.

Sentences for Non-Felony Offenses. Sentences based on convictions for certain non-felony offenses are to be counted only if the sentence was imprisonment for 30 days or more, or probation for at least one year. These are:

Criminal contempt of court
Disorderly conduct and similar offenses
Driving without a license or with a revoked or suspended license
False information to a police officer
Fish and game violations
Gambling
Loitering
Non-support
Prostitution
Resisting arrest
Trespassing

Sentences based on convictions for certain other non-felony offenses are not to be counted. These are:

Hitchhiking
Local regulatory violations
Public intoxication and similar offenses
Minor traffic infractions
Vagrancy

Juvenile Sentences. Juvenile sentences are counted for offenses against persons, including residential burglary and drug trafficking.

Decay Factor For Prior Sentences. If there exists a ten-year period during which the offender neither sustained a sentence of imprisonment including a maximum term of more than one year, nor is known to have served time in confinement on a sentence of imprisonment including a maximum term of more than one year, sentences imposed prior to the beginning of that ten-year period shall not be counted. Convictions for crimes of violence and convictions for crime involving the distribution of drugs are, however, always counted. Violent offenses are the state and federal counterpart of offenses in Chapter Two, Part A, Offenses Involving the Person, and any other offense that involves force or threat of force against a person, including burglary of a dwelling. Controlled substance offenses are described in Section 401 of the Controlled Substance Act (21 U.S.C. § 841); Sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 955, and 959); and Section 1 of the Act of September 15, 1980 (21 U.S.C. § 955a).

COMMENT - Page 129

Decay Factor.

The time period of 10 years seems totally appropriate in terms of providing a decay factor and determining an enhancement of punishment for criminal history. However, as a point of clarification, the Commission may choose to specify that the 10-year period begins with the defendant's most recent release from criminal justice jurisdiction (eg. release from prison, termination of probation or parole supervision) and begins with the commencement of the present offense behavior.

RECOMMENDATION:

Clarify language as to the ending and starting points of the decay period.

2. *within three years after any release from imprisonment on a sentence counted in A above; or within three years after the imposition or commencement of any sentence counted in B above.*

Note to Section D: Any sentence giving rise to the scoring of points under either of the subsections in section D should be counted in A or B above, notwithstanding the fifteen or ten year limitation otherwise applicable.

This option is easier to apply because the date of sentencing is more easily available than the date of release on a sentence to incarceration. Its adoption, however, could prevent the counting of the most serious prior criminal conduct.

PART D - PLEA AGREEMENTS

[Reserved]

See Chapter Six, Part C, for a discussion of policy issues presented for public comment.

PART E - OTHER OFFENDER CHARACTERISTICS

The Commission's authorizing legislation requires it to consider whether a number of offender characteristics have "any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined relevant. 28 U.S.C.§ 994(d). The characteristics are:

1. *age;*
2. *education;*
3. *vocational skills;*
4. *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;*
5. *physical condition, including drug dependence;*
6. *previous employment record;*
7. *family ties and responsibilities;*
8. *community ties;*
9. *role in the offense;*
10. *criminal history; and*
11. *degree of dependence upon criminal activity for a livelihood.*

Chapter Three of the preliminary guidelines addresses role in the offense and degree of dependence on criminal activity for a livelihood in Part A, and criminal history in Part C. The other factors have not, however, been thoroughly addressed in this preliminary draft.

One method of permitting courts to address these characteristics would be to allow the court the discretion to consider one or more them, as appropriate, in setting the sentence within the 25 percent range. 28 U.S.C. § 944(b). Another method would be to cite them as aggravating or mitigating factors where appropriate. A third method would be to treat them as multipliers in the same manner as Chapter Three adjustments.

In connection with its May 22, 1986 hearing on prior criminal history, the Commission asked over 200 persons and organizations to provide written comment on the extent to which these characteristics should be considered in sentencing. Public comment is now invited on which of these factors should be considered relevant to sentencing, and in what circumstances.

COMMENT - Page 136

Part E, Other Offender Characteristics

As pointed out, the Commission's authorizing legislation requires the consideration of a variety offender characteristics which have "any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence". The Commission is further instructed to take these characteristics only into account in terms of the extent for which they are relevant [Title 28, U. S. Code, Section 994(d)].

As proposed by the Commission, the fairest, most equitable and least disparate method of allowing the courts to consider these characteristics would be in remaining within the 25 per cent range of sentence. Any other consideration, such as using these offender characteristics as multipliers, would only convolute and complicate the process further without any discernable benefit.

RECOMMENDATION:

Implement system as described in the first sentence, Paragraph No. 1 of page 137.

CHAPTER FOUR - DETERMINING THE SENTENCE

OVERVIEW

Chapter Four describes the process by which sanction units are converted into actual sentences and explains the range of sentencing options available to the court. §A411 describes the conversion of sanction units into months of imprisonment. §A412-A420 describe, in turn, each of the sentencing options other than imprisonment: probation, supervised release, community confinement, home detention, restitution, fines, forfeiture, community service, and order of notice to victims. Section A421 addresses the relationship of statutory maximum and mandatory minimum sentences to the guidelines, and §A422 offers guidance on the use of consecutive and concurrent sentences.

The Commission has identified two issues in Chapter Four as particularly appropriate for public comment:

(1) How should sanction units be converted into terms of imprisonment?

(2) How should sanction units be converted into sentences other than imprisonment?

Two other Chapter Four-related issues are discussed in Chapter Six (Other Issues):

(1) How should the appropriate amount of a fine to impose on an offender be determined? (Chapter Six, Part A)

(2) What "eligibility criteria" or other restrictions should be established for offenders the court is considering for placement in community confinement or home detention? (Chapter Six, Part D)

§A411. Imprisonment

a. The guideline table set forth in (e) below displays the guideline range of months of imprisonment applicable to the total sanction units. If the exact number of the total sanction units is not listed in the table, it is to be rounded down to the nearest listed number.

b. Where the minimum number of months of imprisonment specified in the guideline range is greater than zero, that number must be satisfied by imprisonment or by custody for intervals of time as a condition of probation under 18 U.S.C. § 3563(b)(11). The imprisonment or custody sentence may not exceed the highest number in that range. For example, if the offender's total sanction units are 26, the court must impose a term of imprisonment of between 14 and 20 months.

c. Where the minimum number of months of imprisonment specified in the guideline range is zero, no minimum term of imprisonment or

custody is required. However, a term of imprisonment up to six months may be imposed.

d. A sentence is within the guidelines if it includes at least the minimum number, and not more than the maximum number of months of imprisonment specified in the guideline range.

e. Guideline Table

Total Sanction Units	Guideline Range (in Months of Imprisonment)	Total Sanction Units	Guideline Range (in Months of Imprisonment)
Less than 14	0-6	174	162-202
14	2-8	180	168-210
16	4-10	186	174-216
18	6-12	192	180-224
20	8-14	198	186-232
22	10-16	204	192-240
24	12-18	210	198-246
26	14-20	216	204-254
28	16-22	222	210-262
30	18-24	228	216-270
32	20-26	234	222-276
34	22-28	240	228-284
36	24-30	246	234-292
38	26-32	252	240-300
40	28-34	258	246-306
42	30-36	264	252-314
44	32-40	270	258-322
48	36-44	276	264-330
52	40-50	282	270-336
56	44-54	288	276-344
60	48-60	294	282-352
66	54-66	300	288-360
72	60-74	306	294-366
78	66-82	312	300-374
84	72-90	318	306-382
90	78-96	324	312-390
96	84-104	330	318-396
102	90-112	336	324-404
108	96-120	342	330-412
114	102-126	348	336-420
120	108-134	354	342-426
126	114-142	360	348-434
132	120-150	366	354-442
138	126-156	372 or above	360-Life
144	132-164		
150	138-172		
156	144-180		
162	150-186		
168	156-194		

Commentary

The guideline table presented above translates the offender's total sanction units into guideline ranges of months of imprisonment. Sanction units totalling less than 14 equate to an imprisonment range of zero to six months. The court may, therefore, impose a sentence other than imprisonment on offenders whose units total less than 14. Sanction unit totals of 14 or more will require the court to impose some term of imprisonment.

The selection of 14 sanction units as the level below which a court may sanction an offender without imprisonment was intended to establish a range of units (0-14) that was broad enough to permit the court to give minor offenders (including repeat violators of the most minor statutes) probation or other non-imprisonment sentences. Selection of a significantly lower number than 14 would have unnecessarily complicated the required mathematical calculations without any discernible benefit.

Because 14 sanction units correspond to a minimum of two months' imprisonment, the total of the offender's sanction units is always 12 more than the minimum months of imprisonment in the corresponding range. The maximum of the guideline range generally exceeds the minimum by the greater of 6 months or 25%, the limit allowed by 28 U.S.C. § 994(b) (as amended by Pub. L. No. 99-363). For simplicity, it was decided to use only even numbers in the guideline range.

The court is required to impose a sentence within the guideline range set forth below unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Commission in formulating the applicable guideline (18 U.S.C. § 3553(b)).

Subject to applicable policy statements, the determination of where to sentence within the guideline range is within the discretion of the court. For example, if the total sanction units are 56, the court, in order to sentence within the guidelines, must sentence the offender to a term of imprisonment of at least 44 months but not more than 54 months.

The court must explain its specific reasons for imposing a sentence at a particular point within the range, or outside the range, in open court at the time of sentencing. 18 U.S.C. § 3553(c).

The guideline table presents one approach for converting sanction units into a term of imprisonment. Another approach would be to make the conversion rate from sanction units ito imprisonment depend on the nature of the offense committed. Offenses resulting in the most serious harms would result in the imposition of proportionately greater prison terms. For example, an offender who committed an offense involving the person could be required to discharge 90% of his sanction units by imprisonment, while an offender who committed an offense involving property would be required to discharge only 50% of his units by imprisonment. Comment is invited on the guideline table approach as well as any other method of converting sanction units to terms of imprisonment.

COMMENT - Page 138

Determining a Sentence.

The guideline table as developed provides a reasonable equation of sanction units into months of imprisonment. However, in the most strong terms possible, it is recommended that the Sentencing Commission adopt a system as suggested in the final paragraph on page 141. Offenses resulting in more serious harms (violence, drugs) should be treated differently than offenses involving lessor degrees of harm. Certainly an offender who has committed an offense involving the person should be required to discharge a greater proportion of his sanction units by imprisonment as opposed to an offender who committed a nonviolent property offense.

As one of the members of the group of probation officers that was able to participate in the Sentencing Commission's July 1986 Seminar, it is recommended that the previously considered mixed approach of disposing of sanction units be considered. Such a posture would not only provide a needed consideration of different punishments for a variety of crimes, but there would be certain very practical benefits as well. If the Commission chose to adopt this approach, a greater fexibility would be provided to the courts in terms of developing sentencing. Certainly this fexibility would be welcomed by many of the federal judges who have expressed concern over what is preceived to be as infexibility on the part of the proposed guidelines.

RECOMMENDATION:

Adopt system as described in the final paragraph on page 141.

CONVERSION OF SANCTION UNITS INTO SENTENCES OTHER THAN IMPRISONMENT

The Commission has identified several ways to address this issue. One question is common to each approach, however: what types of sentences, other than imprisonment, should be measured by sanction units? The Commission could, for example, adopt a guideline that would require an offender to compensate a victim for his/her losses separate and apart from any punishment the offender might receive for his conduct. Accordingly, under such a guideline, restitution would be required whenever feasible without regard to the satisfaction of any sanction units; the offender would still be subject to other punishment(s) in satisfaction of all sanction units. A similar approach could be taken with respect to forfeiture and an order of notice to victims.

The same question occurs with respect to probation and supervised release: should those sentences or any conditions of those sentences be accorded sanction unit value? Because the underlying purpose of many probation sentences is fundamentally rehabilitative, some observers have noted that it is inappropriate to accord any sanction unit value to their imposition. Others have contended that it would be appropriate to accord sanction unit values to those conditions that are punitive or significantly deprive the offender of some liberty, such as a condition that the offender observe a curfew or submit to urinalysis on a frequent basis. Comment is specifically invited on these issues as well as the alternative proposals outlined below.

OPTION 1: Mandatory Satisfaction of All Sanction Units

Under this approach, the court would be required to impose a sentence that satisfied all of the offender's sanction units. If, for example, an imprisonment range of 80-100 months applied, and the court selected the minimum of the range as the appropriate term of imprisonment, the remaining 20 months in the range would still have to be discharged by alternative sanctions of equivalent weight. Establishment of a system of this nature would require the Commission to set equivalency rates between imprisonment and all other types of sentences determined to have sanction unit value. The Commission could, for instance, develop a table that established certain terms of community confinement or home detention as the equivalent of one month's imprisonment. Other equivalencies would be established for non-confinement sentences, like fines and community service, as well. Comment is invited on both the approach in general and the equivalency rates that should be established between imprisonment and other sanctions.

OPTION 2: Permissive Satisfaction of All Sanction Units

There are several possible approaches to this option. The common thread among all of them is that the court would not be obligated to impose a sentence that satisfied all sanction units. One approach would be to establish equivalencies between imprisonment and other types of sentences, but permit the court to impose non-imprisonment units in any amount up to the maximum of the range. So, for example, where the court chose to impose the minimum term of imprisonment in an 80 to 100 month range, the judge could impose additional 0-20 units of non-imprisonment sanctions.

Conversion of Sanction Units into Sentences Other Than Imprisonment.

In this writer's opinion, this section of the proposed guidelines is one area that is desperately in need of refinement in what is otherwise an outstanding document. Those that would suggest "the underlying purpose of many probation sentences is fundamentally rehabilitative" are absolutely unfamiliar with what is happening in the criminal justice system. It is imperative that sanction units be accorded to those conditions of probation that restrict liberty, punish, and deter offenders.

Probation officers must reassess their traditional role of "rehabilitating" the offender as opposed to providing just punishment. Supervision must be administered in a manner that protects the public from the further crimes of the defendant. Title 18, U. S. Code, Section 3563(b)(20) as well as the other conditions of probation provide the court and probation officers with an opportunity to reasonably achieve the goals of sentencing. The courts and probation officers should be willing to seek out alternative techniques that protect the public, as well as incapacitate the offender. Prison space is simply a scarce resource. The Sentencing Commission must assume the role of promoting probation and postrelease supervision as a means of achieving the goals of sentencing:

> a. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> b. to afford adequate deterrence to criminal conduct;
>
> c. to protect the public from further crimes of the defendant; and
>
> d. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The Honorable Gerald B. Tjoflat has publicly stated the following:

"Now, the sense of the Senate, and the legislative history, is that prison is a very scarce resource, and it ought to be used for violent offenders, it ought to be used for career criminals, for those who commit crimes on bail, for those who can't obey the law under any circumstances, those who can easily be predicted for committing more crimes, for serious offenders, and that since prison is a scarce resource, we have got to make, said the Senate, probation more punitive than it is now."

COMMENT - Page 142 Contd.

Probation and postrelease supervision can achieve this goal as described by Judge Tjoflat. However, the United States Sentencing Commission's responsibility in achieving this goal cannot be ignored. It is incumbant that a properly supported system of probation supervision be promoted by the Commission as a goal in achieving the ends of sentencing as described in Title 18, U. S. Code, Section 3651. This can be done by allocating conditions of supervision with sanction units.

RECOMMENDATION:

It is respectfully recommended that the C[illegible]n adopt Option No. 1 as described on page 142.

CHAPTER SIX - OTHER ISSUES

PART A - FINES

The Commission specifically invites comment on the method a court should use to determine the amount of a fine to be imposed on an individual offender. The next part of this chapter invites comment on the method that should be used to determine the amount of a fine to impose on an organization. See Chapter Six, Part B (Organizational Sanctions).

In October 1984, Congress enacted federal statutes that significantly raise the maximum limits on fines that may be imposed on convicted offenders. The new federal sentencing statutes that will take effect with enactment of the guidelines continue those new maximums. Under the new statutes, an individual may be fined up to $250,000 for a felony or a misdemeanor resulting in death. For any other misdemeanor, an individual may be fined up to $25,000 and, for an infraction, up to $1,000. An organization may be fined up to $500,000 for a felony or a misdemeanor resulting in death, $100,000 for any other misdemeanor, and $10,000 for an infraction. 18 U.S.C. § 3571. Organizations convicted of antitrust offenses may be fined up to $1 million. 15 U.S.C. § 1.

In establishing these new maximums, Congress clearly intended to make the fine a more effective sanction than it has been in the past. Previously, the low fine maximums often resulted in judges avoiding fines as a sentence because they could not be imposed in an amount sufficient to punish or deter. Congress has now granted the courts authority to impose meaningful fines and has charged the Commission with the responsibility to provide guidance in their use.

Under the new law, a sentencing judge contemplating whether to impose a fine must consider the general purposes of sentencing, including, among other things, the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, and afford adequate deterrence to criminal conduct. In addition, the court must specifically consider the following five factors in determining whether to impose a fine, and the amount of the fine, the time for payment, and the method of payment:

(1) the ability of the offender to pay the fine in view of income, earning capacity, and financial resources (and, if the offender is an organization, the size of the organization);

(2) the burden the fine will impose on the offender and dependents, relative to the burden imposed by other punishments;

(3) any restitution made or obligated to be made by the offender;

(4) any measure an organizational offender has taken to discipline those officials responsible for the offense or to insure against its recurrence; and

(5) any other pertinent equitable consideration. 18 U.S.C. § 3572(a).

The Commission has identified two approaches for determining the appropriate amount of a fine to impose on an individual offender. Comment is specifically invited on these two approaches as well as on any other method of establishing an appropriate fine that meets Congressional intent. The first approach emphasizes the fine as punishment; the second emphasizes the deterrent effect of the fine.

1. The Proportionate ("Ability to Pay") Approach

The proportionate approach seeks to make the fine punitive in proportion to the offender's financial resources. While a punitive fine may have some deterrent effect, this approach does not purport to maximize deterrence. Under this approach, the sanction unit value of a fine would be expressed in terms of a percentage of the offender's income or assets determined to be "available" for fine payment.

"Available income" could be defined to mean either gross income less taxes paid, or gross income less taxes and that portion of income deemed necessary for housing, food, clothing, and other essential expenses. The first definition would render a greater amount of the offender's income available for fining; the second definition constricts the amount available by permitting the offender to protect a greater share of income from exposure to a fine. The choice of the appropriate technical definition requires resolution of a much more fundamental question about the use of the fine: how punitive is it intended to be?

Choosing the first definition would arguably permit a court to fine an offender to the extent of depriving him/her of all assets and income, including home and most basic possessions. This option affords the court the greatest opportunity to make the fine a truly punitive sanction. The more assets or income that an offender is permitted to shield from exposure to a fine, the more diluted the potential punitive impact of a fine becomes. The Commission invites public comment on whether an offender should be permitted to protect some portion of income or assets from a fine and, if so, which ones and to what extent.

Under either choice, the value of one sanction unit could be expressed, for example, as one percent of the offender's available annual income. Although the real dollar amount of the fine could differ between two offenders convicted of the same offense, the fine would have the same punitive "sting" on both of them in proportion to their respective financial resources. Any restitution obligation, on the other hand, would have to be paid in full regardless of the offender's income; if the court has to choose between imposing financial "suffering" on the offender or the victim, the guideline would direct it to impose the pain on the offender.

Proponents of basing a fine on the offender's resources argue that this approach would have two principal benefits: (1) the sentencing court will be able to impose a fine that actually punishes the offender to the desired degree; and (2) the offender will be able to pay the fine without imposing substantial, and often futile, fine collection burdens on the federal criminal justice system.

With respect to the first benefit, if a court imposes a fine without considering its actual impact on the offender, the fine is likely to be either excessively high or low. Excessively high fines may financially overwhelm the offender and punish unfairly in relation to both the offender's culpability and society's need to deter

COMMENT - Page 157

Chapter 6 - Part A - Fines.

Clearly the intent of the Congress in both the Comprehensive Crime Control Act of 1984 as well as the Fine Enforcement Act of 1984 was for the courts to more frequently utilize fines in sentencing. Fines have been a long overlooked means of providing just punishment to the offender.

There is one very large obstacle to the court receiving information as to the appropriate nature of when to impose a fine. It is neither in the best interest of the defendant nor his attorney to provide the court with information as to the financial background of the offender. It would be absurd to expect a highly paid narcotics-defense attorney to cheerfully direct his client to provide the court with information as to the offender's ill-gotten assets, such that an appropriate fine may be determined. Similarly, as with the issue of urinalysis, unless the Sentencing Commission elects to build in appropriate sanctions for offenders who choose to withhold this financial data, fines will continue to be ignored as a generally accepted sentencing option by the courts.

RECOMMENDATION:

Appropriate sanctions must be built into the guidelines for defendants who refuse to provide financial data.

a fine that exceeds the organization's gains is imposed. The organizations most likely to be driven into bankruptcy by the imposition of large fines might well be relatively small firms in which there is a substantial overlap between management and shareholders. If that is the case, the burden of the fine ultimately would fall on the responsible parties.

PART C - PLEA AGREEMENTS

The Commission specifically invites comment on issues relating to the role of plea agreements under the guidelines. Congress has directed the Commission to promulgate general policy statements for consideration by federal judges in deciding whether to accept or reject a plea agreement. 28 U.S.C. § 994(a)(2)(D). The legislative history of this provision reflects concern that plea agreements might be used to undermine guidelines. S. Rep. No. 225, 98th Cong., 1st Sess. 63 (1983). Policy statements are therefore needed to insure responsible plea negotiation practices that do not perpetuate unwarranted sentencing disparities.

Public comment is specifically requested on the following issues related to plea agreements.

(1) What are the appropriate limits on judicial scrutiny of plea agreements?

(2) What standards should a sentencing judge apply in evaluating whether a plea agreement is acceptable according to the letter and spirit of the sentencing guidelines?

(3) What is the impact of the Sentencing Reform Act on "charge bargaining" under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure?

(4) What is the impact of the Sentencing Reform Act on "sentence bargaining" under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure?

(5) To what extent can prosecutors and defense attorneys stipulate to the underlying facts of an offense and the offender's characteristics when such factors determine the sentencing result?

PART D - COMMUNITY CONFINEMENT AND HOME DETENTION

The Commission is considering the use of community confinement and home detention as appropriate conditions of probation or supervised release for certain offenders. Community confinement would involve a condition of supervision requiring residency in a community treatment center, restitution center, or other community residential facility, along with additional conditions such as community service, employment, and treatment. Home detention would involve conditions of supervision including a curfew, community service, employment and/or treatment, and would require the probation officer to maintain a high degree of contact with the individual

COMMENT - Page 166

Plea Agreements.

This is an area that provides an incredible amount of potential to totally circumvent whatever guidelines the Sentencing Commission chooses to formulate. At present, many defendants are sentenced under negotiated pleas to a charge which has little or no relationship to the offense behavior in question. For example, in drug offenses many defendants are given the opportunity to enter a plea of guilty to the charge of Title 21, U. S. Code, Section 843(b) (use of communication facility in reference to a drug transaction). The reality of the situation is that the offense behavior had very little to do with a telephone call but, in fact, had very much to do with the defendant who was in possession of a large quantity of a controlled substance. The court, of course, is limited as to the potential sentence (four years) that may be imposed.

Another common plea of convenience is when the defendant enters a plea of guilty to simple misdemeanor possession (Title 21, U. S. Code, Section 844). This plea of convenience restricts the court to a one-year sentence. The obvious question is should the offender in Boise, Idaho, be forced to enter a plea of guilty to a five-year felony for possession of 10 pounds of marijuana while his counterpart in Miami, Florida, is permitted a plea of guilty to a one-year misdemeanor for the same offense behavior. Clearly, the answer should be no if the Commission's goal is truly to eliminate disparity in sentencing.

RECOMMENDATION:

It would seem totally appropriate that the Sentencing Commission offered standards to the courts in terms of accepting Plea Agreements. Those standards should revolve around the following stipulations:

1) no Plea Agreement may be accepted by the court that deviates from the factual reality of the offense behavior,

2) no plea to an offense may be accepted by the court that statutorialy sets a maximum penalty that would be less than the sentence imposed under the sentencing guidelines.

Without these considerations, the door would be fully opened for Plea Agreements to be entered into in which defendants are sentenced, as is many times the case at present, under circumstances and conditions that have little or no connection to the behavior that precipitated their prosecution in federal court.

on supervision. These sanctions are described further in Sections A414 and A415, respectively.

1. As a Condition of Probation

The Commission is attempting to determine the categories of probationers for whom community confinement and home detention would be suitable sanctions. Many serious offenders will automatically be excluded from placement in a community confinement or home detention program as a condition of probation because the guidelines will not permit them to be sentenced to probation. When the guidelines do permit probation, a sentencing court may decide that community confinement or home detention affords acceptable levels of punishment or control for an offender who the court believes requires supervision but not imprisonment.

The Commission specifically invites comments on the following questions:

What purposes of sentencing might best be fulfilled through such sanctions? Which category of offenders and offenses should be eligible for those programs? What offender characteristics, e.g., a history of violent or sexually assaultive conduct, should exclude an offender from consideration for these programs? Would community residential correctional facilities and probation resources be misspent if an individual with "low risk" for recidivism was placed in such a program for punitive purposes?

2. As a Condition of Supervised Release

In conjunction with supervised release (where the offender has completed a prison term and is under supervision) other questions as to which offenders should be placed into programs of community confinement and home detention are appropriate. Because Congress intended the purpose of punishment to be fulfilled by way of the individual having served a prison term, that purpose may not statutorily be considered in determining whether to place an offender on supervised release. See 18 U.S.C. § 3583(d).

For purposes of monitoring, control, or providing rehabilitative services, however, the Commission solicits public comment in determining which of these purposes might be most appropriately fulfilled through these programs. Which categories of offenders and offenses should be eligible for placement into these programs, and which should be excluded? For example, should violent criminals who might not be placed in community confinement on probation be placed in such confinement on supervised release as a means of control and assimilation back into the community?

PART E - DETERMINING OFFENSE VALUES FOR MULTIPLE CRIMES

Comment is solicited on how to calculate the offense value for multiple crimes. How should the guidelines treat a bank robber who pistol whips three (or ten) tellers, a conman who sends 10,000 letters defrauding each recipient of $10, or a drug dealer who shoots a police officer, while endangering several others?

The Commission could resolve some fundamental issues in this area with the following basic rules:

1. Where one crime is charged (and conviction obtained), take into account only uncharged conduct that the guideline for the crime of conviction explicitly cross-references. (This rule flows from the proposed approach to modified offense sentencing in part VII of Chapter One).

2. Where the offender is convicted of several crimes that are not related, add the offense values (as determined by the guidelines) for each separate crime.

3. Where the offender is convicted of an inchoate crime and also the related completed crime, ignore the inchoate crime. (This is the traditional merger rule.)

4. If the offender, during a single course of conduct, has committed a financial crime or caused financial injury more than once, add the financial injuries (on the basis of the relevant guideline tables) to determine the total offense value for that series of crimes. Treat similarly other offenses, such as drug offenses, where guideline sentences rest upon quantities.

5. When an offender is convicted of two or more crimes arising out of the same course of criminal conduct, apply the appropriate guideline to each conviction; insofar as the conduct underlying the conviction overlaps, eliminate any overlapping offense value (using the higher offense value in case of conflict).

The rule presented below is particularly suitable for public comment:

6. If more than one offense is committed or injury results during the same course of conduct, add the offense values of the three most serious injuries or crimes (after calculating the offense values for each according to rules 1-5) and ignore the others.

If no rule is adopted limiting multiple injuries, the guidelines will produce seriously anomalous results where there are many injuries or threats of injury during the same course of conduct. A car driver, for example, who recklessly runs a busload of passengers off the road would receive 50 times the penalty imposed on a similar person who knocked a bus with only one passenger off the road; yet the underlying conduct is the same. An offender who threatened one hundred people with physical injury would receive one hundred times the punishment imposed on an offender who threatened one person. Of course, in each example the multiple injuries caused are considerably worse than the single injury and courts should increase the sentence to reflect that difference. The Commission does not believe that the sentence should rise directly in proportion to the number of victims involved. That is not because the injury to the fiftieth victim is any the less serious than the injury caused the first. Rather, viewed from a just punishment perspective, it is because one who hurts three people is already so highly culpable that injuring three more is not viewed as twice as bad. Viewed from a crime control perspective, the penalty for injuring three people is likely to be severe

enough to deter the conduct in question; a sentence twice as severe is not needed to deter injury to six.

The Commission has considered certain alternatives to Rule (6). For example, the injuries could be added up to a multiple other than three. Or, a multiplier could be used that diminishes according to a mathematical formula as the number of separate injuries increases (as with the approach taken with financial injuries and drugs).

The Commission requests comment on the proposed rules set forth above as well as suggestions regarding workable and just alternative approaches.

PART F - TREATMENT OF UNUSUAL AGGRAVATING OR MITIGATING FACTORS

The Commission requests comment on the treatment of aggravating or mitigating factors that occur only rarely but are serious concerns in the few cases where they do arise. Examples of such mitigating factors might be the presence of a serious mental disability that did not rise to the level of a successful defense, self-defense, coercion, necessity, provocation, or a criminal act done for merciful purposes, e.g., euthanasia. An example of a rare, but serious aggravating factor would be extremely barbaric behavior by the offender.

The Commission has identified several options for considering these factors. One would be to promulgate a guideline expressly permitting the court to go outside the guideline range where the factor was demonstrated to be present. The guideline could establish a general standard of proof, or specific standards for each circumstance. If the court determined the factor present, the guideline could establish a certain range or amount by which the sentence could be adjusted. Another approach would be to establish separate Chapter Three adjustment multipliers for each factor.

The Commission invites comment on (1) what specific unusual factors should be considered so compelling as to warrant special treatment; (2) the standards of proof that should govern the court's inclusion of any such factor in sentencing; and (3) the method by which the Commission should permit courts to take these factors into consideration.

CONCLUSION

As its work has progressed, the Commission has become increasingly aware of the difficulties of foreseeing and capturing in a single set of guidelines the vast range of human conduct likely to be relevant to a sentencing decision. For this reason, the Commission has concluded that the guideline writing process is a continuing one, to be carried on with progressive changes over a period of many years, as Congress contemplated in establishing a continuing Commission. Congress realized, and the Commission agrees, that greater knowledge and experience can only improve the guidelines over time.

The Commission will collect and carefully analyze public response to these guidelines. After the guidelines become effective, the Commission will carefully

Comment - Page 167

Deterimining Offense Values for Multiple Crimes.

The examples provided on pages 167 and 168 clearly point out some of the problems and difficulties in imposing appropriate punishment and sanction for those who commit offenses against multiple victims. It is known that the Commission has in the past rejected a system which enhances sentences in a direct proportion to the number of victims involved. It has rather considered a form of punishment that provides for a multiplier that deminishes according to a mathematical formula as to the number of separate injuries and/or victims. Clearly this latter choice is the more appropriate and practical.

RECOMMENDATION:

Adopt a system of progressive, but dimishing sanctions, as the number of victims increases.

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12-3-8

**STATEMENT OF JUDGE EDWARD R. BECKER,
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
BEFORE THE UNITED STATES SENTENCING COMMISSION
DECEMBER 2, 1986**

My name is Edward R. Becker. I am a Judge of the United States Court of Appeals for the Third Circuit and have served on that court for almost five years. I previously served for over 11 years as a Judge of the United States District Court for the Eastern District of Pennsylvania. As the Commission knows, the Judicial Conference of the United States has asked the Chief Judge of each circuit to designate one circuit and one district judge from each circuit to represent the views of the circuit before the Commission. I was designated by Chief Judge Ruggero J. Aldisert as the Circuit Judge representative for my circuit. With me today is Judge Maryanne Trump Barry of the District Court for the District of New Jersey who is the designated District Judge representative. Prior to her elevation to the bench Judge Barry was First Assistant U.S. Attorney for the District of New Jersey.

This statement represents Judge Barry's views as well as my own. While there has not been time to submit this draft for reaction by the judges of the circuit, in view of the written and oral observations concerning the draft guidelines that Judge Barry and I have received from judges within the Third Circuit concerning their reactions to the draft guidelines, we are confident that the judges of

the circuit concur in the general comments contained in Part II.

I. INTRODUCTION AND OVERVIEW; SUGGESTION THAT COMMISSION ASK THE CONGRESS FOR AN EXTENSION OF TIME FOR SUBMISSION OF GUIDELINES AND FOR MODIFICATIONS IN THE ENABLING STATUTE

Judge Barry and I note at the outset how impressed we are that the Commission, faced with such an enormous challenge, has produced such a formidable product and such an excellent framework for discussion and development in such a short period of time. It is plain that the Commission and its staff have performed herculean labors, working under the hydraulic pressures of time and the staggering burden of the task. Notwithstanding these efforts, it is apparent that the overwhelming reaction to the draft guidelines has been negative. Judges in particular have generally pronounced the draft guidelines to be flawed in a number of important particulars.

The judges who have preceded me before the Commission have asserted that the guidelines are: (1) unduly mechanical and rigid; (2) extremely complex and difficult to apply; (3) too often inappropriately harsh; (4) consequently likely to be burdensome upon prison facilities; (5) inevitably productive of vastly increased workloads for both trial and appellate courts; (6) likely to discourage guilty pleas hence to cripple the operation of the federal judiciary; (7) likely to elevate the role of the prosecutor over that of the judge; and (8) likely to create their own brand of disparity and injustice. Most importantly, and the cause of much of the foregoing, is concern that the mechanical formula that lies at the

heart of the guidelines is a poor substitute for the exercise of judicial discretion in dealing with the infinite variety of offenses and offenders that challenges and vexes all who attempt to administer justice.

Judge Barry and I endorse these criticisms, but in so declaring, we acknowledge that they are, in reality, directed only in part to the Commission itself, because so much of what the Commission has produced is mandated by the provisions of the Comprehensive Crime Control Act of 1984 and subsequent amendments to the Act. Because we are optimistic that there will yet be revisions in the governing statute, we feel justified in raising those criticisms here. Indeed the very first point we wish to make is that we believe it important that in January, 1987, the Commission ask the Congress to amend the statute in those areas that make it extremely difficult to produce workable guidelines. Congress has already amended the statute once, and it can do it again, expeditiously.

At all events, we believe that the sophistication of the task before the Commission is so great that the public interest will not be served by the submission of the proposed guidelines to the Congress in April 1987. Rather we believe that the Commission should report to the Congress its progress to date, transmit its latest working draft, and request of the Congress a minimum of an additional six months and preferably an additional year within which to forge a new set of guidelines that will accommodate the serious objections that have been presented to the present draft guidelines. The Congress cannot help

but be pleased by the Commission's progress to date and will, we are confident, understand that time is necessary to produce the kind of product that the public interest demands.

The Commission has heard the above-mentioned objections that we too will make many times before, hence, we will expound upon them only briefly. Thereafter, in an effort to be of maximum assistance to the Commission, we will devote the bulk of our presentation to four areas or approaches that seem not to have been made or stressed by prior presenters.

First, we will present case studies, i.e., we will share with the Commission the results of parallel non-guideline and guideline analyses of recent presentence investigation reports that have resulted in actual sentences. These studies will demonstrate at once the complexity, difficulty of application, and undue harshness of the draft guidelines. Second, we will voice our concern about the need in the guidelines setting for application of more rigorous evidentiary rules than those that have long governed sentencing hearings. Third, we will discuss problems in the appellate review area. Fourth, speaking only for myself, we will identify some serious concerns that have been expressed about the constitutionality of the present structure and composition of the Sentencing Commission under the separation of powers principle. If those concerns are justified - and we believe it inappropriate as sitting judges to take a position in this regard - the inevitable, constitutional challenge may possibly result in invalidation of the Commission's work at a point when

thousands of defendants have been sentenced. Because that is a daunting prospect indeed, and because it is not too late for Congressional correction of any such defects, we believe it appropriate to place this matter in the open and on the record now. Judge Barry and I will conclude by addressing the specific items in the draft guidelines on which the Commission has invited comment.

II. GENERAL COMMENTS ON THE DRAFT GUIDELINES

A. Effect on Guilty Pleas and Cooperation

Maintenance of current federal court dockets within Speedy Trial Act constraints, given the present complement of judicial manpower, absolutely depends upon a high percentage of guilty pleas. The present percentage is approximately 90%. The maximum sentence reduction of 20% provided by the guidelines for acceptance of responsibility by means of a guilty plea is grossly inadequate to maintain anywhere near the current level of guilty pleas. Because there is little incentive to plead guilty under this system and because, as a result, virtually everyone will go to trial, the system will choke to death.

We also believe that too little credit may be given for cooperation. Because cooperation can only be rewarded up to 40% there is insufficient incentive to cooperate and prosecutors will be forced either to grant immunity or to forego cooperation. We cannot recoil from the fact that successful law enforcement depends upon the willingness, for whatever motive, of those involved in criminal

activity to come forward. Neither can we escape the fact that under the present system the preeminent motivation is the reward of little or no incarceration. If under the guidelines this reward must be withheld, cooperation of any type and most particularly that critical cooperation that is now rendered at considerable danger to the individual will, absent immunity, simply dry up.

B. Proliferation of Proceedings

The modified real offense sentencing model requires findings by the district court on a plethora of facts required to calculate the various harm values and to make other required adjustments to the sentence. The amount of judicial time that will be consumed in developing a record and making these findings promises to be staggering. Even where the case has gone to trial and verdict, few of these necessary findings will have been subsumed in the verdict, much less explicated by the jury in its verdict. The number of required findings should be reduced.

C. The Weights Accorded Additional Harm Values

The additional sanction units imposed upon a defendant under certain circumstances seem excessive. Indeed, a number of factors that the guidelines use to enhance the base value of the offense, those relative to the type of injury or property loss to the victim, result in enhancement for a period almost as long as that imposed for the base offense. Some reappraisal seems in order. Moreover, the extremely high harm values for drug couriers could result in a young person who agreed to carry a drug on the spur-of-the-moment receiving

several years imprisonment on the same basis as the hardened drug criminal who was convicted of carrying drugs. Separate and apart from the effect on the individual, this could have a devastating effect upon plea bargains and cooperation with the government. See also discussion at III D, infra.

D. Impact on the Prison and Probation Systems and on the Judge

We recognize that the translation table from sanction units to jail time is as yet tentative but, unless there is a very substantial change, it appears that most defendants will go to jail, unduly taxing the already vastly overcrowded (50% over capacity) capacity of the U.S. Bureau of Prisons. Conversely, the Federal Probation System, which has had such enormous success over the past 20 years, will become an anachronism. Probation will be available in but few cases and the discretion of the judge to place an offender on probation will be virtually emasculated. Indeed, the sentencing judge will be primarily relegated to the role of an accountant, charged with the mechanical computation of sentence and visited only with a minimal discretion within a guideline range.

E. Problems with the Preponderance Standard

The guideline structure enables the imposition of a heavily enhanced jail sentence which springs essentially from bare preponderance findings. Where a prosecutor does not have sufficient evidence to prove conduct associated with but apart from the offense itself, beyond a reasonable doubt, he or she may nonetheless obtain a sentence of many years in jail that is the product of fact findings

concerning related offense conduct (not separately indicted) that have been made by a bare preponderance of the evidence. This seems unfair.

F. Fact Finding Role of Probation Officers; Need for Additional Personnel

The fact finding role of probation officers will be vastly expanded. Unless significant additional funding is made available for the probation service, the new system cannot function.

G. Quantification of Harm Values; The Need for Additional Discretion

Because of the detailed ratcheting of the guidelines, the judge is given inadequate leeway in making extremely subtle and difficult distinctions relative to sentence enhancement which have enormous consequences. The difference between "extreme psychological injury" and "significant psychological injury" or "severe," "permanent," and "serious" bodily injury is elusive at best. Moreover the property table of monetary values is much too stratified and wider ranges would seem in order. It would seem far preferable to reduce the number of categories and permit the sentencing judge to select within a range, specified by the Commission, the number of points to be added (or subtracted) instead of using the precise point value designated by the Commission.

H. Judicial Statements of Reasons

We do not think a judge should be required to state specific reasons for imposing a particular sentence within the guideline range. Such statements will be nothing more than identification of factors already taken into account in the calculation of the point score and

will be yet more grist for the appellate mill.

III. GUIDELINE V. NON-GUIDELINE SENTENCE SURVEY RESULTS

A. Difficulty in Scoring

The material set forth in the succeeding pages, prepared by U.S. Probation Officers in the Eastern District of Pennsylvania, demonstrates several points. First it demonstrates the complexity of the guidelines in terms of the enormous difficulties that will be encountered in "scoring" them. In each of the six cases attached, all of which have proceeded through actual sentencing, the presentence investigation (PSI) report was submitted to the staff of the Sentencing Commission which furnished the "correct" guideline score (with the exception of one case in which the Commission was unable to compute a score on the basis of the PSI). The reports were then submitted to eight experienced U.S. Probation Officers with instructions to compute the number of sanction units under the guidelines. The disparity between the Commission score and the scores of the eight participants in the exercise are startling and disturbing.

The results of the exercise obviously mean that an enormous amount of training will be required of probation officers as well as judges -- a major task in view of the tremendous responsibilities of

these already overburdened officials.[1] Indeed we suggest that some consideration be given to the creation of a cadre of Commission certified scorers within the probation departments, even though that approach is less than satisfactory. Beyond this, however, the exercise suggests that even with rigorous training, given the mandatory effect of these extremely complex guidelines, the guidelines will create their own disparity as well as injustice in specific cases. We have attempted to identify the source of the disparity demonstrated in this exercise. The comparisons follow.

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1. By way of contrast, reference should be made to the 1982 General Accounting Office study of the U.S. Parole Commission guidelines in which the GAO concluded that the hearing examiners made errors in applying the guidelines in 53% of the cases studied. Senate Commission on the Judiciary Comprehensive Crime Control Act of 1984, S. Rep. 98-225, 98th Cong., 1st Sess., reprinted in 1984 U.S.C. Cong. & Admin. News 3182, 3238 (citing General Accounting Office, Federal Parole Practices: Better Management and Legislative Changes Are Needed, Report No. B-133223 (1982)). It bears noting that the primary job of hearing examiners consists of computing parole dates under the guidelines. Hundreds of district courts applying vastly more complicated sentencing guidelines are likely to err at a far greater rate.

A COMPARISON OF COMMISSION COMPUTED GUIDELINE SCORES WITH

GUIDELINE SCORES COMPUTED BY EASTERN PENNSYLVANIA PROBATION OFFICERS

(On Cases Recently Sentenced by the Eastern Pennsylvania Court)

	Computation of Commission's Guideline Score	Eastern Pennsylvania Probation Officer Guideline Score							
		Officer #1	Officer #2	Officer #3	Officer #4	Officer #5	Officer #6	Officer #7	Officer #8
CASE #1 (Tax Evasion)	28	66	17	28	28	28	35	70	35

CASE FACTS: Defendant is a 50-year-old white male, who pled guilty to four counts of tax evasion. Defendant failed to report income totalling $85,417.00. The total tax due for this income was $37,682.00.

MAJOR PROBLEMS IN SCORING GUIDELINES: 1) How to treat criminal history offenses, convictions and sentences that occur subsequent to the instant offense, but prior to sentencing on the instant offense; 2) How to apply the 20 percent reduction for acceptance of responsibility.

CASE #2

	Computation of Commission's Guideline Score	Eastern Pennsylvania Probation Officer Guideline Score							
		Officer #1	Officer #2	Officer #3	Officer #4	Officer #5	Officer #6	Officer #7	Officer #8
CASE #2 (Counterfeit Securities)	79	126	450	79	63	143	132	143	132

CASE FACTS: Defendant is a 49-year-old white male, who pled guilty to one count of conspiracy to transport counterfeit securities in foreign commerce. This was a major international conspiracy, involving multiple actors and over five and one-half million dollars of counterfeit securities.

MAJOR PROBLEMS IN SCORING GUIDELINES: 1) Calculating the dollar amount of the property lost; 2) Determining what multipliers (if any) should be applied to the defendant's role in the offense; 3) Computing the amount of time the defendant spent in custody for prior convictions.

CASE #3

	Computation of Commission's Guideline Score	Eastern Pennsylvania Probation Officer Guideline Score							
		Officer #1	Officer #2	Officer #3	Officer #4	Officer #5	Officer #6	Officer #7	Officer #8
CASE #3 (Child Pornography)	60	60	48	60	39	72	60	72	60

CASE FACTS: A 44-year-old male doctor (pediatrician) pled guilty to one count of a two-count indictment, charging him with knowingly using minors to produce visual depictions of minors engaged in sexually explicit conduct, and with transporting these pictures in interstate commerce. Approximately, 3400 pictures of nude minor males were discovered in the defendant's residence; however, there was no evidence that the doctor personally had direct sexual contact with these youths or that he abused his position as a doctor in the commission of the offense.

MAJOR PROBLEMS IN SCORING GUIDELINES: 1) Determining the harm done; 2) Deciding if the 20 percent reduction applied for acceptance of responsibility.

CASE #4

	Computation of Commission's Guideline Score	Eastern Pennsylvania Probation Officer Guideline Score							
		Officer #1	Officer #2	Officer #3	Officer #4	Officer #5	Officer #6	Officer #7	Officer #8
CASE #4 (Bank Larceny)	13	72	2060	16	136	121	250	121	250

CASE FACTS: The defendant is a 27-year-old white male, who pled guilty to one count of bank larceny from an indictment that also charged conspiracy and aiding and abetting. Briefly, the defendant walked into a bank and said, "Put the money in the bag." He then walked out with $1,900.00 in the bag. The defendant has several other bank robbery charges pending.

MAJOR PROBLEMS IN SCORING GUIDELINES: 1) Realizing that pending charges are irrelevant; 2) Determining actual harm (i.e., bank robbery or bank larceny); 3) Determining if the post-offense adjustment applied; 4) Determining if substance abuse points should be applied; 5) Accurately calculating an extremely complex criminal history score.

CASE #5

	Computation of Commission's Guideline Score	Eastern Pennsylvania Probation Officer Guideline Score							
		Officer #1	Officer #2	Officer #3	Officer #4	Officer #5	Officer #6	Officer #7	Officer #8
CASE #5 (Bank Robbery)	100	91	60	113	216	94	122	94	122

CASE FACTS: This 24-year-old white male pled guilty to one count of a two-count information, charging him with bank robbery and aiding and abetting. Although only charged with bank robbery, the defendant and his codefendant stole a car which they used in the commission of the robbery, and they also assaulted the owner of the vehicle. During the bank robbery, the defendant stayed in the car while the codefendant entered the bank with a firearm and threatened to kill a teller. The codefendant then left the bank with $2,354.00.

MAJOR PROBLEMS IN SCORING GUIDELINES: 1) Determining which harms should be added to the base offense; 2) Determining if psychological harm was done to the teller who missed five days of work; 3) Defining the defendant's role in the instant offense and appropriately applying the adjustment (multiplier); 4) Again, the criminal history in this case was extremely confusing and difficult to compute.

CASE #6

	Computation of Commission's Guideline Score	Eastern Pennsylvania Probation Officer Guideline Score							
		Officer #1	Officer #2	Officer #3	Officer #4	Officer #5	Officer #6	Officer #7	Officer #8
CASE #6 (RICO)	Could Not Be Determined Based on PSI	1344	13,572	Unable to Determine	165	817	345	81	345

CASE FACTS: The defendant is a 46-year-old white male, who was found guilty by a jury of two counts of racketeer influenced and corrupt organization, distribution of methamphetamine, and two counts of possession with intent to deliver methamphetamine.

MAJOR PROBLEMS IN SCORING GUIDELINES: 1) Determining if there is or is not a base offense value for RICO; 2) Determining how many times to apply the calculation for multiple RICO counts; 3) Calculating the quantity of drugs to be included in the computations; 4) Transferring pounds of PCP into doses of methamphetamine to compute the scope of the offense; 5) Guidelines have an incorrect referral in their index to Section E213. This should refer to Section E211; 6) Lack of clarity as to the appropriateness of including prior convictions in the criminal history score in which the defendant was without legal representation.

The problems identified in the Probation Department exercise are corrorborative of our general comments on the guidelines, supra, the calculation of harm values and of the various multipliers under the complex guidelines scheme is most problematic.

B. The Harshness of the Guidelines

Next we have compared the sentences actually imposed in these six cases, all of which are of recent vintage, with the minimum and maximum sentences according to the tentative guidelines. In order to evaluate the effect of real time served in the case of prison sentences, we have also calculated the amount of time that the defendant sentenced under the present system could be expected to serve given the U.S. Parole Commission guidelines. Unless the translation scale from sanction units to jail time is drastically changed, the results may also be considered startling, reflecting significantly increased sentences under the guidelines. We seriously doubt that Congress intended so radical a change, particularly given its express concern about the burdens on the prison system. The comparisons follow.

PART II

A COMPARISON OF ACTUAL SENTENCES IMPOSED IN THE EASTERN DISTRICT OF PENNSYLVANIA WITH SENTENCES AS DETERMINED BY PROPOSED GUIDELINES

	Actual Sentence Imposed	Minimum Sentence According To Guidelines	Maximum Sentence According To Guidelines
CASE #1* (Tax Evasion)	5 years' probation 1300 hours of community service Restitution to IRS	16 months' incarceration (real time)	22 months' incarceration (real time)
CASE #2* (Counterfeit Securities)	5 years' custody of Attorney General 3 years' probation (Parole Guidelines: 40-52 months)	5 1/2 years' incarceration (real time)	6 years-10 months' incarceration (real time)
CASE #3* (Child Pornography)	5 years' probation $50,000 fine 1500 hours of community service	4 years' incarceration (real time)	5 years' incarceration (real time)
CASE #4* (Bank Larceny)	7 years' custody of Attorney General 5 years' probation (Parole Guidelines: 64-78 months)	4 months' incarceration (real time)	10 months' incarceration (real time)
CASE #5* (Bank Robbery)	5 years' custody of Attorney General (Parole Guidelines: 36-48 months)	7 years' incarceration (real time)	8 years-8 months' incarceration (real time)

* NOTE: Description of offense and offender provided in PART I.

C. The Fate of Successful Probation Cases

We have set forth above our dismay as to the apparent relative unavailability of the probation option under the guidelines. In order to determine if our concern is well placed, we searched out a half-dozen "border line" cases, i.e., cases in which the "in-out" decision was a close one but which had resulted in sentences of probation which were successfully completed. We found that these probationers, all of whom have successfully adjusted and have not recidivated, would all have received significant terms of imprisonment under the tentative guidelines. While we understand that the guidelines reflect in part an intention by the Congress that retribution play a greater part in sentencing than may have been contemplated by the sentencing judges in these cases, we do not believe that Congress intended such a radical alteration in the criminal justice scheme and the concomitant effect on the individual. The chart follows.[2]

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2. The foregoing statistics were prepared under the direction of H. Richard Gooch, Chief U.S. Probation Officer, and Thomas R. Maher, Program Development Coordinator of the U.S. Probation Department for the Eastern District of Pennsylvania.

A COMPARISON OF ACTUAL SENTENCES IMPOSED

WITH MINIMUM GUIDELINE SENTENCES

ON CASES PLACED ON PROBATION AND SUCCESSFULLY COMPLETING PROBATION

IN THE EASTERN DISTRICT OF PENNSYLVANIA

CASE #1

Defendant was a 22-year-old white female, who pled guilty to conspiracy to manufacture, distribute, and possess with intent to distribute methamphetamine. She was "aware" that her friends were involved in a major drug-manufacturing operation, and she was present during discussions and planning. No direct involvement. No prior record.

Actual Sentence Imposed	Mandatory Minimum Sentence Under Sentencing Guidelines
2 years' probation	2 1/3 years' imprisonment (real time)

Probationer successfully completed her term of supervision in February 1986. She remained crime free, and, for the most part, drug free during her supervision period. She was involved in therapy throughout her supervision to help deal with problems caused by her relationship with her boyfriend (who was the source of her conviction).

CASE #2

Defendant was a 31-year-old black female, who pled guilty to distributing a large amount of methamphetamine on two occasions and carrying a firearm during the offense. Subsequently provided extensive assistance to the government. No prior convictions.

Actual Sentence Imposed	Mandatory Minimum Sentence Under Sentencing Guidelines
5 years' probation	6 1/2 years' imprisonment (real time)

The probationer successfully completed five years of uneventful supervision in the community in August 1986. Throughout the period of supervision, she remained crime free and drug free, while maintaining steady full-time employment and supporting her children.

CASE #3 This individual was a 32-year-old white male, who pled guilty to one count of Title 18, USC, Section 1962. In effect, this individual was a "worker" in a large-scale gambling operation. No prior record.

Actual Sentence Imposed	Mandatory Minimum Sentence Under Sentencing Guidelines
5 years' probation $10,000 fine	1 year imprisonment (real time)

Although this individual is still on probation, there have been no incidents since sentencing in October 1985. This probationer has maintained steady employment in a responsible position with the City of Philadelphia, and he continues to support his dependants and make regular payments on his $10,000 fine.

CASE #4 This probationer was a 29-year-old white male, who was found guilty of two counts of distributing a relatively small amount of methamphetamine. He has one prior conviction (probation) and some substance abuse history.

Actual Sentence Imposed	Mandatory Minimum Sentence Under Sentencing Guidelines
4 years' probation (Drug aftercare condition added later)	2 years and 2 months' imprisonment (real time)

This probationer successfully completed his supervision term in September 1984. During the probation period, he overcame a drug problem through therapy and also secured full-time employment. Unfortunately, near the end of the probation term, he again became unemployed, and he and his family were back on public assistance when the case closed.

CASE #5

This defendant was a 29-year-old white female, who had recently become a widow. She was found guilty after trial, in 1978, of distributing a very large amount of cocaine on a single occasion. No prior convictions, but a history of some substance abuse.

Actual Sentence Imposed	Mandatory Minimum Sentence Under Sentencing Guidelines
5 years' probation $5,000 fine Psychiatric treatment	12 years' imprisonment (real time)

This individual attended college during her probation term and was remarried. She graduated from Villanova University, in 1982, with a 3.79 grade point average and was awarded a medal for her excellence in management studies. She went on to become a systems analyst for a major accounting firm, earning an excellent income which she used to pay the Court-ordered fine in full. Her probation officer states that, throughout her probation period, she was a model client who moved from "one success to another."

CASE #6

This defendant was a 36-year-old white male, who, in 1983, pled guilty to three counts of mail fraud as a minor actor in a large-scale auto accident insurance fraud. The subject only made $1,200 for his involvement. He has a prior record and some substance abuse history.

Actual Sentence Imposed	Mandatory Minimum Sentence Under Sentencing Guidelines
5 years' probation $1,200 restitution Drug treatment	4 months' imprisonment (real time)

This probationer successfully completed his term of supervision without incident. He maintained full-time employment throughout the period, supported his family and paid his restitution in full.

D. Conclusion

In our view, the lesson of these exercises is that the Commission must structure the guidelines so that significantly more discretion is vested in the sentencing judge, including with respect to the fundamental "in-out" decision. We believe that the Commission should widen the range for a given offense both in terms of allowing the district court wider discretion in assessing, enhancing and reducing sanction values and in selecting the appropriate sentence along the range. Additionally, we believe that the Commission should recommend to the Congress that it amend the statute to widen the permissible guideline range, hence the ultimate discretionary range, of a sentencing decision within the [widened] guideline range by as much as 50%. Such additional leeway might eliminate much potential injustice. The premise of the Commission's system is that there is a correct sentence in every case. We believe that this premise is fundamentally flawed. Rather we believe that there is a range of correct sentences in every case, and that what the guidelines should do is to give the judge wide discretion within that range without being obliged to quantify the significance to be ascribed to each factor.

IV. SENTENCING HEARINGS: THE EVIDENTIARY RULES AND THE FACT FINDING PROCESS

It is plain that the critical facet of the sentencing process under the guidelines is the determination of modified real offense behavior beyond the offense of conviction. As we have noted, facts

found by a mere preponderance of the evidence may convert what would otherwise be a probationary term into a sentence of incarceration ranging anywhere from a modest term to decades in jail. The mere preponderance standard is the lowest standard by which facts may be found in federal court. A preponderance finding is, a fortiori, the least reliable finding.

Under Fed. R. Evid. § 1101(d)(3), the rules of evidence do not apply in the sentencing context. The inapplicability of evidentiary rules under the present system has not been a cause of concern because of the virtually unlimited discretion vested in the sentencing judge to balance things out. But under the new system, each and every fact finding may result in many years of real sentence time. Where every judicial finding and the evidence upon which it is based implicates so serious a liberty interest, and where the finding may be predicated on the lowest standard of any cognizable judicial finding, we do not believe that our system can countenance the making of those findings without application of the more rigorous rules embodied in the Federal Rules of Evidence. The offense of <u>conviction</u> will have been predicated upon evidence admissible under the more rigorous federal rules. Indeed, even a misdemeanor conviction, which carries minimal or no jail term, requires application of the federal rules. Therefore, proof by a mere preponderance of enhancement factors which can result in decades of imprisonment should at the very least require application of the Federal Rules of Evidence, and we believe that the Commission should so recommend.

An alternative would be to increase the standard of proof from mere preponderance to "clear and convincing," but we think that to be the less desirable course. Our concern as to the necessity of more rigorous rules of evidence than under the present system relates not only to the obvious importance of the relevancy and hearsay rules but also to the authentication and opinion rules. The latter would appear to be especially significant in insuring the integrity of the proceedings and in evaluating harm values and other related offense conduct.

We are aware that making the Federal Rules of Evidence applicable to sentencing hearings would render those hearings more time consuming and burdensome. However, for the reasons set forth above, the prospect of fact finding without them is disquieting. It thus bears repetition that the fact-finding process should be simplified by reducing the number of factors that must be found and by giving more discretion to the sentencing judge.

Another recommendation in this area that we believe the Commission should seriously consider is the use of the jury to make critical fact findings that bear upon sentencing. As we have seen, these findings may be as important as those of guilt or innocence. While the practice of submitting special interrogatories to the jury has been frowned upon in criminal cases in the past, see, e.g., United States v. Desmond, 670 F.2d 414 (3d Cir. 1982), we believe that this device should now be considered, both as a valuable truth finding and efficiency device under guideline sentencing. Thus, in appropriate

instances, subject to the discretion of the district court, special interrogatories could also be submitted along with the determination of guilt or innocence for the charged offense, inquiring as to such matters as type of contraband, the amount of loss or degree of injury, etc., and perhaps even relative culpability of the defendants. We do not suggest that the defendant would have a right to submission of such questions to the jury, but the defendant may desire it and the court may think it preferable to have the jury make such determinations. We also believe that in exceptional cases consideration might be given to a bifurcated second deliberation (after guilty verdict) on such questions.

V. APPELLATE REVIEW

18 U.S.C. § 3742 provides that either the defendant or the government may seek review in the Court of Appeals, inter alia, if a sentence: (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Commission; or (3) was imposed outside the guideline range. That the workload of the Courts of Appeals will be increased by some 25 to 30 per cent seems ineluctable, and, in the absence of a substantial increase in judicial manpower, which seems highly unlikely in the short run, there will be nothing that the already overburdened Courts of Appeals judges can do but work even harder. The only hope for relief would appear to lie in simplifying the guideline system and affording more discretion to the sentencing judge, and we have urged that these measures be effected.

In addition, we believe that clarification should be given to two provisions in the statute. The first is to the word "incorrect" in § 3742, which, if given its literal meaning, seems heavy handed in terms of appellate oversight of the district courts. The second is "unreasonable" as it appears in in 18 U.S.C. § 3742(e). That section provides that:

> If the Court of Appeals determines that the sentence -
> (2) is outside the range of the applicable sentencing guideline and is unreasonable, it shall state specific reasons for its conclusions and -
>
> > (A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall be set aside the sentence and -
> > (i) remand the case for imposition of a lesser sentence;
> > (2) remand the case for further sentencing proceedings; or
> > (3) impose a lesser sentence;
> > (B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and -
> > (i) remand the case for imposition of a greater sentence;
> > (ii) remand the case for further sentencing proceedings; or
> > (iii) impose a greater sentence; or
>
> (3) was not imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, and is not unreasonable, it shall affirm the sentence. (Emphasis added.)

No clue has been given by the Congress as to the meaning of "unreasonable" except for the provisions of § 3742(d)(3) which provide:

> Upon review of the record, the court of appeals shall determine whether the sentence -
> . . . .

> (3) is outside the range of the applicable sentencing guideline, and is unreasonable, having regard for -
> (A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and
> (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).

We must begin with cognizance of the fact that the only basis on which the district court can sentence outside of the guidelines is that provided in 18 U.S.C. § 3553(b):

> Application of Guidelines in Imposing a Sentence - The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.

In view of this provision, it would seem that correcting an outside-guidelines sentence would depend upon whether the sentencing court erred as a matter of law (or was clearly erroneous or abused its discretion -- the scope of review seems uncertain) in finding the presence of an aggravating or mitigating circumstance that was not adequately taken into consideration by the Commission in formulating the guidelines and that that circumstance should result in a sentence different from that described. The making of such a determination -- of adequate consideration vel non -- does not seem to involve the notion of "unreasonableness" which is the touchstone for review under § 3542(e), but rather a more exacting standard. The contours of "unreasonableness" seem rather vague and undefined and it is far from

clear how the Courts of Appeal are to determine that question. If what is intended is simply abuse of discretion review of a discretionary decision based on a judgment as to whether the sentence is "out of line," we can live with that as at least one area of discretion built into the system. But there are better places to build in discretion and it therefore seems that clarification from either the Commission or the Congress as to the meaning of § 3742 is in order.

VI. CONSTITUTIONALITY OF THE COMMISSION - THE POTENTIAL SEPARATION OF POWERS PROBLEMS

We respect the fact that the Commission is proceeding in a responsible manner according to its charter from Congress. However, in view of the solemn and awesome duties imposed upon it, we believe that the Commission should seriously weigh the concerns that have been expressed in various quarters about the constitutionality, under the separation of powers principle, of the Commission's structure and organization, and that it should report to the Congress if it entertains serious doubts about its own validity.[3] This is because it would be most unfortunate if, after thousands of defendants had been sentenced to terms of incarceration under the guidelines, the guideline scheme was declared unconstitutional. There can be no doubt

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3. The matter has been discussed in the legal press, see, e.g., National Law Journal, issue of December 8, 1986, and in several law journals. We are aware also of a new and major piece that will soon be forthcoming in a major law journal.

that a constitutional challenge will be mounted soon after guideline sentencing begins. We therefore submit that, to the extent that the Commission believes that the scheme is flawed, it should ask Congress promptly to eliminate the vitiating factor or factors even if that means reconstituting the Commission or remitting the Commission's work product to Congress for its own de novo consideration.

The essence of the potential constitutional problem anticipated by some lies in the following facets of the Commission's structure and membership. First, the Commission is a non-representative body whose members are removable by the President, but which is in effect legislating mandatory sentencing decisions which will replace the individual decisions of judges. Second, three sitting judges have been appointed to serve on the Commission with members of the executive branch. Moreover, one of the judges, appointed by and removable by the President, has received a stipend for some period of the Commission's existence in addition to his judicial salary (i.e., the difference between a district and a circuit judge's salary), and as district judges are appointed to the Commission in the future this will again occur.

Under the Sentencing Reform Act, the sentencing guidelines will indicate whether incarceration, probation or a fine is appropriate for a particular crime and offender characteristic. The guidelines will also specify the length of incarceration an imprisoned defendant should serve within a range, the maximum of which may be no more than 25 per cent greater than the minimum. The seven member

commission that decides the sanction that an offense merits is nominally in the judicial branch, but its members, as noted, are both appointed and removable by the President. After promulgation by the Commission, the guidelines must sit before Congress for 180 days before they go into effect. Only an Act of Congress, however, may block the implementation of the guidelines or change one of its terms.

Section 3553(b) of Title 18 provides that a sentencing "court shall impose a sentence of the kind, and within the range" established by guidelines developed by the Sentencing Commission "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." Presumably such an omission will not be too frequent. Therefore, the sentencing guidelines established by the Commission will determine the sentence actually imposed on a person convicted of a federal crime. A judge who disagrees with the guidelines themselves, and not with their application to the particular case, may not deviate from the recommended sentence. Although a judge may feel that a particular sentence is too harsh for a person convicted of a certain crime, he will be required to impose that sentence if the offender fits within the Commission's classifications. Because of the extent to which they bind judges, and because of the liberty interests they so immediately affect, it has been argued that those guidelines may be "substantive law."

It is also arguable that the scheme just described raises

constitutional non-delegation problems.[4] Although the non-delegation doctrine has been moribund since the 1930's, several recent statements in Supreme Court opinions suggest that it may be revived. See, e.g., Justice (now Chief Justice) Rehnquist's concurring opinion in Industrial Union Dep't. v. United States, 448 U.S. 607, 675 (1980). If a revived non-delegation doctrine were applied to the Sentencing Commission, it is argued that it is conceivable that the Commission's

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4. Two rationales have been advanced to justify agencies' engaging in lawmaking: (1) where the choices are technical; and (2) where administrative action is necessary for rules to keep up with rapid technological and other developments. In permitting Congress so to delegate its powers, the courts have recognized that some matters are so detailed that they might not be enacted if Congress were forced to develop them. In many instances, the creation of an agency to regulate a particular industry itself represents the type of policy choice that Congress must make.

   The enactment of sentencing guidelines, however, is neither technical nor fast-changing. The Sentencing Commission is instead legislating over fundamental questions concerned directly with citizens' liberty. This distinguishes the Commission's work from the rules promulgated by other executive or administrative bodies, which have been permitted to assume the function of applying the Congressional mandate. (But see United States v. Grimaud, 220 U.S. 506 (1911), holding that Congress could delegate to an administrative agency the power to determine whether specified conduct could be criminalized.)

   Although the Commission's organic statute does list a number of factors which the Commission may consider in establishing guidelines, it need only consider these factors "to the extent that they do have relevance" and may take other factors into account. The Commission is not bound by prior average sentences or by the legislatively established sentencing grade for an offense. Indeed, the only substantive restraints on the Commission's discretion not already written into law are that the guidelines impose an incremental penalty when the defendant is convicted of multiple offenses and not impose a consecutive sentence for conspiracy and the underlying substantive offense. This power, exercised by a seven member Commission, might be said to offend the non-delegation doctrine's requirement that the legislature make the difficult policy choices.

organic statute would be deemed an excessively broad delegation of legislative power, and therefore unconstitutional.

Because the non-delegation doctrine has not been invoked in recent years by the Supreme Court, however, we assume that the statute would survive a non-delegability attack if one were made. We therefore turn to two potentially more serious constitutional problems that have been raised: the power of the executive over the Commission's work and the presence of judicial members on the Commission.

A. Executive Power - The Effect of the Removal Provision

As has been noted, the Sentencing Reform Act empowers seven commissioners appointed and removable by the President to set the sanctions for all federal offenses. Despite its nominal placement in the judicial branch, the Commission may arguably violate the separation of powers principle by giving the executive both legislative and enforcement powers over federal criminal law. It has been argued that, both functionally and legally, the Commission is controlled by the executive. First, all of the members of the Sentencing Commission are appointed by and removable by the President. In Bowsher v. Synar, 106 S. Ct. 3181 (1986), the Supreme Court found that analogous congressional power over the Comptroller General rendered him subservient to Congress. In Bowsher, moreover, the possibility of removal was tempered by the difficulty of garnering the support of both Houses of Congress. No such constraint exists in the case of the Sentencing Commission. Those making this argument

conclude that the President's removal power over the Commission members therefore ensures that they will be subservient to him, and that subservience gives the President de facto control over what the Commission does, enabling him to force the Commission to promulgate guidelines with which he agrees.[5]

Second, in contrast to the authority of sentencing judges and members of the U.S. Parole Commission, the Sentencing Commission will make the one and final decision over the sanction a criminal defendant will receive. Under the Act, the sentencing judge is not permitted to consider the merits or reasonableness of the relevant guideline the Commission has promulgated. Instead, he or she is required to apply the guidelines in all but extraordinary cases. The limited appeal provisions both preclude the appellate courts from reviewing the Commission's work and, more significantly, pressure the district courts to impose sentences within the guidelines. Indeed, it is intended that judges voice disagreement with the guidelines only through communication with the Sentencing Commission. Those opposed to the Commission on separation of powers grounds argue that, by setting enforcement strategy and, through the manipulation of Commission membership, in determining the sentences to be imposed for

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5. By way of disclaimer, we note at once our respect for the integrity and independence as well as the ability of the Commissioners, including those serving ex-officio, each of whom I know personally. But the doctrine we have alluded to is an impersonal one and these considerations have no legal relevance.

each federal crime, the executive under the Commission system will control federal criminal law to the exclusion of both Congress and the judiciary.

The Supreme Court in Bowsher concluded that the Comptroller General was a legislative officer because he was removable by the legislature for the reasons enumerated in the statute. The Court thought that the terms in the removal statute were "very broad, and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will . . . . In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress." 106 S. Ct. 3190-91. The validity of this separation of powers attack on the Commission turns on whether or not the provision governing the removal of Sentencing Commission members could be similarly characterized, so that its members are executive branch officers for purposes of the work they do on the Commission.

Answering this question requires reference to the cases construing other statutory grants to the President of the power to remove federal officers of various kinds. Humphrey's Executor v. United States, 295 U.S. 602 (1935), construed a removal provision which authorized the President to remove members of the Federal Trade Commission for "inefficiency, neglect of duty, or malfeasance in office." The Court there decided that under this provision President Roosevelt could remove a member of the FTC only for one of the causes shown, so that Humphrey could not be removed simply because his

political viewpoint was different from the President's.

The words of the provision at issue in Humphrey's Executor are not significantly different from those in the one at issue in Bowsher. This might suggest that the two cases are in some conflict with one another, because in Bowsher the Court concluded that a provision like this one made the person so removable dependent upon the branch authorized to remove, while in Humphrey's the Court concluded that the provision guaranteed the person so removable a significant amount of independence.

The two cases can be distinguished, however, because in both the Court construed the statute before it with significant reliance on the provisions' legislative history. In Bowsher, the Court presented and relied upon a great deal of legislative history suggesting that Congress actually wanted the Comptroller General to be beholden to the legislative branch. In Humphrey's, by contrast, the Court concluded that both the legislative history and the functions performed by the FTC indicated that the provision should be read more narrowly, so that it would guarantee the Commission member a significant amount of independence. Wiener v. United States, 357 U.S. 349 (1958), also suggests that the extent of a President's power to remove will depend upon the functions performed by the officer to be removed. In Wiener, the Court concluded that a War Claims Commissioner who performed essentially judicial activities could not be removed by the President even though no provision established the conditions under which the officer could be fired. This was true because the job given him required independence.

It is not entirely clear how the removal provision governing Sentencing Commission members would be construed by a court. On the one hand, it could be read narrowly, as was the provision in Humphrey's. If it were so read, it would guarantee the Sentencing Commission members a certain amount of independence, and a reviewing court would not have to find that Sentencing Commission members were beholden to the executive branch. This would suggest that the above separation of powers attack on the Commission would fail. If the provision were read broadly, however, to grant the President wide discretion to remove Commission members, then the members' independence would be diminished, executive control over the Commission's work would increase, and it would be more likely that the grant to the Commission of rulemaking power would be unconstitutional.

In addition, we note that the executive branch is represented on the Commission by the Attorney General, who sits as an ex-officio member. This executive presence could be viewed as a powerful tool by which the President's views could be made known to the Commission, and through which the President's control over the Commission -- if the removal provision is interpreted to grant the President such control -- could be wielded on a day to day basis.

B. Presence of Judicial Members

A second separation of powers attack on the Commission might be based on the fact that three judges serve as Commission members. The political branches presumably can influence judges in a number of ways, including their power to appoint a sitting judge to a higher

judicial position. Judges have also historically performed valuable extrajudicial and advisory functions in a variety of contexts. The procedural rules for the courts are promulgated by the judiciary in a nonadjudicatory fashion, and the courts are also given explicit power to appoint some inferior federal officers under Article II. In none of these cases, however, is a judge granted an additional salary or appointed to serve with members of the executive branch. Although each member of the judiciary is beholden to the political branches to the extent that he or she is appointed by a President, the provisions for life tenure without salary dimunition insures that no one President will be able to appoint all members of the judiciary and therefore that the judiciary as a whole will be non-partisan.

This potential attack on the constitutionality of the Sentencing Commission is based on the notion that a judicial presence on the Commission upsets that delicate balance. Unlike the Judicial Conference and the Advisory Committees on the Federal Rules, the Commission is not a purely judicial body. The members of those other bodies are appointed by the Chief Justice of the United States. All the Commission members, however, are appointed by the President, and the Attorney General and Chairman of the U.S. Parole Commission are members ex officio. Moreover, Commission membership entitles the district judges to an extra stipend paid by Congress. Through appointment as a Commission member, the argument goes, the President can thus reward favored judges with money and prestige, and such a reward is the obverse of a dimunition in salary expressly prohibited

by the Constitution. Finally, by removing a district judge from the Commission a President can reduce the judge's salary, arguably in contravention of the terms of Article III of the Constitution.

It is also arguable that the Commission's responsibilities threaten judicial integrity. The development of guidelines involves a complex moral calculus that is both politically and legally controversial. In New York, Pennsylvania and elsewhere, the establishment of sentencing guidelines has met with strong political opposition. In addition, the guidelines will likely elicit a myriad of constitutional challenges, based on equal protection and due process claims, that arguably will both enable litigants to take discovery against sitting judges and require judges to discern the intent of their peers on the Commission. Arguments for and against judicial membership on commissions which develop legislation which will then come before the courts are set out in In re President's Commission on Organized Crime, 736 F.2d 1191 (11th Cir. 1985) and In the Matter of the President's Commission on Organized Crime, subpoena of Nicodemo Scarfo, 783 F.2d 370 (3d Cir. 1986). We therefore do not review them further here.

The final potential difficulty with judicial membership on the Sentencing Commission is the nature of the rules promulgated by that body. Courts may not legislate: only Congress can. However, courts may "order their own docket," Wayman v. Southard, 23 U.S. 1, 41 (1825), and they may establish rules of procedure to accomplish that task. Id. The distinction between permissible ordering of the docket

and impermissible legislation is the same as Erie's distinction between substance and procedure. Sibbach v. Wilson, 312 U.S. 1 (1940). If the rules of civil procedure were substantive, the Sibbach court acknowledged, they could not be imposed except after passage by both chambers of Congress, signature by the President, or a congressional override of his veto. Under this analysis, the Commission guidelines can be promulgated by judges only if they are procedural. However, as discussed above, it has been argued that the Commission guidelines are substantive law because they bind judges and therefore have a direct impact on what sentences are imposed on those convicted of federal crimes. If this argument is accepted, and the guidelines are deemed substantive law, then judges who serve on the Commission may transgress the limits on their power by participating in the Commission's work.

It should be noted in this regard that the problem, if one exists, cannot be minimized or muted by the contention that judges are on a temporary "one-shot" assignment. Quite the contrary, the Commission is an ongoing body, and has the very important responsibility of revising the guidelines as new situations arise or as troublesome aspects in the operation of the guidelines are called to the Commission's attention. Thus sitting judges will be called upon to interpret their own handiwork.

C. The 180-Day Layover Process

Under the statute, the guidelines take effect 180 days after they are promulgated unless Congress passes an Act to the contrary.

Such a provision, however, does not necessarily cure the Commission's purported constitutional shortcomings.

The lay-over provision is premised on the belief that Congressional inaction constitutes legislative approval of the guidelines. Congress presumably felt that while affirmative legislative action would be time-consuming and difficult, a lay-over provision would prevent the Commission from promulgating guidelines radically inconsistent with the legislative intent. Whatever effect the lay-over provision might have in restraining the Commission, however, it is quite arguable that it does not constitute legislation sufficient to cure any constitutional flaws the Commission may have.

D. Conclusion

We take no position as to the validity of these legal arguments. But along with other judges with whom we have spoken, we are disturbed by the prospect that there may be a successful challenge to the Commission's authority after numerous defendants have been sentenced. Prophylactic legislative action or early resolution of any such challenge would therefore seem enormously important.

VII. RESPONSES TO SENTENCING COMMISSION'S SOLICITATION OF COMMENTS

The Commission has asked witnesses to comment upon specific matters, and we do so as follows:

A. Modified Real Offense Sentencing System

While Judge Barry and I believe that the Commission's choice of a "modified real offense" system is preferable to the alternate

system suggested, we reiterate our concern about the elements of the system that the system proposes to adopt. To repeat what we have said earlier, the premise of the Commission's system is that there is a correct sentence in every case. We believe that this premise is fundamentally flawed. Rather we believe that there is a range of correct sentences in every case and that what the guidelines should do is to give the judge wide discretion within those ranges without quantifying the significance to be ascribed to each factor.

B. Manner in Which Chapter Two Organized Offenses

We believe that the chapter organizes offenses in a satisfactory manner.

C. Reduction for Acceptance of Responsibility and for Cooperation

We agree that there should not be an automatic reduction, but believe that in both these respects (guilty plea and cooperation) the amount of leeway to be granted should be increased and be solely within the discretion of the sentencing judge. The 20% leeway for acceptance of responsibility is grossly inadequate to promote a sufficient number of guilty pleas to keep the system functioning. The 40% leeway for cooperation is also inadequate for many cases.

D. Criminal History Scoring

1. Urine Test or Drug Abuse Scoring

We would eliminate the scoring of three points if the offender had a positive urine test for heroin or any other opiate, cocaine or PCP either at the time of arrest, during the pretrial release period, or during the presentence release period, and we would

also eliminate the three point score if the offender is determined to have been an abuser of heroin, etc., within ten years of the current conviction. First of all, we believe that the second facet of the provision is counter-productive, for no one will admit to drug abuse for fear of consequences, hence the pretrial services or probation departments will be unable to afford them help. Second, we are concerned that a sentence will be enhanced for what may be a sickness. At the very least this provision will engender constitutional attack. Third, the provision will engender litigation, for the use of drug tests will require proof: (1) of chain of custody; (2) of the accuracy of the test; (3) of the reliability of the laboratory's procedures, etc. Finally, we believe that the ten-year period is too long and that if the provision is to remain, five years would be a more appropriate period.

2. Alternative approach to criminal history score table

We see relatively little difference in the alternative and are satisfied with the original formulation.

3. Non-felony Offenses

The proposal is too complex. One category should be sufficient and discretion given to the sentencing judge as to how to treat it.

4. Juvenile Sentences

We prefer the Commission's initial proposal rather than the alternative.

5. Relation Between Criminal Record and Sentences

We are concerned that the guidelines will require imposition of long sentences on relatively minor offenders who have a succession of minor offenses on their record.

E. Other Offender Characteristics

We believe that the district court should be permitted to consider an offender's age, education, vocational skills, mental and emotional condition, physical condition, previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon criminal livelihood not only in setting the sentence within the 25 per cent range, but ideally also in determining where the individual fits in the guidelines, including the "in-out" decision. To the maximum extent that the Commission can, within the statutory framework,[6] permit these considerations to be factored into the sentencing decision by the judge, such discretion would be extremely desirable. If it cannot, legislative authority to do so should be sought.

F. Conversion of Sanction Units Into Sentences Other Than Imprisonment

We prefer the July draft which was more flexible. To the

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6. Query whether this recommendation is at odds with 28 U.S.C. § 994(e), which requires the Commission to "assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." See 28 U.S.C. § 994(e) (emphasis added). The Commission notes in the preliminary draft that the only factors which it thoroughly addressed are the offender's role in the offense, criminal history, and degree of dependence upon criminal activity for a livelihood.

extent that the current draft is utilized, we would reject option 1 on page 142 (Mandatory Satisfaction of All Sanction Units). Rather we do not believe that the court should be obligated to satisfy all of an offender's sanction units by imprisonment.

G. Fines

We believe that the value of fines in the criminal sentencing scheme has been overrated and that fines should only be imposed in the presence of a clear ability to pay. The volume of uncollected fines in the United States may well approach the national debt! Within the framework of this approach, we believe that the harm based deterrent and compensation approach is more desirable. It combines what we believe to be the better penological theory with the threshold request of enforceability, i.e., the ability to pay the fine.

H. Community Confinement and Home Detention as Conditions of Probation

We endorse these measures. We note, however, that a high incidence of supervised release will require additional probation personnel for which provision must be made in the budget.

I. Determining Offense Values for Multiple Crimes

Rules 1 through 5 of Chapter Six, Part E appear to resolve correctly the bulk of the issues that arise when multiple crimes are committed during a single course of conduct. The Commission has pinpointed Rule 6 as "particularly suitable for public comment," and our comments will focus on that Rule. Rule 6 states that "If more than one offense is committed or injury results during the same course of conduct, add the offense values of the three most serious injuries

or crimes (after calculating the offense values for each according to rules 1-5) and ignore the others."

We note in passing that although this Rule seems to suggest that multiple offenses committed during the same course of conduct are somehow distinct from multiple injuries committed during that course of conduct, the illustrations to Rule 6 indicate that the Commission is particularly concerned with limiting the number of multiple injuries that can be considered to enhance offense value.

There can be little question that in many cases there should be an enhanced offense value when multiple injuries are caused just as, in other cases, there should be no enhancement because no <u>real</u> injury is caused. Merely to state this proposition is to anticipate a host of fact-dependent issues neither articulated by the Commission nor susceptible of quantification. Thus, to use one of the Commission's illustrations, it is merely fortuitous that the bus that the car driver recklessly ran off the road contained 50 passengers rather than one. Perhaps for this reason the Commission recognizes that it would not be just to impose 50 times the penalty in the former situation. But if the Commission does not believe that the use of 50 would be just, utilizing any other particular number may be similarly unjust in a particular case. If, for example, one clerk is behind a counter of a 7-11 store when a hold-up occurs and the offense value is X, why should the fortuity that 3 clerks are behind the counter when there is no real injury make the offense value 3X? On the other side of the spectrum, if one brutally murders ten people, why should he or

she be treated the same as one who brutally murders three people?

Rule 6 does not distinguish between the varying degrees of injury. Were the three people who received the "most serious injuries" merely frightened or were they grievously harmed? And should that not make a difference? A multiplier, be it 3 or otherwise, will provide an unsatisfactory result at both ends of the spectrum, i.e., where there is no real injury and where there is severe injury. Similarly, Rule 6 does not distinguish between injuries that result from what is in effect a non-intent crime and those that result from a crime of intent. Thus, if the driver was not merely reckless but, knowing that the bus contained 50 people, deliberately forced that bus off the road, Rule 6 provides no room for discretion. Neither does discretion exist to distinguish between the "con" man who deliberately defrauds a host of people of $10 from the "con" man who deliberately defrauds a host of people of their life savings.

A sentence should reflect one's moral culpability measured by society's standards. To the extent the Commission has heroically attempted to reflect this proposition in Rule 6, it has attempted to quantify what is unquantifiable. A multiplier of three, for example, can perhaps be a point of departure for the exercise of informed discretion, but that is all it should be. And an alternative posited to Rule 6 -- a multiplier that diminishes according to a mathematical formula as the number of injuries increase -- suffers from the difficulties outlined above while adding the complication of one more

mathematical formulation. The only solution -- still again -- is to afford the district court judge the discretion to deal with each fact situation as it arises.

We propose that the factors comprehended by Rule 6 together with those discussed above should be deemed aggravating or mitigating factors compelling enough to permit the court to go outside the guideline range. See Chapter Six, Part F. The Commission has opened the door in this regard by identifying "extremely barbaric behavior" as an example of a "serious aggravating factor." Id. Would not the brutal murder of ten people be deemed "extremely barbaric behavior?"

Weighing in a qualitative sense the factors relevant to Rule 6 is precisely what courts do now - with skill and with ease. It is not only appropriate but critical that that weighing process be retained even were it possible, which it is not, to accurately and fairly quantify the factors involved. To repeat, allowing the sentencing judge more discretion is what is needed.

J. Plea Bargaining

Unless the Commission permits the plea bargain to trump the guidelines, there will likely be few plea bargains because there is little incentive to plead. See supra. We await the Commission's policy statement on plea bargaining with great interest.

K. Violation of Probation and Supervised Release

Issue 1: Which violations of conditions of supervision should be considered less serious and more serious? (See Chapter Four of the guidelines, Determining the Sentencing, for a list of proposed mandatory conditions of probation and supervised release, and 18 U.S.C. § 3562(b) for examples of discretionary conditions available to the court.)

We consider violations of the following five technical conditions of supervision as listed on pages 144 and 145 to be less serious than the other eight conditions, at least in the great majority of cases:

B. The offender shall not leave the judicial district without obtaining permission from the probation officer.

E. The offender shall answer inquiries by a probation officer and follow the instructions of the probation officer.

F. The offender shall notify the probation officer promptly of any changes in address or employment.

H. The offender shall maintain reasonable hours, shall associate only with law-abiding persons, and shall not associate with individuals with criminal felony records unless granted permission to do so by the probation officer.

M. The offender shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons. The offender shall notify the probation officer immediately of any change in employment status to include job changes or being out of work.

We consider violations of the following seven technical conditions of supervision as listed on pages 144 and 145 to be more serious than the five technical conditions listed above, at least in the great majority of cases:

C. The offender shall report to the probation officer as directed by the court or the probation office and submit a truthful written monthly report within the first five days of each month.

D. The offender shall permit a probation officer to visit his/her home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

G. The offender shall notify the probation officer promptly if arrested or questioned by a law enforcement officer.

I. The offender shall not possess a firearm, dangerous weapon, or destructive device.

J. The offender shall not purchase, possess, use, distribute, or administer any controlled substance, including narcotics, marijuana, depressants, or stimulants, or any paraphernalia related to the foregoing unless prescribed by a physician. The offender shall not frequent places where such drugs are illegally sold, dispensed, used or given away. Neither shall the offender drink alcoholic beverages to excess.

K. The offender shall not enter into any agreement to act as an informer or special agent of any law enforcement agency.

L. As directed by the probation officer, the offender shall provide notification to third parties as to risks that may be occasioned by the offender's criminal record or personal characteristics, and shall permit the probation officer to make such notifications and to confirm the offender's compliance.

Issue 2: The extent to which the probation officer should have discretion in dealing with persons under supervision before formally reporting violations to the court.

Lesser Technical Violations. We believe that the probation officer should have wide discretion in dealing with the five lesser technical violations

listed in the comments of Issue 1 above and formally report violations to the court in accordance with internal management policies developed by the district court and probation office. We suggest that such a policy provide that a specified threshold level be reached (including the number of violations) as well as the approval of the probation officer's immediate supervisor or a higher level of management be obtained before reporting a violation of this nature to the court. We would consider it inappropriate and unnecessary for the Sentencing Commission to issue guidelines specifying the point at which the probation officer would be required to report lesser technical violations to the court.

Serious Technical Violations. As far as a violation of the seven technical conditions (identified above) which are considered to be more serious are concerned, we would recommend that guidelines be developed and issued by the Sentencing Commission which would require the probation officer to report serious technical violations after a specified number of occurrences (or at any earlier point deemed to be appropriate by the probation office).

New Criminal Behavior. We concur with the Commission's proposal that for the most serious of violations, including Condition A and other conduct that

constitutes new criminal behavior (except certain petty offenses), the probation officer have no discretion in reporting the first and all subsequent violations and the court be required to issue a subpoena or violator's warrant and conduct a violation hearing.

Issue 3: The appropriateness of the sentences proposed above for application to revocation of supervision.

The approach proposed by the Commission to address violations of probation and supervised release appears to be a logical extension of the framework considered when developing the sentencing guidelines. Specifically, the process requires a minimum standard of compliance with general and special conditions and provides a range of alternatives to the court which are commensurate with the magnitude of the violations (i.e., lesser technical violations, serious technical violations, and unlawful behavior). The process seems both reasonable and fair. However, the fixed sentences (page 155, paragraph 3: "Upon revocation of probation, the court would be required to impose a certain sentence.") proposed for the three categories of violations seem extremely inflexible and, if imposed under certain circumstances, could even be described as unreasonable. Accordingly, the Commission may wish to grant the court at least some latitude by allowing

a guideline range of sentences for violations of probation and supervised release that would permit the court to consider mitigating factors. If this is not feasible, then consideration should be given to the assignment of lesser sanctions for technical violations.

Issue 4: Upon revocation, the credit, if any, the offender should receive for time successfully spent on supervision or for compliance with other conditions of supervision such as payment of fine, community service, halfway house residency, or intervals of custody for probationers.

Upon revocation, credit for selective accomplishments while under probation supervision, such as fine payments, community service, etc., should be given; however, any credit received should be limited to those whose revocations are based on technical violations and not new illegal behavior.

In keeping with the above, we believe that there needs to be a distinction made between conditions that are designed to serve the public (fine, restitution, community service) and those designed to serve the client (drug treatment, vocational training, employment search). Only satisfactory compliance of conditions

that are designed to serve the public should qualify for a credit allowance.

If the idea of a credit allowance for selective accomplishments is endorsed by the Commission, the following points should be considered:

(1) All special conditions that qualify for a special credit allowance should be clearly identified in the guidelines.

(2) The guidelines should address the criteria that must be satisfied to qualify for the credit allowance assigned to each condition.

(3) The guidelines should standardize the credit value (or range) that is assigned to each condition.

(4) Application of the guidelines should be uniform and non-discretionary.

Issue 5: The manner of handling probation violations for organizations.

Presently, the only penalty that can be imposed on the organization is a maximum fine and/or an order of probation, with accompanying conditions. While the problem is a difficult one, we suggest the following:

At the time of sentencing, all offender organizations should be fined an appropriate amount; the sentence should be suspended, and the defendant placed on appropriate probation with a special condition of

completing a specified number of hours of community service. The court and defendant should immediately designate a responsible person(s) or position(s) (i.e., C.E.O., Board of Directors, etc.) to assure compliance with the court order. Designated persons should have the authority and responsibility to assure the organization's cooperation.

If the offender organization violates any of the conditions of supervision, the court should have the option of issuing a warrant or summons for the designated person(s) to appear and show cause why the organization's probation should not be revoked.[7] In addition, the court should also have the discretion of imposing the maximum fine on the offending organization for violation of probation.

[7] We express no view at this time as to whether the court may find the designated corporate officer(s) in civil or criminal contempt for failure to assure court compliance.

VIII. CONCLUSION

We hope that the foregoing presentation does not seem like a jeremiad directed against the statute. It is not intended to be. We accept the statute as a given and intend our comments as a constructive effort in support of the development of a workable guidelines system. In our view, the touchstone of the Commission's efforts should be to develop a system of "guided flexibility."

On behalf of the judges of the Third Circuit, Judge Barry and I wish the Commission well in its labors.

CCRC
12-3

Testimony of

NORMAN A. CARLSON
DIRECTOR, FEDERAL BUREAU OF PRISONS

before the
United States Sentencing Commission

December 2, 1986

I appreciate the opportunity to appear before you today to discuss the draft guidelines developed by your Commission.

At the outset, I want to commend the Commission for your work thus far. The draft guidelines present a long-awaited mechanism through which the many and complex factors involved in a crime can be considered at sentencing and through which disparity can be reduced.

The most critical aspect of the sentencing guidelines, as far as we are concerned, is their impact on the federal prison population. In order that this impact can be assessed within the context of our current population growth, let me briefly discuss the present situation.

Since 1980, the population of the Federal Bureau of Prisons has increased by over 75 percent, to a level today of over 41,400. This record-high population, nearly 50 percent above the combined rated capacities of the 47 federal institutions, is the result of the Administration's efforts to combat organized crime and drug trafficking, the large Cuban inmate population in the System, and an increase in the number of District of Columbia offenders committed to federal custody. The recently-enacted Anti-Drug Abuse Act is expected to increase the number of drug offenders being sentenced to federal prisons as well as the length of time they spend in confinement.

To manage the population growth, the Bureau of Prisons is in the midst of the largest expansion program in history. Through the construction of new institutions and the construction and renovation of housing units at existing facilities, we are striving to reduce overcrowding to 20 percent by Fiscal Year 1993.

As I have testified previously, I believe that prison capacity should not dictate the length of sentence imposed on offenders. On the other hand, the impact of major changes in sentencing practices and procedures cannot be ignored.

Members of our staff have been working closely with your Research Office in developing models to estimate the impact of the

guidelines on the future prison population. Although not yet complete, I understand that preliminary results indicate that imposition of the sentencing guidelines outlined in the draft would substantially expand the population through increased time served in prison as well as more offenders being committed to prison.

While I do not question the sentence lengths proposed in the draft guidelines, I am concerned with our ability to respond - in terms of resources and the lead-time necessary to construct new prisons - to a potential, dramatic increase in the federal prison population.

Without question, prisons are a scarce resource in the criminal justice system. They are expensive to build -- as well as to operate. As is true of all scarce resources, our goal must be to maximize the impact they make to the overall effectiveness of the system. Above all, we must assure that prison space is available for those whose criminal behavior presents the greatest threat to society -- the violent, the predatory and the repetitive offender.

Let me briefly discuss some other effects these guidelines would have on the Federal Bureau of Prisons.

The first issue concerns the relevancy of Offender Characteristics to sentencing. While these characteristics have, in my opinion, merit in sentencing decisions, I believe judges must have discretion in their application to individual offenses.

I would also like to comment on provisions of the proposed sentencing procedures. I believe that the preponderance of evidence standard for all sentencing information and the standard of the burden of proof placed on prosecutors are steps which will create a much more adversarial hearing process at the time of sentencing. I am specifically concerned about the negative impact these standards may have on information contained in the Presentence Report, a document prepared by U.S. Probation Officers which is essential to Bureau of Prisons staff in making designation and classification decisions. Facing evidentiary rule standards on presentence information, Probation Officers may omit information that is vital to the Bureau of Prisons and other components of the criminal justice system. I would suggest that the proposed standards be reconsidered.

I also urge the Commission to consider establishing a separate section for prison offenses in the Offense Conduct Chapter, emphasizing the unique nature of crimes committed in institutions. Escape offenses, not covered in the draft guidelines, should be addressed and should cross-reference offenses involving persons (Part A) and property (Part B). The use of a weapon in escape

should add to the base penalty, and all escapes from federal custody should, in my opinion, result in additional imprisonment.

Offenses involving the possession of contraband need to be more precisely defined to point up differences between firearms and drug possession in a prison setting, as opposed to those offenses in the community. The possession of alcoholic beverages, a substantial security concern in prisons, should also be included.

I believe special offense characteristics or cross-references recognizing the severity of trespassing should also be added, due to the security threat such behavior on prison property may pose.

Finally, Criminal Sexual Conduct mentions a "corrections officer" victim. I would suggest that broader language be used to cover all correctional staff - including contract employees and volunteers.

Let me conclude, Mr. Chairman, by stating that I have long supported the need to eliminate sentencing disparity, and, like you, have seen guidelines work successfully in several states. I look forward to continuing to work closely with the Commission and to implementation of the guidelines in the federal criminal justice system.

underlying food and drug statutes themselves: all that is required is an application note clarifying that cross-reference for an offense that "involved fraud" should be applied only where the offense of conviction was one the rested upon proof (or formal admission) of an intent to defraud. And yet, that obvious and straightforward solution, which is fully consistent with the "charge offense" approach, apparently was not even considered. An observer might conclude that the Commission had made a basic policy shift toward "real offense" sentencing, but I am aware that anything like that had been decided or even discussed. The more likely explanation is "simplification" for its own sake, without considering the broader policy issue.

In either case, the practical result is equivalent to a basic shift of policy. By consolidating §2N2.1 into §2F1.1, we would mix a wide range of offenders and offenses under the same guideline: misdemeanants with felons, the least with the most culpable, purely commercial harms with personal injuries or risks to public health or safety, and widely disparate underlying statutory policies. As can be seen, ultimately this does not reduce overall complexity; it simply shifts the complexity from guideline selection to the application of increasingly complex and broad-ranging individual guideline sections. I would predict that many observers would find it unseemly that offenses against statutes motivated by considerations of public health and safety would be sentenced under a guideline designed initially for commercial frauds; they will demand modifications to put health and safety risks into the guideline text itself. The beginnings of this process already can be seen in the Commission's own proposal of a departure consideration for injury risks, and its request for comments on an attenuation of the economic loss concept that heretofore has been central to the fraud and theft guidelines, focused as they are on property crimes. Once that process develops, the "fraud" guideline becomes less focused on fraud; it becomes, in effect, a generic guideline tending toward the "real offense" system that the Commission rejected ab initio.

By raising this point, I do not mean to comment on the overall merits of "real offense" versus "charge offense" sentencing. The Commission may wish to re-examine that fundamental policy choice. But I see no indication in the record that the Commission has done so, or intends this current proposal as a basic policy shift. That is a very large subject that deserves separate and complete consideration in its own right. My concern is that the Commission unintentionally may be backing into a major policy shift without ever having considered the subject at all.

3. The General Approach to "Regulatory" Offenses. I have a similar concern regarding the implications of the current proposal as indicating yet another deviation from the fundamental policy choices on which the existing guidelines' structure rests, which is the overall approach to "regulatory" offenses. Current §2N2.1 is only one of several guidelines based on the same overall approach, which was first formulated in 1987 and continues to be stated in Chapter 1, Part A of the current Guidelines (pages 8-9). That approach describes a four-tiered structure for dealing with regulatory offenses, in order to distinguish differing levels of harm and culpability in a way that parallels the substantive law's distinction of "public welfare offenses" from more serious crimes. As food and drug offenses are the widely-recognized paradigm for "regulatory offenses," the withdrawal of §2N2.1 may be interpreted as a signal that the Commission intends to dismantle the guidelines' overall approach to "regulatory offenses" more generally. As in the case of "charge offense" sentencing, that may or may be the Commission's intent. But from what I have seen, I am unaware

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12-3-86

STATEMENT OF

RICHARD J. ARCARA

ERIE COUNTY DISTRICT ATTORNEY
BUFFALO, NEW YORK

ON BEHALF OF

THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

COMMENTS ON

PRELIMINARY DRAFT SENTENCING GUIDELINES

DECEMBER 2, 1986

My name is Richard J. Arcara. I am a former United States Attorney for the Western District of New York; the present District Attorney for Erie County, Buffalo, New York; and as its President-Elect, I speak to you today on behalf of the National District Attorneys Association. Our Association represents the interests of state and local prosecutors from throughout the United States.

As you know, the National District Attorneys Association has worked closely over the past year with the Commission as it proceeded with its monumental task of meeting the Congressional mandate to promulgate sentencing guidelines.

We wish to commend you on the overall quality of the Preliminary Draft Sentencing Guidelines which were issued in September of this year. The National District Attorneys Association generally supports the approach taken by the Commission in the Guidelines, though we have some reservations and make some recommendations for your consideration. The Guidelines reflect not only your hard work and dedication to your task but also your sense of duty.

We understand and appreciate the determination it takes to follow the difficult and complex mandate given you by the Congress. There is no question that the Commission could have taken a simpler and less controversial path. There is also no question that you reflected a sensitivity to the public's concerns regarding the present sentencing system and the abuses which exist in unwarranted sentencing disparities.

A COMMENT ON THE GENERAL APPROACH TAKEN BY THE GUIDELINES

At the outset, it must be stressed that the Commission was created, and is operating under the provisions of Chapter II of the Comprehensive Crime Control Act of 1984, which contains the Sentencing Reform Act of 1984. The Commission is obligated to follow the mandate of Congress and the Guidelines are to be held accountable to that standard and that standard alone.

The Commission rightly has sought input from interested parties throughout the country. Academic discourse and philosophical arguments are properly being considered by the Commission and they serve many useful purposes. However, in the final analysis, the private philosophies of an organization or individual are not the proper measure of the Guidelines. The National District Attorneys Association suggests that the Commission is compelled to reject criticism of the Guidelines which are based on philosophical standards inconsistent with the enabling legislation.

Congress intended to cure the unwarranted disparities of subjective sentencing and set a goal for the Commission to create Guidelines which produce similar treatment of similar defendants who commit similar crimes.

In that regard, Congress specifically directed the Commission, in 28 USC §994(f), to pay particular attention to the

requirements to provide "certainty and fairness in sentencing and reducing unwarranted sentencing disparities." This is the emphasis of the Congress and the mandate to the Commission.

The National District Attorneys Association believes that the Commission has been faithful to its enabling legislation and the resulting Guidelines, with some modifications, are an appropriate mechanism to achieve the stated purpose required by the Congress.

The methodology of the Guidelines includes a straightforward, simple to apply, narrative approach which seeks to reflect the thought processes a responsible and conscientious judge would employ in making a sentencing decision. It operates on a system of **real offense sentencing** which requires the judge to identify all relevant offense characteristics, and base the sentence on the conduct necessarily involved in the offense of conviction plus the conduct done in furtherance of that offense and any injuries or harm which result from the defendant's conduct.

MODIFIED REAL OFFENSE SENTENCING

We agree with the choice made by the Commission in selecting this method over one based on "offense of conviction". We believe it essential that there be a complete accounting of the nature of the crime and all its associated elements to allow for the specific differentiation of criminal conduct that the Congress

requires. The goal of the Guidelines is to identify the specific nature of the crime and treat it with an appropriate sentence and to distinguish it from other crimes which may be included within the same "offense of conviction" category but which will differ in the particulars of the actual conduct and harm caused.

The Commission has drafted a modification in the use of the **real offense system** by adopting a substantive compromise between the two systems. The Guidelines specify only those certain factors that the Commission believes should be considered in assessing a sentenoe.

We believe, however, that the Commission may be too restrictive in this area and has excluded judicial discretion to a much greater degree than may be wise. We suggest that in addition to the "road map" approach, that the Guidelines specifically provide that other factors may be considered by the judge as he finds them to relate to the conduct of the defendant. The judge may then, using sound discretion, account for these acts and consequences either in aggravation or in mitigation of the offense value, within a range to be determined by the Commission.

NUMERICAL OFFENSE VALUES

We also endorse the use of **numerical offense values** assigned to each relevant aspect of the defendant's conduct. The offense values reflect each identified unlawful act or omission, injury or harm under the modified real offense system. The use of

a numerical value system facilitates a determination of the relative ranking of offenses and the relative level of sanction for the particular criminal conduct in question. In assigning the preliminary values contained in the draft, the Commission has correctly considered most prominently the harm resulting from the offense and the need to deter future similar offenses.

We believe that the Commission should specifically set base offense values. However, we do not necessarily believe that the Commission should preempt the reasonable judicial discretion that the sentencing judge might have in actually setting the value for each specifically identified offense characteristic. Rather, we would suggest that the Commission instead assign a range of values for such specific offense characteristics and afford the sentencing judge the opportunity to exercise his discretion in formulating the actual sentence under the Guidelines.

For example, rather than arbitrarily specific values of 120 for severe bodily injury and 60 for serious bodily injury, the Commission should promulgate a maximum and minimum range for each level of injury from which a judge may exercise his discretion in determining a value to be added to the base value.

SENTENCING RANGES

The National District Attorneys Association does not believe that a numerical system is inherently evil. Objections to the Guidelines based on its numerical system and claiming that it

unfairly impinges and impedes the exercise of discretion on the part of the sentencing judge are misplaced if the above modification is made. Controlled sentencing discretion has been directed by the Congress and not, as some would suggest, by a runaway Commission.

Furthermore, although 18 USC §3553(b) requires sentencing judges to impose a sentence of the kind and within the range created by the Guidelines, we believe that ample judicial discretion is retained. Even though a Guideline range must be strictly limited to a maximum variation of 6 months or a 25 percent difference between the minimum and maximum sentence of incarceration, the Guidelines allow unfettered discretion within that specific range.

DEGREE OF DETAIL

The Commission has been criticized because of the degree of detail contained in the Guidelines. We believe that such detail facilitates a proper differentiation between criminal conduct for sentencing purposes. By way of example, the property table (§B251) in the Guidelines could arguably contain fewer than 13 gradations. The fewer categories there are, the more often different criminal situations will be lumped together and treated the same. We believe that the amount of detail in the Guidelines is necessary to avoid the unwarranted wide variations in sentencing that would continue to exist if only general Guidelines and policy statements are proposed.

We further note that Congress, by demanding the creation of Guidelines with specified narrow sentencing ranges, and requiring judges to follow those Guidelines, is asking for a radical departure from past practice. Suggestions from opponents of the Guidelines that statutory restrictions be amended, that the required timetable for implementation be modified, that the implementation procedures themselves be modified and that "field tests" be developed should not be made to this Commission but are matters which have already been decided by the Congress.

Beyond these comments on the general approach taken by the Guidelines, the National District Attorneys Association has several specific comments regarding the preliminary draft. We will address ourselves to numerous issues, including:

1. Linking the Guidelines sentencing ranges to the issue of prison overcrowding.

2. The need for firm sentencing and a reduction in the use of felony probation.

3. Recognition by the Commission of the appropriateness of sentencing defendants for the psychological harm they inflict.

4. The need to allow prosecutors sufficient latitude in obtaining and rewarding cooperation from defendants and in obtaining plea dispositions.

1. THE ISSUE OF PRISON OVERCROWDING AS A FACTOR IN DETERMINING SENTENCING GUIDELINES.

We believe that the Commission should attempt to promulgate Guidelines in an atmosphere free from the external and artificial constraint of linking such Guidelines to the present capacity of the federal prison system. The Commission's first responsibility is to create Guidelines which equitably and fairly reflect the purposes of sentencing; just punishment, deterrence, incapacitation and rehabilitation. 28 USC §991(b)(1); 18 USC 3553(a)(2). Your responsibility is to formulate a system which determines a just sentence for particular criminal conduct in specific circumstances.

It is essential that this Commission make its judgments free from every artificial constraint on justice. If, in its good judgment, this Commission believes that criminal conduct should be punished by incarceration, the Guidelines should properly call for it at the level at which justice will be done.

Justice is not served by this Commission blinding itself to what justice requires and instead calling for alternatives to

incarceration for the sole reason of the potential effect on prison population that such incarceration may cause.

It would be illogical and inappropriate to factor in a mitigating circumstance which is based wholly on the fortuitous availability or unavailability of prison space at a particular point in time. To artificially skew the Guidelines toward minimal incarceration, as some would propose, is to render such Guidelines unjust and void.

This Commission would better serve the ends of justice by making honest determinations regarding incarceration and closely monitoring the effect such Guidelines have on prison capacity.

This Commission fulfills its responsibility by monitoring and reporting the effects of its Guidelines. The actual administration of correctional systems is the responsibility of the executive branch of government. The cost of paying for justice is properly a cost which the National District Attorneys Association believes that the Congress must face. It is a cost properly paid in dollars and not by returning convicted criminals to the streets when they should be serving a just sentence.

2. THE NEED FOR FIRM SENTENCING AND A REDUCTION IN THE USE OF FELONY PROBATION.

No greater decision has to be made by the Sentencing

Commission then the bottom line issue of sentence length for specific crimes and the availability of non-incarcerative sentences, notably probation, for convicted felony offenders.

The Congress has delineated certain sentencing parameters which the Commission must follow. Congress has directed that crimes of violence or in violation of the drug laws perpetrated by prior felons shall be severely punished by near maximum terms of imprisonment. 28 USC §994(h). Substantial terms of imprisonment are required when an offender has two or more prior felony convictions. 28 USC §994(i). Accordingly, Congress itself makes the element of a defendant's prior criminal record an aggravating factor which must be taken into account by the Guidelines by increasing the length of incarceration.

Study after study shows that prior criminal history is a strong predictor of recidivism. Based on a crime control theory, simply put, a convicted criminal's prior criminal history should result in increased sentence length for the purpose of incapacitation and/or deterrence. We commend the Commission for its efforts to formulate a mechanism which adopts this theory of punishment and we approve of the basic format contained in the Guidelines.

Furthermore, we believe that the Guidelines must reflect the need for tough sentences for all violent and otherwise serious crime and for violations of the drug laws. We believe that Guidelines which provide for firm sentences of incarceration are

consistent with the Congressional mandate under which you must operate. The Congress has stated that "in many cases, current sentences do not accurately reflect the seriousness of the offense;" and that the "Commission shall not be bound by such average sentences and shall independently develop a sentencing range ..." 28 USC 994(m).

We submit that such language is nothing less than a call, by the Congress, for longer sentences of incarceration than presently are being assessed. We hope that this Commission will not seek to ameliorate the attacks on the Guidelines by a wholesale modification of the sentencing ranges which the Preliminary Guidelines propose. As proposed, we believe that the range of sentences contained in the Guidelines, for the most part, are appropriate in terms of sentence length.

This Commission must address the issue of probationary sentences for convicted felony offenders. You should resist all calls for maintaining the availability of non-incarcerative sentences for virtually all crimes.

Probation is simply not adequate, in most instances, to reflect the seriousness of the offense, to promote respect for the law or to provide just punishment for an offense. Probation is not always effective as a deterrent to criminal conduct and it fails to incapacitate a defendant or to protect the public from further crimes of a convicted defendant. More often than not, probation does little for a convicted defendant's rehabilitation.

It does not meet the basic needs of sentencing as defined by Congress 18 USC §3553(a)(2).

Furthermore, the imposition of unwarranted probationary terms for convicted felony offenders is at the base of Congress' displeasure with sentence disparities and with the uncertainty found in the present sentencing system.

In addition, as a sentencing method, probation has not reached its projected expectations. The Rand Corporation Report on Felony Probation, sponsored by the National Institute of Justice, released in March, 1985, found that 65% of felony probationers were rearrested while still on probation and that 51 percent of them were convicted of a new crime. Only 35 percent of convicted felons placed on probation managed to "stay clean."

Probation has been used on a regular basis as a dumping ground for many felony offenders, notably as a reaction to prison overcrowding. While this alternative to prison appears to be less costly from some points of view, any apparent cost savings can be outweighed by the cost of the future crimes against our citizens who are placed in jeopardy by releasing felons on probation.

The National District Attorneys Association believes that probation should be available for minor crimes committed by first-time offenders or where there exists some strong compelling mitigating circumstance that justifies such action in the sound exercise of reasonable judicial discretion. We believe that the Commission, in its Guidelines, properly earmarks probation for that purpose.

3. THE APPROPRIATENESS OF SENTENCING CONVICTED DEFENDANTS FOR THE PSYCHOLOGICAL HARM THEY INFLICT.

People have the right to be free from crime and the effects of crime. One of the basic tenets of our criminal laws is that they serve to protect the physical security of the person. Of utmost importance is the right of a person to be free from adverse psychological damage inflicted as the result of criminal conduct. Clearly, psychological trauma can be every bit as injurious to a person as physical trauma. We commend the Commission for including in the Preliminary Guidelines, as an aggravating sentencing factor, the actual existence of extreme or significant psychological injury caused by the defendant's criminal conduct.

We are not talking here of the mere anger or fear or feeling of violation that plagues victims of most criminal conduct. The Commission properly does not factor in such injury, real though it may be. Rather, the Commission seeks to include only significant or extreme psychological injury which causes substantial impairment of the intellectual, psychological or emotional capacity of a victim.

Certainly such injuries may be hard to quantify and the government properly has to establish the existence of such injury. However, where it does exist, we believe that the Commission has

correctly noted that it would have a significant impact on the sentencing judge and it should be a factor in assessing a sentence under the Guidelines. In those cases, the time required to develop the existence of this aggravating factor is well-worthwhile. However, we again advise the Commission to allow for a range of values for such identified psychological injury. We believe that a sentencing judge will be in a better position to make a reasoned value judgment of the degree of sentence enhancement merited, within a range selected by the Commission.

The National District Attorneys Association believes that a convicted defendant should be made to face all the consequences of his criminal actions. Often these consequences can't be completely measured in drops of blood or stitches or broken bones. They may be measured in anguish, emotional scars, and significant impairment of the psychological state of the victim. To ignore these provable injuries is to heap additional insensitivity upon the helpless victim at the very time he or she is at their weakest. A fair and just sentencing system should not revictimize such a victim of crime.

4. THE NEED TO ALLOW PROSECUTORS SUFFICIENT LATITUDE IN REWARDING COOPERATION FROM DEFENDANTS AND IN OBTAINING PLEA DISPOSITIONS.

A convicted criminal's willingness to cooperate with

authorities is a valid consideration at sentencing. Cooperation is a significant mitigating factor which helps distinguish offenders for purposes of sentencing. In many cases, cooperation by knowledgeable offenders is the only way to create, conduct and complete investigations aimed at ferreting out criminal conduct. This is particularly so in the investigation and prosecution of major narcotic offenses and other organized criminal activity.

The Guidelines recognize this legitimate need of law enforcement. However, the National District Attorneys Association believes that the 40 percent maximum reduction available under the Guidelines may not always be sufficient to reward exceptional assistance which may involve significant risks undertaken by an offender during his cooperation. Rather than set specific categories of reduction as is presently proposed, we suggest that the United States Attorney be able to request up to 100 percent reduction for offenders who perform undercover work or who provide testimony under life-threatening or personally dangerous circumstances, where such conduct directly and materially aids a significant criminal prosecution. However, we have no objection in making any sentence reduction in excess of 40 percent contingent upon the sound exercise of judicial discretion rather than solely upon certification of the United States Attorney. We believe that allowing this greater leeway will serve as an incentive for offenders to cooperate and will serve the ends of justice. We believe that such exceptional service on behalf of

law enforcement, coming as it does even after conviction, sufficiently distinguishes one offender from another and justifies any disparity in the final sentence which the cooperating offender receives.

We would further suggest that any disputes that develop between the United States Attorney and the defendant's attorney with respect to the certified range between 20 and 40 percent should be allowed, under the Guidelines, to be resolved by the sentencing judge.

PLEA DISPOSITIONS

Plea dispositions account for the overwhelming percentage of all criminal convictions and cooperation by a convicted criminal is often made a part of a plea agreement.

The National District Attorneys Association believes that the Guidelines must reflect the fact that under the present system, sentence bargaining is, in many instances, a significant factor in inducing a plea disposition. The Commission is correct in determining that offenders who plead guilty currently receive substantially lower sentences than those who are sentenced after a trial.

The Guidelines properly establish a mitigating factor where the offender demonstrates that he or she recognizes and sincerely accepts responsibility for the offense and has taken steps toward rehabilitation. We agree with the Commission that

the reduction should not automatically accompany a plea disposition because of the mere fact that a plea was entered but rather properly resides instead in the sound exercise of the discretion of the sentencing judge.

The Guidelines propose that this reduction be limited to 20 percent of the total offense value otherwise calculated for the offense. We suggest that the limitation to only a 20 percent reduction may be too restrictive and that more leeway may be necessary to effectuate a just sentence, especially when sentencing a first time offender who may present other offender characteristics which might properly serve as mitigating factors. These, of course, are the characteristics set forth in 28 USC §994(d) which include age, education, vocational skills, employment, family and community ties, etc.

We suggest that the range should be extended upward, but that any percentages in excess of 20 percent require the specific agreement of the United States Attorney. It should be clear that any reduction is subject to the discretion of the sentencing judge who may reject any agreement made between the prosecution and defense to exceed the 20 percent limit and assess only the amount, if any, which he deems appropriate.

We believe that by allowing reductions for cooperation and for plea dispositions where acceptance of responsibility and relevant offender characteristics exist, this Commission can provide for both just and firm sentences consistent within one single set of Guidelines.

CONCLUSION

The National District Attorneys Association believes that the draft promulgated by the United States Sentencing Commission is a commendable initial effort in the development of fair sentencing guidelines. We agree with the basic structure and format of the preliminary draft of the Guidelines. We suggest only that more deference be afforded sentencing judges in determining the actual offense values from a range of values established by the Commission. We believe that retaining such discretion will have a positive effect on creating a fair and workable system. It is also our hope that more leeway will be given to accommodate cooperation by defendants and to facilitate plea dispositions.

We believe that the Commission is proceeding on the correct road toward the development of Sentencing Guidelines. After this period of public comment, we hope that the Commission remains faithful to its mandate. We thank you for giving us the opportunity to present our views.

00106
12-3-86

STATEMENT OF THE ACTIVE JUDGES OF THE SECOND CIRCUIT CONCERNING SENTENCING GUIDELINES

The undersigned members of the United States Court of Appeals for the Second Circuit, having reviewed the September 1986 preliminary Draft of the sentencing guidelines, urge the Sentencing Commission to make a substantial revision of the proposed guidelines to reduce the complexity and detail of the current version. We believe a sentencing guideline system as mandated by Congress can be developed that will not require innumerable factual determinations by district court judges and that will preserve a sensible range of discretion within which sentencing judges can take into account the varieties of human behavior they confront in selecting appropriate sentences. The proposed draft creates a host of problems many of which are described in the joint statement submitted to the Commission by 43 district judges within the Second Circuit. We urge the Commission to give serious consideration to the views reflected by the district judges of this Circuit, and we await with interest the next version of the Commission's guidelines.

Wilfred Feinberg, Chief Judge
Irving R. Kaufman
James L. Oakes
Thomas J. Meskill
Jon O. Newman
Amalya L. Kearse
Richard J. Cardamone
Lawrence W. Pierce
Ralph K. Winter
George C. Pratt
Richard J. Miner
Francis X. Altimari
J. Daniel Mahoney

December 1, 1986

00106
12-3-86
attachment

JOINT STATEMENT CONCERNING THE PROPOSED SENTENCING GUIDELINES

This is a joint statement of the undersigned district judges of the Second Circuit to the United States Sentencing Commission commenting on its September 1986 draft of proposed Sentencing Guidelines pursuant to the Comprehensive Crime Control Act of 1984 ("the Act").

We fully appreciate the difficulty of the task undertaken by the Commission and the obvious dedication, diligence and creativeness with which it has been pursued. However, our thoughtful analysis of the proposed guidelines has led us to the firm conclusion that the implementation of the guidelines in their present form would have serious adverse consequences on the criminal justice system which the Commission may not have anticipated.

I. Overloading of the Courts

Perhaps the most serious effect of the proposed sentencing procedure would be the massive additional burden it would impose on already overworked federal judges at both the trial and appellate levels.

The Commission's concept of sentencing for the "real offense" which the defendant has committed rather than the statutory "offense of conviction" is highly praiseworthy. Moreover, the aggravating and mitigating factors which the Commission proposes to be used in determining the "real offense" are matters which clearly should be taken into account in deciding upon the sentence and, indeed, have heretofore routinely been considered by sentencing judges, although in a less mechanistic way.

But the assignment to each of these factors of specific numerical values which are applied to modify, by multiplication or addition, the basic offense value, and the requirement that the presence or absence of these factors be determined by a preponderance of evidence standard will require evidentiary hearings in connection with almost every sentencing. It is virtually inconceivable that defense attorneys will accept without challenge the probation department's statements respecting such matters as the defendant's role in a multi-defendant offense, the portion of defendant's income derived from illegal activity, the continuing nature of the activity, the defendant's involvement in other illegal activities, the size of such operations, the use of intimidation to recruit and control subordinates, the employment of

special skills, the destruction or concealment of evidence, the attempted subornation of perjury, or the degree of psychological injury sustained by the victims.

Moreover the establishment of a large number of relatively narrow dollar loss or gain categories, with different base offense values, for such monetary crimes as mail and wire fraud, tax evasion, antitrust and securities violations and insider trading will surely trigger disputes and require evidentiary hearings to determine the dollar category into which the offense falls. Likewise assigning different offense values depending on the quantity of drugs, number of illegal guns, illegal aliens or counterfeit citizenship documents involved will require supplemental hearings as to factual issues which are frequently not resolved at the trial on the merits.

It is quite conceivable that hearings on these ancillary issues could require almost as much court time as the trials themselves. Indeed, such hearings will be required in many cases in which a guilty plea has rendered a trial on the merits unnecessary.

Furthermore, even if the district court's sentence is within the guidelines, its factual findings in support of the sentence will be subject to an appeal in which the court of appeals will have to review the record to determine whether the findings are clearly erroneous. It appears likely that there will be such an appeal in a great majority of the cases, even where there is no appeal from the conviction itself.

The federal courts simply cannot handle this massive additional workload without a substantial increase in the number of judges and support personnel, which in turn would require additional courtrooms, chambers and office space which are not available in the present courthouses and which could be provided only after lengthy delays. In the meantime, court backlogs would accumulate, to the substantial prejudice of all litigants.

II. Shift of discretion from judges to prosecutors

The objective of reducing disparities in sentencing is unarguably laudable, although we believe that the disparities have not been as great as popularly perceived, because in many instances the differences in sentences for similar offenses have been due more to the differences between offenders than to the differences between judges. Nevertheless,

we welcome the Act's concept of establishing for each offense a guideline range of sentences, allowing the government to appeal if the sentence is below that range and the defendant to appeal if it is above.

However, we believe that the rigidly mathematical approach of cataloguing every foreseeable aggravating or mitigating factor and assigning to each a specific numerical value reduces the discretion of the district judge almost to the point where the sentencing process could be performed by a computer or an accountant.

Since the sentence for a given offense could thus be predicted with a fair degree of accuracy once the aggravating and mitigating factors have been determined, the prosecutor and the defense counsel can effectively bargain for a specific sentence by selecting the counts to which the defendant will plead and stipulating the aggravating and mitigating factors.

Thus the prosecutors would have much more control over sentences than would judges. This could lead in the federal courts to the kind of rampant plea bargaining which has generated much justifiable criticism of state criminal justice systems.

III. The shift from probation to incarceration

The adoption of the guidelines in their present form would produce generally much harsher sentences than are now being imposed, particularly for less serious offenses. Any offense for which the sanction units total is 14 or greater would require a sentence of incarceration.

Many less serious crimes which have heretofore frequently been punished by fines and orders of restitution and community service would now require penitentiary terms. For example, evasion of $5,001 in income taxes carries a base offense value of 14, as does making a profit of $10,001 from insider trading or defrauding securities investors of any amount, however small.

These offense values apply even to first offenders who have otherwise been model citizens. While the sentences may be reduced slightly by the defendant's "sincere acceptance of responsibility," for example by voluntary restitution or cooperation in an investigation of the criminal activities of others, many offenders are not in a position to make immediate and full restitution nor to furnish evidence of the crimes of others.

Even more significantly, the guidelines would not permit the use of probation as an alternative to incarceration, even where the guidelines call for only a brief period of confinement. One ultimate result would be an enormous increase in the inmate population of a federal prison system which is already filled to over-capacity. Another would be the almost complete curtailment of the probationary sentencing programs which have been used with great success in the rehabilitation of offenders, as an alternative to committing them to institutions which may harden anti-social attitudes or serve as "schools for crime." Instead of using our excellent but already overworked probation staffs for supervision, the guidelines would impose on them an overwhelming burden of additional investigatory work in the preparation of pre-sentence reports covering the many aggravating and mitigating factors needed to compute the total sanction units.

IV. The proposed remedy

All of the foregoing disadvantages can be avoided by a simple, albeit fundamental, change in the proposed guidelines: go back to what the Act provides; specify for each offense a range of incarcerative sentences, the maximum being 25% greater than the minimum; provide that the district judge may take into account in

determining the sentence the same aggravating and mitigating factors considered in the draft guidelines and, where the judge finds that the prospect of rehabilitation of the defendant outweighs the need for the punishment, incapacitation and general deterrence which incarceration would provide, may substitute probation under suitably onerous conditions, such as restitution, where a sentence of confinement for 24 months or less would be within the guideline range.

The district judge should be authorized to rely on factual statements in the pre-sentence report as to the aggravating and mitigating factors unless the defendant submits an affidavit denying such statements and detailing the evidence which would be offered at an evidentiary hearing thereon. The judge should be given the discretion to disregard any disputed facts if he finds that the effect on the sentence would not be sufficient to justify the expenditure of time required for a hearing thereon.

If the sentence is above or below the guideline range, it will, of course, be appealable, and on appeal all of the district court's discretionary decisions, for example as to substituting probation for the specified term of incarceration, should be reviewable according to an abuse of discretion standard.

V. Conclusion

We believe that a revision of the guidelines as suggested above would achieve the desired objective of reducing sentencing disparities while preserving the ability of the sentencing court to devise sentences which balance the need for punishment, incapacitation and deterrence with the equally important goal of rehabilitation, and would also avoid the intolerable overloading of the courts and prisons which would inevitably result from the implementation of the guidelines as presently proposed.

December 1, 1986

Respectfully submitted,

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M. Joseph Blumenfeld, D. Conn.
Dudley B. Bonsal, S.D.N.Y.
Henry Bramwell, E.D.N.Y.
Charles L. Brieant, Chief Judge, S.D.N.Y.
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Jose A. Cabranes, D. Conn.

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Robert L. Carter, S.D.N.Y.

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Constance Baker Motley, S.D.N.Y.

Thomas F. Murphy, D.Conn.

Alan H. Nevas, N.D.N.Y.

Richard N. Owen, S.D.N.Y.

Edmund L. Palmieri, S.D.N.Y.

Thomas C. Platt, E.D.N.Y.

Milton Pollack, S.D.N.Y.

Leonard B. Sand, S.D.N.Y.

John E. Sprizzo, S.D.N.Y.

Louis L. Stanton, S.D.N.Y.

Charles E. Stewart, S.D.N.Y.

Robert W. Sweet, S.D.N.Y.

Robert J. Ward, S.D.N.Y.

Edward Weinfeld, S.D.N.Y.

Jack B. Weinstein, Chief Judge, E.D.N.Y.

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12-8-86
attachment

THE LEGAL AID SOCIETY

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Attorney-in-Chief
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Attorney-in-Charge of the
Criminal Defense Division
Caesar D. Cirigliano

Chief of Operations
Jack Lipson

December 4, 1986

Mr. Paul Martin
Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue N.W.
Washington, D.C. 20004

Dear Paul:

The Federal Defenders submitted written comments on the Preliminary Draft Sentencing Guidelines in connection with our testimony at the Washington, D.C. regional hearings on December 2, 1986. The written comments had several appendices attached, but Appendix C had not arrived in the mail in time to be included. I received Appendix C when I returned to New York and have enclosed 15 copies.

I would greatly appreciate it if you could see that these are forwarded to the staff member responsible for distributing the testimony so that they can be attached to our written comments.

Sincerely,

Robin Charlow

Robin Charlow

RC/ms

Thanks Paul!

Appendix C

FEDERAL DEFENDERS OF SAN DIEGO, INC.

28 November 1986

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

Attention: Guidelines Comments

Dear Chairman Wilkins:

Thank you for giving me the opportunity to appear before the United States Sentencing Commission in San Francisco on November 18. During my testimony, Commissioner Corrothers asked that I put in writing the examples of base offense value inequities that I cited during my testimony.

Based on the weight given offenses by the base offense value system:

Insider Trading/Cocaine

1) A $25 million gain resulting from insider trading violations (BOV 52) is less serious than possession with intent to distribute 25 grams of cocaine (BOV 66).

Bombing/Cocaine

2) The bombing in the federal building in San Francisco which occurred November 17 (K 218, BOV 60) may be viewed as less serious than possession with intent to distribute 25 grams of cocaine (BOV 66).

Fraud/Marijuana

3) While it depends upon the number of victims and transactions, a $100,000 fraud (BOV 10 + 6 = 16) could be viewed as less serious than possession with intent to distribute 1 pound of marijuana (BOV 18); possession with intent to distribute 1 pound of marijuana (BOV 12) is more serious than a single-scheme fraud of up to $15,000 (BOV 11).

Fraud/Theft

4) A single victim/single transaction fraud of $250,000 (BOV 20) is less severe than a $26,000 theft (BOV 22).

Bank Robbery/Insider Trading, Fraud

5) An alcoholic who walks into a bank with a note and takes $500 (BOV 36 + 24 + 4 = 64) is more serious than a $25 million insider trading gain (BOV 52) and a multi-victim/multi-transaction $25 million fraud (BOV 60).

Burglary/Cocaine

6) Burglary (BOV 24) of $10,000 (BOV 12) from an occupied dwelling (BOV 40) resulting in bodily injury (BOV 20) to the victim (total BOV 96) is less serious than possession with intent to distribute 251 grams of cocaine (BOV 132).

Immigration/Fraud

7) Transportation of four undocumented aliens for gain (BOV 12) or the possession of one false citizenship document (BOV 12) is more serious than a single-victim/single-transaction $15,000 fraud (BOV 11).

The above are only examples of an apparent socioeconomic bias favoring white collar offenders (fraud, insider trading, securities fraud) over more typical street crimes (theft, robbery or drugs). While judgment calls must be made and delineations of culpability recognized, sentencing guidelines should not require an elitism in the sentencing process. Every case brings its own set of circumstances, both aggravating and mitigating, and involves an accused whose human qualities must be considered. The mathematical approach upon which the preliminary draft is based does not and cannot adequately measure or punish the behavior of human beings.

Very truly yours,

Judy Clarke

JUDY CLARKE
Executive Director

bcc: Robin Charlow
Hon. James M. Burns

00168
12-3-86

COMMENTS OF THE FEDERAL DEFENDERS ON THE PRELIMINARY DRAFT SENTENCING GUIDELINES

Submitted December 2, 1986

The Federal Defenders have provided comment and opinion on the Preliminary Draft Sentencing Guidelines to the Sentencing Commission over the past several months, both formally - through oral and written testimony of individual Defenders at regional hearings expressing their personal views - and informally - through meetings and discussions with members of the Commission and its staff. We submit these additional comments at this time, some of which overlap those expressed earlier, to indicate the opinions generally held by Defenders across the country on some of the major areas covered by and left open in the preliminary draft. We do not repeat at length points discussed more thoroughly in our previously-submitted position papers and in written testimony appended hereto, and we make reference to these where appropriate. We have also omitted specific criticisms of individual sections of the draft, which we have already reviewed in great detail in regional hearing testimony and in meetings with the Commission's staff. This memorandum is intended as an overview of our concerns with some of the major issues raised by the preliminary draft.

1. The Draft Guidelines Are Too Detailed And Complex.

In an apparent attempt to capture every aspect of behavior, harm, or other characteristics potentially important in a "real offense" sentencing system, the Commission has drafted guidelines that are extremely precise and detailed. This level of detail is undesirable for several reasons.

First, although many factors are included as relevant to the sentencing decision, the determination of which factors to include and of what weights to assign these factors does not seem to be based on empirical analysis. There is no discussion, for example, of factors now generally considered in sentencing for particular types of crimes or of the relative weight each factor generally receives. While the Commission is not bound by current practice, it should not, without sound and articulated reason, alter current practice if that practice reveals a reasoned consensus view. The primary purpose of sentencing reform is to reduce unwarranted sentencing disparity, not to change current sentencing results that are consistent rather than disparate.

Second, many of the detailed distinctions in the draft come dangerously close to "legislating" in that they effectively create new offense definitions (e.g., offenses of higher and lesser degree) and, in some instances, new crimes not now contained in federal law. As the factors assigned sanction points in this draft move away from the elements of the crime of conviction and toward other facts considered relevant to real offense sentencing, the Commission is

requiring added punishment of a specified degree, without a jury trial, based only on a preponderance of evidence standard, for conduct that Congress has not determined is to be punished more severely or at all in connection with the crime of conviction.

Third, the many fine distinctions in this mandatory system will inevitably lead to disputes over the applicability of the factors potentially relevant in each case. Since sentencing judges are not permitted to ignore factors over which disputes arise, as they now can and often do, every dispute must be resolved, whatever the effort needed to resolve it. The result will be an enormous increase in sentencing-related litigation, often without any corresponding improvement in sentencing equity.

Finally, the level of detail in combination with the elaborate format used (i.e., the statutory index to offense categories; specific offense characteristics add-ons; cross-references to other offense sections; several different property and harm-level tables; offender multipliers; a separate criminal history calculation with its own add-on factors and multiplier or table; and a final sanction unit-to-sentence translation table) produces a set of guidelines that is far too complex to lend itself to ready, everyday use.* This kind of complexity will result in differing application of the guidelines by the thousands of judges, probation officers, prosecutors

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* The Senate Judiciary Committee Report indicates that the Commitee expects the Commission to evaluate the guidelines "to assure that [they] are not so complex as to detract from their effective use". S. Rep. No. 225, 98th Cong., 1st Sess. 168 n. 405 (1983), hereafter "Senate Report".

and defense counsel who will be using them to predict and determine sentences, and differing application will bring us back to the very uncertainty and disparity that the guidelines were intended to cure. Moreover, assigned and retained defense counsel who now take on only one or two federal criminal cases each year will be discouraged from doing so because of the need to master such a complex sentencing scheme. Also, of particular importance in these days of fiscal consciousness, large budgetary increases will be required for all parties in the criminal justice process; the more detailed, precise and complex the guidelines, the more time and resources that will be necessary to investigate, calculate, resolve disputes, justify on the record, and appeal sentencing determinations.

2. The Numerical System Employed In The Draft Guidelines Is Flawed And Produces Results Contrary To Those Intended By Congress.

Congress directed the Commission "to devise categories based on characteristics of the offense and categories based on characteristics of the offender" and to recommend, "[f]or each combination of a cateogry of offense and a category of offender, a sentence or sentencing range". Senate Report at 168; see also 28 U.S.C. §994(b)(1). Through this process, Congress expected not only a complete set of guidelines that "reliably breaks cases into their relevant components", but also one that "assures consistent and fair results". Senate Report at 168 (emphasis added); see also 28 U.S.C. §991(b)(1)(B) (one purpose of Sentencing Commission is to establish sentencing practices that "provide certainty and fairness"

(emphasis added)). Moreover, though Congress limited to a 25% range any individual guideline recommending imprisonment, it stated that "all the ranges [for a particular penal offense taken] together would be expected to cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it, for the applicable class of offense". Senate Report at 168. In short, although Congress gave the Commission discretion to design the guidelines in any form "of a series of grids, charts, formulas, or other appropriate devices" it prefers, id., Congress nevertheless anticipated that the Commission would directly consider and determine the appropriate sentence to apply to each combination of offense and offender characteristics, that all such sentences for any particular offense would range roughly from probation to the statutory maximum, and that all resulting sentences would be fair.

As many witnesses have testified at the Commission's regional hearings, these Congressional expectations have not been met. The draft guidelines will result in many sentences that are not fair by anyone's standards, that do not cover the probation-to-maximum range for each offense, and that are clearly not the result of the Commission having individually reviewed each combination of offense and offender characteristics in order to establish its corresponding appropriate sentence.* We believe that the numerical format selected by the Commission is partly to blame for these and other failures.

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* Examples of these inappropriate sentencing results are contained in Appendix A, letter outlining testimony of Michael Katz, Federal Defender in Denver, Colorado (see pp. 1-2); Appendix B, letter from Richard Reeve, Assistant Federal Defender in New Haven, Connecticut;

(footnote continued on next page)

The Commission has decided to use a single, rigid point scoring system to quantify and compare all different types of harms and behaviors. Many of these factors do not lend themselves to precise numerical evaluation. Further, many factors cannot be equated with one another in the neat, mathematical fashion imposed by the draft. For example, can we really say that extreme or significant psychological injury in an offense not involving the person is worth exactly the same 12 points as $1,001-$5,000 in taxes evaded and 1-4 unlawful aliens smuggled or transported? Can we also fairly say that one more dollar is worth two more points though one more alien is worth four more points, or that the very same psychological injury is worth exactly twice or exactly four times as much in an offense involving the person? Here again, it does not appear that any empirical analysis was undertaken of the comparable importance of such factors under current sentencing practice or in the minds of the public or of criminal justice practitioners and scholars.

One also wonders what basis there is for assigning 12 points to the factors listed above. Why is this number selected and what does it represent? The number seems even more arbitrary when one realizes that the same 12 points do not always translate into the same amount of sentence length; they can result in varying increases in sentence length depending upon how many other points they are added

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Appendix C, letter of Judy Clarke, Federal Defender in San Diego California, to Chairman Wilkins; Appendix D, letter of Judy Clarke to Judge Nielsen (see p. 4, "Drug Offenses"); Appendex E, testimony of Phylis Skloot Bamberger, Attorney-in-Charge of the Federal Defender Appeals Unit in New York City (see examples 3 and 4 on pp. 16-17).

to. The absence of an equivalency between offense value points and sanction units on the one hand, and the actual sentence length on the other, illustrates that the Commission has assigned very specific point values to conduct and harms while having no direct correlation in mind with the effect these points will have on the ultimate sentence. This is clearly not what Congress intended when it required the Commission to recommend an appropriate sentence for each combination of offense and offender characteristics.

It is not surprising that a system which quantifies very precisely the unquantifiable, equates precisely factors of incomparable value, and assigns precise but essentially arbitrary sanction points to relevant factors, also produces so many improper, unfair, and anomalous results. Though we do not advocate use of a particular format for the Commission's guidelines - it could be narrative, grids, matrices, or whatever - we think any system that involves a direct correspondence between combinations of relevant factors and the resulting sentences, rather than one that employs an arbitrary, intermediary point score system, would be preferable and more likely to comply with Congressional mandates and expectations.

3. The Draft Guidelines' Apparent Denigration Of Probation As A Sentencing Option Is Very Disturbing And Clearly Contrary To Legislative Intent.

As some of the above-quoted portions of the Senate Judiciary Committee Report indicate, probation was to be an option for almost all offenses,* if committed under certain circumstances or by

* Convictions for Class A and B felonies cannot occasion a sentence of probation. 18 U.S.C. §3561(a)(1).

certain offenders. Indeed, the Commission is even directed to consider that probation is generally the appropriate sanction for first offenders committing non-violent or otherwise non-serious offenses. 28 U.S.C. §994(j). In addition, even after the Commission has accounted for the four purposes of sentencing in drafting its guidelines, the statute directs the judge, before imposing sentence, to consider once again these four purposes; these purposes include rehabilitation, 18 U.S.C. §3553(a)(2)(D), which Congress said can best be achieved by a non-incarcerative sentence, see 18 U.S.C. §3582(a); Senate Report at 68, 76-77, 91-92.

The draft guidelines do not acknowledge these and numerous other legislative indications that probation is often to be the appropriate punishment.* See Appendix F, testimony of Lucien Campbell, Federal Defender for the Western District of Texas, pp. 3-14; Appendix E, pp. 12-14. In part, this results from the draft's numerical scoring system. Some of the criteria relevant to the in/out decision do not lend themselves to mathematical scoring and are

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* See, e.g., Senate Report at 59 (footnote omitted).

> [T]he only type of sentence for which current law provides a full range of options is the term of imprisonment. This probably results in too much reliance on terms of imprisonment when other types of sentences would serve the purposes of sentencing equally well without the degree of restriction on liberty that results from imprisonment.
>
> . . . .
>
> . . . The Committee encourages the fashioning of conditions of probation in order to make probation a useful alternative to a term of imprisonment.

therefore apparently ignored in the draft's calculus. These could include, for example, collateral (non-criminal) punishments the defendant will suffer; the need for, appropriateness of, and availability of rehabilitation or educational programs; or the possibility of sufficiently restrictive and punitive conditions of probation. Some criteria relevant to an in/out decision are simply not the same as those relevant to a determination of the length of sentence (as is said repeatedly in the Senate Report), and have therefore been omitted from a scoring system apparently geared toward assessing sentence length.

Rather than satisfying the Congressional mandate to examine such difficult questions as in what instances and for which offenders the usefulness of rehabilitation outweighs the need for institutional incapacitation, or when all four purposes of sentencing, including incapacitation, could be served by an appropriately-fashioned sentence of probation, the Commission opts for an easy way out. In contravention of legislative intent, it demotes rehabilitation, the only sentencing purpose that is to be affirmatively achieved through non-incarceration sanctions. It then relegates the difficult decision of whether or not to incarcerate to the tail end of a mathematical formula that fails to capture the most important considerations necessary for making the probation determination. Probation is a vital and effective sanction that should play a significant role in any rational, civilized sentencing system. Contrary to clear Congressional intent, we think the draft guidelines suffer from a

serious lack of recognition of the importance and usefulness of probation and contain no examination of the principles on which the in/out decision is now and should be made. See generally Appendix B; Appendix D, pp. 1-2; Appendix F. For examples of cases in which probation has been and should be imposed but which would result in incarceration under the draft guidelines, see Appendix A, pp. 1-2, and Appendix B.

4. The Sentences Resulting From The Draft's Scoring System Are Much Too Harsh.

The Commission has often stated that the sentence values in the draft are for purposes of discussion only and do not represent what the final sentence values will be. We find the draft guidelines' sentences terribly harsh and trust that they will be reduced significantly in the final version. It appears to us that if these values are retained, many more defendants will be incarcerated, and many for far longer than under current law. We do not think that Congress intended such a result, see Senate Report at 116, or that the Commission should produce such a result without substantial, express justification.

5. The Modified Real Offense Sentencing System Outlined In The Draft Guidelines Is Much Too Broad And Overinclusive.

The modified real offense sentencing system used in the draft guidelines at times requires consideration of unadjudicated, unadmitted criminal conduct. We note that, although the commentary in the draft guidelines discusses a few of the problems inherent in using

a real offense approach, see draft pp. 12-14, the guidelines adopt a form of real offense sentencing without resolving these and other real offense sentencing problems. For reasons explained in more detail in our earlier testimony and position papers, see Appendix E, pp. 2-3; Appendix G, "Fact Finding in Guideline Sentencing", pp. 2-10, the Federal Defenders continue to oppose consideration at sentencing of unadjudicated conduct which, if proven, would establish other or additional crimes, unless the defendant has admitted such conduct.

In our view, even though the real offense approach used in the draft is modified, it goes far afield in requiring punishment for conduct and harms that are not sufficiently or fairly related to the offense of which the defendant was convicted. Often mandatory increments in punishment are added with no consideration of mens rea on the defendant's part, little or no requirement of a causal or foreseeable connection to the crime of conviction or to the defendant's conduct, and no consideration whatsoever of possible defenses to the aggravating behavior. Many cross-references require full or close to full punishment for other crimes despite the fact that the defendant may never have been charged with such crimes or may have been acquitted of such conduct or have had such charges dismissed by the prosecution.* Moreover, these other crimes need be proven only

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* One might read the guideline's provision precluding consideration of "conduct for which further prosecution is barred" (draft p. 10) to prohibit punishment for dismissed charges. However, illustration 7 on page 17 of the draft seems to indicate otherwise. Therefore, it is not clear what effect the provision on page 10 is intended to have. In the absence of clarification from the Commission, we assume it can be read in so limited a manner as to permit consideration of charges resulting in acquittal or dismissal.

by a preponderance of evidence (and virtually any type or quality of evidence may be considered in this regard), and the defendant may not even be entitled to a hearing to contest his guilt of the aggravating conduct. Even more disturbing, in some cases the incremental punishment for such aggravating "other crimes" and behavior is way out of proportion to the base punishment for the crime of conviction, creating a situation in which the tail (aggravating behavior) wags the dog (crime of conviction).* See generally Appendix D, pp. 2-4; Appendix E, pp. 3-6, and due process discussion below.

It is not a sufficient answer that judges now may consider any other behavior they deem relevant in sentencing. Although they currently have the discretion to consider such behavior, under the guidelines they would be required to do so. Also, when they determine whether to punish for aggravating conduct or harm, judges now take into consideration many of the very factors discussed above (e.g., causal connection, defenses, mens rea) that are omitted from the draft's mechanical system.

6. The Due Process Requirements In The Draft Guidelines Are Unclear And, To The Extent That They Are Explicated, Are Wholly Inadequate.

Little is said in the draft about the parameters of due process under guideline sentencing. It would seem that virtually any type or quality of evidence may be considered in determining sentence.

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* The "tail wagging the dog" situation distinguishes the draft guidelines approach from the facts in McMillan v. Pennsylvania, 106 S.Ct. 2411, 2418 (June 19, 1986).

See Standard of Proof section on p. 8 of the draft and its citation to 18 U.S.C. §3577. There is no indication that the government or the defendant would be entitled to an evidentiary hearing to resolve a disputed issue of fact relevant to sentencing, and there is no clear explanation of what rules would apply to the conduct of such a hearing when held. See draft pp. 17-18.

The modified real offense sentencing system employed in the draft seems particularly onerous when coupled with a mere preponderance standard of proof, the absence of a right to an evidentiary hearing on contested issues, and the virtually unrestricted consideration of any kind of evidence without the availability of some mechanism, such as cross-examination, to test its reliability. We question the constitutionality of mandatory punishment for unadjudicated criminal behavior subjected to such a serious lack of due process protections. More important, we question the wisdom of this approach for a system that will serve as the national standard for sentencing and, therefore, must be perceived as just and fair. The more rigid and mandatory the punishment for aggravating behavior, and the more such behavior includes attenuated evidence of unadjudicated crimes, the greater is the need for due process guarantees to ensure that the most precious right to liberty is not carelessly or unfairly denied. See generally Appendix G.

We would propose the following procedural protections: First, the government should be required to give notice of aggravating factors upon which it intends to rely in arguing for application of

particular guidelines in each case, and the defense should have the same obligation to provide comparable notice of mitigating factors. Notice must be required in sufficient time to permit each side to investigate and rebut factual allegations and/or legal arguments. Both sides must also have similar advance notice of the contents of the pre-sentence report, including the probation officer's calculation of the applicable guideline factors and resulting sentence. A good faith exception for the diligent but late discovery of additional factors should be provided. Any factors omitted from the advance notice and not subject to the good faith exception should not be allowed to affect the sentence unless substantive due process is implicated, in which case an adjournment might be necessary.

In addition, we think that a clear and convincing standard of proof rather than a mere preponderance standard should apply to evidence used to enhance punishment. As explained above and in our previous submissions, it is not fair to punish someone for what is essentially unadjudicated criminal conduct based on a standard of proof so much less conclusive than that applied at trial to the elements of the crime. We feel the clear and convincing standard is a fair compromise between the greater reliability afforded by the trial standard (beyond a reasonable doubt) and the practical desire for more flexibility in sentencing proceedings. The issue is not simply what standard is constitutionally mandated,* but what standard

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* We do not think that McMillan v. Pennsylvania, 106 S.Ct. 2411 (June 19, 1986), permitting use of a preponderance standard for an aggravating sentencing factor, is necessarily controlling. McMillan rests in part on deference to state law and procedure, on the language of the Pennsylvania statute in question, and on the relative weight of

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is fair and appropriate; Congress often requires more protection than the constitutional mimima.

We also think the Commission must explicitly include a guideline guaranteeing the right to a hearing to resolve disputes over factors which the judge is going to consider in sentencing. In addition, the Commission should recommend amendment of the Federal Rules of Criminal Procedure to likewise guarantee the right to a sentencing evidentiary hearing.

Given the desire to avoid full-blown trials at sentencing, we have modified our original position that all the Federal Rules of Evidence should apply at these hearings. We still think the rules relating to privileges and to competency should apply. Also, if punishment is to be fairly imposed, the parties must have an opportunity to present evidence and the right to compulsory process, and there must be some minimum test of reliability and a meaningful opportunity to contest the reliability of the evidence considered. We think cross-examination is the best test of accuracy and reliability and, therefore, that the right to confrontation and cross-examination should usually apply. When and if the court determines that confrontation is not necessary, it must be able to articulate a rationale akin to a hearsay exception or some other reason for finding the evidence especially trustworthy, accurate and reliable. The

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the aggravating factor vis-a-vis the crime itself. In any event, McMillan was a very close decision, with four dissenters calling for proof beyond a reasonable doubt. The clear and convincing standard we advocate is, we believe, a reasonable accomodation to both the majority and the dissenters in McMillan.

government and the probation officer should be required to give notice of their intention to rely on hearsay evidence sufficiently in advance to allow the defendant to meet it, including in the notice the particulars of the hearsay evidence. In addition, the court should not consider or admit hearsay evidence unless the government demonstrates both a need for the evidence (i.e., that the point in issue is material and could not feasibly be proven without the hearsay evidence) and circumstancial guarantees of its trustworthiness.

Even in today's completely discretionary system, judges sometimes hold hearings and/or require reliability-tested proof of aggravating factors used to enhance sentences. See, e.g., United States v. Fatico, 603 F.2d 1053 (2d Cir. 1979); 458 F.Supp. 388 (E.D.N.Y. 1978); 579 F.2d 707 (2d Cir. 1978); 441 F.Supp. 1285 (1977). We think that such safeguards are all the more necessary in a system with rigid, precise, mandatory enhancements for what can often be rather attenuated conduct or harm.

7. The Guidelines Should Presume Concurrent Rather Than Consecutive Sentencing In Most Cases.

While the draft asks for suggestions on the use of concurrent or consecutive sentences, the guidelines' instructions are already drafted in a manner that assumes all the points for all offenses of conviction are cumulated, thereby effectively requiring consecutive sentences in all cases. See draft pp. 9-10. Suggestions are later included for mitigating this result somewhat. See draft

pp. 168-69. Cumulating sentences on all counts is far too harsh and usually inappropriate. Cutting off the cumulation at some arbitrary number of counts, as the draft later suggests, seems equally undesirable; it would send a very distressing signal to criminals that any additional offenses above the cut-off number are essentially punishment-free. Like other features of the draft, both these possibilities were apparently conceived without consideration of how judges presently resolve the question of when to cumulate multiple sentences.

We see no reason to alter current practice in regard to cumulation of sentences. There now appears to be a presumption that sentences imposed for multiple counts covered by the same indictment or course of conduct and by the same trial or plea will run concurrently. This presumption is overcome when the concurrent sentences, or the maximum sentence permissible for the highest count, are too low to adequately reflect the extensive scope or extreme seriousness of the total pattern of conduct. Only in such exceptional cases are consecutive sentences usually imposed. We think this current presumption of concurrent sentences should be carried over to and embodied in the guidelines, along with an appropriately restricted exception to the general rule.

CONCLUSION

We hope these comments and observations are useful to the Commission in its continuing effort to draft sentencing guidelines, and we look forward to the opportunity to examine and review the Commission's next draft.

APPENDIX A

OFFICE OF THE FEDERAL PUBLIC DEFENDER
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MICHAEL G. KATZ
FEDERAL PUBLIC DEFENDER

TELEPHONE
(303) 844-4545
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October 30, 1986

Honorable 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 the invitation to appear and address the Commission on Wednesday, November 5th. It is my understanding that you wish to have a written summary of some of my views prior to my oral testimony. I apologize for the delay in providing you with this written response, but know that you will understand the competing needs of representing my clients in court.

Let me state at the outset that I am aware that the Federal Public Defenders have been and will be filing position papers in response to the proposals of the Sentencing Commission. I have worked with the members of the Federal Defender Legislative Committee over the years and am confident in their ability to represent the defender point of view. I do not feel that regional differences are that significant, nor do I feel that the experience and philosophy of criminal defense lawyers differs that much. We are a fairly homogeneous group dealing with common problems, and thus we share common perceptions about the criminal justice system and in particular sentencing. I also know that the Committee has had substantially more time to study the proposals of the U.S. Sentencing Commission, and therefore I place even more faith and reliance in their perceptions.

I find the preliminary draft of the sentencing guidelines very disturbing for a number of reason. Most significantly, the sentence ranges proposed in the guidelines are extremely harsh. Many more people will be going to prison under this new system than under current practices. I have applied the guidelines to a couple of situations where my client received probation and have been shocked to see the amount of actual time that would have to be served under the guidelines. For example, a young man who broke into an unoccupied cabin (a dwelling) in Rocky Mountain National Park and stole some food would have to serve around four years despite the lack of a prior criminal record.

Another client of mine, a postal employee, who embezzled an item of third class mail containing pornographic literature, would have a guideline range of at least six to twelve months without any prior record. Finally, a client of mine who had knowledge of the making of a large quantity of counterfeit money and who exercised control over the printing press by storing it in a rental locker at the request of the principal, and who himself passed one of the twenty dollar notes, would receive at least forty-two sanction units for a sentence of thirty to thirty-six months, even if he had no role in the manufacture of the counterfeit money. If such a role, however minimal, were determined by the court, the offense value would be substantially increased. In the case I'm referring to the quantity of money actually printed by the principal was in excess of $500,000 adding 48 sanction units and calling for a sentence of 78 to 96 months. The young man in question was a college student with no criminal record who assisted his friend, a man who employed him on a part time basis as a mover while working his way through school.

Taking a second place only to the harshness of the guidelines is my concern for the loss of flexibility in sentencing and the attempt to divest the court of its discretion and its traditional role in the sentencing process. I suspect that many judges will take seriously the presumptive sentence range even if they find it personally offensive or inapplicable in a given case. The implementation of the guidelines, the standardization of sentencing into a rigid and mechanical formula, and the threat of government appeal will ultimately cause judges to "toe the line" and surrender their individual judgments to the "cold" sentencing formula. Another major concern I have is the lack of incentive for "rehabilitation" built into this system. To a great extent the new sentencing process suffers from some of the same problems inherent in the parole system. With the exception of the Youth Correction Act, inmates trade incentives for the "benefit" of knowing early on how much time they will have to serve. I realize that "rehabilitation" is a disfavored concept, but believe any penal system should build in incentives for hard work, education, drug rehabilitation, and other types of self improvement while in an institution. With the exception of a reduction of sentence for "cooperation" there is no such incentive in this system. A workable solution might be to allow reduction of sentence or discharge upon certification by the Bureau of Prisons that an inmate has shown sufficient signs of rehabilitation to be released and that further incarceration would serve no purpose regarding protection of the public.

Another area of major concern is the impact of the sentencing guidelines on the judicial process. The sentencing process becomes far more complicated under the guidelines. Judges, probation officers, and counsel for both the government and the defendant will have to spend a great deal of time applying the guidelines and litigating over the meaning or lack of meaning of certain terms and concepts. Everything from the determination of the "modified real offense" to the meaning of "drug abuse" and the applicability of evidence of "other crimes" should create a judicial nightmare. The application of traditional concepts of due process such as the need for hearings to determine whether a defendant should be held accountable both primarily or secondarily for crimes for which he has not been convicted is a particular problem. It is true that courts have traditionally had no restriction placed upon what they can consider in sentencing, and that judges consider a great deal of non criminal conduct in determining a defendant's "character". Nonetheless, the use of a point system with aggravating and mitigating factors requires much more attention to be given to the determination of these factors because of the precise application being made. This necessarily creates much more room for dispute. Furthermore, the harshness of the guidelines will undoubtedly result in more criminal trials and thus a greater impact on the judicial system, not to mention the prison system which will need to be developed to house the greater number of people who will be going to prison under the new sentencing law.

Another area of great concern about the new sentencing guidelines is the philosophy that is expressed regarding remorse and cooperation and the way these factors are taken into account. For example, what place does consideration of "remorse" have where a defendant is arguably not guilty or has a legitimate claim that he has been mischarged and he thereafter goes to trial to vindicate these beliefs? Suppose there is a legitimate question concerning the proof of one of the elements of the offense? My experience has been that the federal judges in Colorado do not punish these people for going to trial, nor would they necessarily reward them for foregoing their right to trial. Of course, judges can and should consider "remorse" in the appropriate situation. To the extent that a guilty plea may be consistent with remorse the court can take that into account. But to formulate an incentive for pleading guilty, which of course acts as a disincentive or even punishment for going to trial, is simply repugnant to the way we like to think our judicial system operates. Likewise, cooperation in an <u>appropriate</u> case can and

should be considered by a sentencing judge. However, cooperation is not simply the flip side of obstructing justice. Many legitimate concerns go into a decision whether to cooperate with the government. A person should not necessarily be punished for exercising discretion and good judgment in these situations. This does not mean that a defendant is not remorseful for his crime or is thumbing his nose at the court and trying to interfere with bringing others to justice. Conversely, some very "bad" people use the judicial system and their cooperation to their benefit in obtaining reduced charges and sentences, and many of these people constitute part of the serious criminal element and deserve harsh treatment. I have tried more than one case in which a key government witness had been involved in the criminal conduct for which my client was on trial and had a greater degree of responsibility then my client, yet was offered a substantial benefit for "cooperation". Cooperation or lack of cooperation is not one of the primary considerations in determining sentence, and the government should not be allowed to have it built in to the sentencing process in such a significant way as to punish those who do not cooperate.

In addition to the general observations that I have made above, I would like to briefly address the section of the preliminary draft dealing with criminal history. In speaking with several other Federal Public Defenders they have felt that my time at the hearing might be well spent in addressing some concerns in this area. To begin with, I believe that the only enhancement should be for previous convictions. Section C322 permits the court to consider other conduct for which the defendant has not been convicted if established by a preponderance of evidence. Such conduct would aggravate the sentence beyond the guideline range. I'm sure the Commission has heard all of the defense arguments for considering only adjudicated conduct. In terms of due process, reliability, and simplication of the sentencing process, this would be my position. But if unadjudicated conduct of peripheral crimes is to be considered it should be deemed as being included within the specific guideline range. In other words, the court could use this type of conduct as justifying a sentence closer to the top of the guideline range.

Another area of concern regarding criminal history is the consideration of drug use or "abuse". Criminal history points would be scored for single incidents involving a positive urine test. This would be the equivalent of the points asssessed for most previous felony convictions, and could translate into substantial additional time being served by a defendant. This

seems unduly harsh and arbitrary. Also, the term drug "abuse" is not defined in the guidelines. Not only does this create obvious problems of interpretation, but finding that a person was previously an abuser by virtue of having been in a drug program results in him being penalized despite the fact that he may have overcome the drug dependence. It creates additional problems in terms of advising a client whether to cooperate with the pretrial service officer or even a probation officer in discovering facts that would lead to a conclusion of prior drug use or abuse. Furthermore, considering that the Senate Judicial Committee felt that drug abuse should not play a role in deciding whether to incarcerate, it should be noted that the enhancement based on prior drug abuse could make the difference between probation and incarceration.

With regard to Section C321, the enchancement to the statutory maximum in certain cases involving "violent" crimes, it should be kept in mind that Congress in passing the statutory maximum sentences did so based on a parole system. In other words, the statutory maximum sentence of ten years takes into account that a person sentenced to ten years would serve substantially less than ten years in prison. Under the new sentencing guidelines that maximum sentence would convert to actual time.

With regard to the "decay factor" for prior crimes it should first be noted that the guidelines are not clear, as to whether the ten year time period commences after an offenders release from custody, and whether the ten years is tolled by the date of the alleged commission of the new offense or the date of conviction. Furthermore, there appears to be no reason for excluding crimes of violence and drug offenses from the decay factor. An individual who committed a robbery or sold drugs at the age of 19, but who has remained "clean" for twenty years and then picks up a conviction for false statement, fraud, or some such other

offense not related to drugs or violence no more deserves to have the earlier conviction considered than someone whose prior offense involves a non-drug related or non-violent crime.

With regard to diversionary dispositions I have been advised that some state jurisdictions require an admission before a judicial body prior to entry of a diversion. Apparently most jurisdictions do not. Thus, there would be a disparity between individuals who receive diversions in certain jurisdictions as opposed to those from other jurisdictions. It is my feeling that diversionary dispositions should simply be omitted from consideration. I know from my experience that the practice in state court is to sometimes offer a diversion where the evidence is thin if not insufficient to convict. Sometimes a prosecutor will actually institute the filing of charges knowing that a diversion will be offered. I believe this supports omitting diversions from consideration in the guidelines.

I believe Tova Indritz, the Federal Defender from New Mexico, will be addressing tribal and possibly foreign convictions. Foreign convictions are suspect because of the absence of "due process" and are not reliable indicators of guilt. Ms. Indridz has substantial experience with tribal convictions and can make a good argument for why they should be omitted from consideration in criminal history.

Finally, perhaps it goes without saying that uncounseled convictions should not be considered under these guidelines. I would feel more comfortable if there were a general provision specifically stating that uncounseled adjudications should not be considered. This would avoid confusion and any disparity in practcice from one federal jurisdiction to another depending on the practices of the U.S. Probation Department.

I hope that some of these comments will be of assistance and I look forward to appearing before the Commission on November 5th.

Sincerely,

MICHAEL G. KATZ
Federal Public Defender

MGK:bdm

APPENDIX B

FEDERAL PUBLIC DEFENDER
DISTRICT OF CONNECTICUT
234 CHURCH STREET
NEW HAVEN 06510

THOMAS G. DENNIS
FEDERAL PUBLIC DEFENDER

(203) 773-2148
(FTS) 645-2148

November 20, 1986

Robin Charlow
The Legal Aid Society
Federal Defender Services Unit
2 Lafayette Street--5th Floor
New York, NY 10007

Dear Ms. Charlow:

I have been advised by Thomas Dennis of our office that you are the "contact person" regarding the sentencing guidelines process. I recently worked up two profiles of cases I have handled within the last three years, one a bank robbery and one a bank embezzlement case, both of which resulted in probation. As the attached shows, and as you no doubt already know, the results under the sentencing guidelines would be quite different. Unfortunately, it is much easier to attack this absurd new law than to set up reasonable guidelines; having been totally against such a system, working through these examples has only reinforced my belief that it is totally unworkable. Connecticut might be substantially different from other districts, but I think not. With respect to bank robbery cases in this district, an Assistant United States Attorney indicated to a district court judge that over 50 percent of all bank robberies are committed by junkies, people with substantial mental problems, compulsive gamblers, etc. A probation officer whose judgment I respect feels that the figure is much closer to 75 percent, at least in the New Haven area. Unfortunately, the guidelines do not offer any real distinction between persons who rob banks and fall within this category, and defendants who really have no substantial mitigating circumstances in their background. Moreover, the solo actor under the guidelines has less opportunity for reducing his period of incarceration than one who acts as part of a group or conspiracy; that is, while the co-conspirator can always rat out his companions, the solo bank robber who is addicted to drugs or has mental problems acts on his own, and thus cannot get a "reward" for cooperating, since he has no associates against whom to cooperate (this is only one of many anomalous twists created by these guidelines; I had always thought that conspiratorial behavior should be punished more severely, since the law fears such joint activity as opposed to individual activity). Aside from all of the constitutional and philosophical issues involved in this absurd procedure, however, the biggest problem I see with the guidelines is that there is no room for differentiation on factors often critical to sentencing judges, and factors which I

believe ought to be critical. For example, in my profile B, the most critical factor to the district court judge who sentenced my client was that, prior to his embezzlement even being discovered by the bank, he had voluntarily gone through heroin withdrawal and sought treatment for his problem. But for the drug problem, it was clear that he would not be involved in any trouble, and his desire and successful effort to beat his drug problem, primarily on his own, was a controlling factor. While it is of some concern under the guidelines, insufficient discretion is given to weighing of this kind of factor in a case. Indeed, it is ironic that under the guidelines, he is penalized substantially for his drug addiction, and rewarded hardly at all for his own efforts to become drug free. Of course, I might be saying nothing more than that this sentencing guideline notion is unfair, unworkable, and a backward step, but I suppose that does not help too much at this juncture.

I hope that the enclosed profiles are helpful to you, and that something concrete can be done to enlarge the potential impact of personal characteristics in a defendant's background. I would like to discuss this with you further, and please give me a call if and when you have some time. Good luck.

Sincerely,

Richard A. Reeve

Richard A. Reeve
Asst. Federal Public Defender

RAR/sjm
Enclosures
cc: Thomas G. Dennis, Esq.

SENTENCING PROFILES

Profile A

Defendant A committed a solo, unarmed bank robbery, wearing a mask and using a toy pistol. He entered the bank, told all the customers and employees except one teller to lie on the floor, and took $6,000. He then attempted to flee in his own car, but a red dye pack was activated and he was ultimately arrested within about 100 yards of the bank. All of the money was recovered in A's car.

At the time of his arrest, A was 25, had a wife and a one year old daughter, had been employed by Amtrak for two years, had an eleventh grade education, and had received an honorable discharge from the Navy. His only prior record was for a six year old breach of the peace (on which he was fined $500) and a speeding ticket.

A's biggest problem was that he was a compulsive gambler and save for a few sporadic visits in the past to Gambler's Anonymous, had never received any help for the compulsive gambling. At the time of the robbery, he was in substantial debt to various businesses, to a local hospital for the cost of his daughter's delivery, and to friends and acquaintances. A psychiatric evaluation after the robbery confirmed that he was a compulsive gambler, that the robbery was an act of desperation which included some suicidal ideation, and that he actually had a sense of relief when he was caught, in that he felt it would give him a break from his life, and he could avoid dealing with all of his

problems. He was both surprised and somewhat disappointed when he was released on bond the day of the robbery, but I was able to get him into an outpatient compulsive gambling treatment program, and he regularly attended Gambler's Anonymous during the pre-plea and pre-sentencing periods. During that time, he established positive relations at both these places, showed consistently high levels of involvement, and was able to substantially improve his financial, psychological, and family situations. His genuine remorse for commission of the robbery was clear, and prior to sentencing, and essentially on his own, he sent a letter to the bank along with flowers, indicating how badly he felt about what he had done.

He was indicted for violations of 18 U.S.C. §2113(a) and (b), and he entered a guilty plea to §2113(b). He was sentenced to five years, execution suspended, three years probation with a special condition of continued gambling treatment. That sentence was imposed nearly two and a half years ago, and so far there have been absolutely no problems on probation, and he continues to make substantial progress with his gambling problem and his life generally.

Application of Proposed Sentencing Guidelines

1). (p. 40) Base Offense Value (Robbery).....36

2). (p. 40) Financial Institution ((a)(3)).....24

3). (p. 36) Theft-Base Amount (B211)..... 2

4). (p. 43) Value (B251)($5,000-$10,000).....12

OFFENSE VALUE.....74

5). Ch 3--Offender Characteristics

Pt. A--Role ..... -

Pt. B--Post Offense Conduct
(p. 123) §2--Acceptance of Responsibility--up to 20% (assume given maximum 20% reduction).....-14

Pt. C (no points--B/Peace not counted--see p. 129)..... -

TOTAL SANCTION UNITS.....60

Range of Sentence--48 to 60 months.

Profile B

Defendant B pled guilty to bank embezzlement. At the time of his offense he was 25 years old, had been married for one and a half years, and was a college graduate. He had worked at a local bank for two years, and at the time of his offense was a head teller for a local branch bank. The offense was directly related to B's drug use and addiction. He had used drugs since high school and college, and had started snorting heroin in January, 1983. His heroin habit progressively increased for the next 16 months, and as of March, 1984, he was snorting as much as $1,000 a day. His acts of embezzlement from the bank coincided in time with the drug habit, and by March, 1984, the total amount of embezzlement had risen to $60,000. At that point, he realized that he could not continue down the same path, and resigned from the bank. There was absolutely no suspicion of his embezzlement, the bank did not want him to leave, and gave him a glowing recommendation at that time. Immediately after resigning, he moved into his sister's apartment, and with her assistance he withdrew on his own from the heroin addiction. He described a two-week period of intense physical and psychological pain, but was able to withdraw, and has had no contact whatsoever with drugs of any kind since that time. Shortly after his withdrawal from heroin, he received a call from the bank; an audit had been taken and the embezzlement had been discovered, and he promptly confessed and gave the bank full details of the nature of his

scheme. At the same time, he began to see a private psychiatrist on a weekly basis, in order to gain insight into why he allowed himself to develop the heroin addiction. Prior to this offense, B had never been arrested for any offense. He was not sentenced in this case until October, 1984, and during the presentence period he found a new job, continued with the psychiatric sessions, and remained drug free. B was sentenced to three years execution suspended, with four years of probation, along with three special probationary conditions: (1) Continued narcotic treatment as determined by the Probation Office; (2) 200 hours of community service; and (3) Restitution at such times and in such amounts as required by the Probation Office.

Application of Proposed Sentencing Guidelines

1). (p. 36) Base Offense Value (Theft)..... 2

2). (p. 36) Embezzlement ((a)(3))..... 6

3). (p. 43) Value (B251)($50,000-$100,000).....24

OFFENSE VALUE.....32

4). Ch 3--Offender Characteristics

Pt. A--Role ..... -

Pt. B--Post Offense Conduct
(p. 123) §2-- Acceptance of Responsibility--up to 20% (assume given maximum 20% reduction).....-14

Pt. C--Heroin Abuse
(1(E)) 3 points = 9[1].....+ 9

TOTAL SANCTION UNITS.....35

Range of Sentence--24 to 30 months.

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1 It is not clear whether the Criminal History is added first, and then 20 percent is taken off for Post Offense Conduct, or vice versa. If the Criminal History score here is added to the Offense Value first, then 14 points would be added to 32, giving B 46 points, and then 20 percent of 46, or 9, would be subtracted, resulting in 37 total sanction units, and a Sentence Range of 26-32 months. I think this is probably what they intend, and my analysis is too lenient to defendant B.

APPENDIX C

Due to a mailing delay, Appendix C was not received in time for inclusion and will be supplied to the Commission at a later date.

APPENDIX D

FEDERAL DEFENDERS OF SAN DIEGO, INC.

5 November 1986

Honorable Leland C. Nielsen
Senior Judge, U.S. District Court
940 Front Street
San Diego, CA 92189

RE: Preliminary Draft/Sentencing Guidelines

Dear Judge Nielsen:

This letter is written in response to your request for input regarding the proposed sentencing guidelines. Simply put, the commission's preliminary draft is a disaster. It is unmanageable, incomprehensible and far too harsh. The enclosed eleven-page outline purports to be a simplified version of the procedures to be followed. However, as you can see from the outline, the procedures, even simplified, are remarkably complex and cumbersome and present numerous technical problems, e.g., application of obstruction of justice guidelines (outline at page 4), application of acceptance of responsibility guidelines (page 5), and adjustment for post offense conduct (page 6). The proposal also carries with it the capacity to dramatically increase the size and cost of the federal bureaucracy as well as to severely clog the courts. In an ideal world, these guidelines are a dream come true for the criminal defense lawyer who specializes in utilizing the technicalities of a system. However, ultimately sentences will be calculated and convicted criminal defendants will be punished. That realism, and an initial review of the preliminary draft of the sentencing guidelines, raise several serious problems.

Probation Guidelines

The commission has completely failed in its obligation to promulgate guidelines to determine "whether to impose a sentence to probation . . ." as required by 28 U.S.C. § 994(a)(1)(A). Instead, the commission arbitrarily assigns point values to a myriad of federal offenses and allows a defendant whose offense scores less than fourteen points to be eligible for probation. The commission relegates rehabilitation to the lowest of the statutory sentencing goals, finding that rehabilitation can be a primary sentencing consideration only for relatively minor

offenses. Consequently, probation is only available in minor (and mostly white collar) offense cases. The transportation of five undocumented aliens for gain, a relatively common offense in this district, is not subject to a probationary sentence. An individual convicted in a "border bust" case involving fifty pounds of marijuana (actually as little as ten pounds) is precluded from probation consideration.

The guidelines completely ignore the age of the offender, the lack of prior criminal record, the reasons the offense was committed, e.g., particular life stresses unlikely to recur, and the general character of the individual subject to the sentence. There must be a recognition in the guidelines that there are residual mitigating factors which must be evaluated and subject to the discretion of the trial judge. Appellate courts subject a trial judges' factual findings to a clearly erroneous review because the trial judge has the opportunity to evaluate the credibility of the witnesses and evidence. Some faith should be placed in the trial judge who likewise has the opportunity to see the offender's family, employer, and other similar supporters and evaluate the "credibility" of a probationary sentence. Not only has the commission severely limited the opportunity for probationary sentences but, as mentioned above, there are no guidelines which assist in evaluating when probation may be appropriate in any case. Certainly, an escape valve must be built into the guidelines to allow a judge to impose probation for any offense where probation is not otherwise prohibited by statute.

Other than the inequities caused individual defendants by this overly restrictive view of probation, there will be tremendous collateral consequences in that the prison population will expand with people who do not need to be and would not otherwise be in prison.

Modified Real Offense Sentencing

This calls for a judge to identify all unlawful acts or omissions done in furtherance of the crime of conviction as well as threatened, attempted or completed injuries or harms that result from the crime. The commission recognizes that judges commonly consider real criminal conduct. See 18 U.S.C. § 3577. However, because actual point totals attach with various unlawful acts or omissions done in furtherance of the crime, the commission's proposal brings with it serious problems. It would

be far preferable to sentence based on the offense of conviction because then at least the offender would be punished for conduct either admitted or proven beyond a reasonable doubt. Under the present system, judges balance the real offense conduct against various mitigating factors, a situation which is precluded under the proposed guidelines. A "modified real offense" sentencing system should at least limit the permissible considerations to harm intended by the offender or which resulted from a reckless indifference by the offender. Certainly, there should not be strict liability for uncharged unlawful acts or omissions.

Under the proposed modified real offense sentencing scheme, there is little, if any, benefit to pleading guilty.

No Provision for a Due Process Hearing/Burden of Proof

The commission somewhat cavalierly concludes that offense characteristics and adjustment factors need only be proven by a preponderance of the evidence. The commentary relies upon the five-to-four decision in McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986), but fails to recognize the sharp division that existed in the Supreme Court over that decision. A complex sentencing scheme should not rely on what is possibly constitutionally permissible but should also contain some basic notions of fairness. To allow certain acts, which are neither pled nor proven, to surface at sentencing and increase a sentence is dangerous and subject to abuse. For example, a defendant convicted of assaulting a government agent by the use of a deadly or dangerous weapon will face a base offense point total of 102 (base offense value of 6, deadly weapon in relation to any crime of violence adding 60 points, and the fact the victim was a government employee adding 36 points). If at the time of sentencing the probation report or the prosecutor shows by a preponderance of the evidence that the victim suffered severe bodily injury, the offense score more than doubles (it would add 120 points) increasing the defendant's guidelines from 90 to 112 months to 198 to 246 months. Because of the dramatic effect on the total sanction units, proof by a preponderance of the evidence is insufficient. It may well be preferable to go through the time and expense of a trial to test the validity of the "enhancement" (adjustment factor) evidence.

Regardless of the standard to be applied, because of the critical impact of the various adjustment offense factors, there must be a provision for an evidentiary hearing to resolve

contested issues. The proposed guidelines do not acknowledge that evidentiary hearings will be necessary to resolve factual disputes about sentencing factors. Other areas where factual disputes will be predictable involve psychological injury, proof of vulnerability of the victim, and alleged obstruction of justice. Actually, all of the adjustment factors are subject to interpretation and which, on many occasions, can only be resolved at an evidentiary hearing.

Base Offense Values for Drug Offenses

While it is recognized that delineations of culpability must be made and offenses must be distinguished from one another on the basis of certain value judgments, the proposal contains a severe socioeconomic bias in violation of 28 U.S.C. § 994(d). For example, the theft of $5 million is treated equally as seriously as a bank robbery by an alcoholic with a note who takes $200. Both base offense totals would equal 60. Possession of two kilos of cocaine is three times as serious as the theft of $5 million and more than three times as serious as insider trading resulting in a profit of $25 million.

Even within the drug offenses, there exists a serious problem in terms of weight of the offenses. According to Part D of the guidelines, at page 55 of the Preliminary Draft, if a mixture contains a detectable amount of a controlled substance, the entire amount of the mixture is considered in measuring quantity. This literally means that a person in possession of three pounds of sugar containing 1% cocaine is subject to a substantially greater sentence than the individual who possesses one-half pound of 100% pure cocaine. The present parole guidelines deal with this very simply by reducing all amounts of drugs to 100% purity and calculating the amount on that basis.

Acceptance of Responsibility

This is an admirable goal of sentencing but the list created by the commission again contains a bias in favor of the white collar offender. Also, given that the acceptance of the responsibility may result in a reduction of 20% of the total offense value, the right to a trial by jury and privilege against self-incrimination may be severely impacted by some of the requirements.

Cooperation

This section is one of the most dangerous contained within the proposed guidelines. By necessity cooperation by criminal defendants should result in some consideration in the criminal process. However, placing the authority to certify cooperation solely in the hands of the prosecutor creates an atmosphere for unscrupulous prosecutors to undermine the relationship between criminal defendants and their lawyers. Ultimately, the prime victim of this kind of arrangement may be the criminal defense attorney. The prosecutors should consider either dismissing the charges against an exceptionally cooperative defendant or there should be some room for the court to exercise discretion in cooperating defendant cases without using a rigid multiplier factor. Again, the system must maintain some balance. This balance is destroyed with power resting solely in the hands of the United States Attorney's Office.

Plea Negotiation

The proposed system will greatly increase the time required to negotiate pleas in that both counsel for the prosecution and defense will need to agree on offense characteristics and adjustment factors. If such an agreement is not reached, there will be great problems with the knowing and voluntary quality of guilty pleas. While the court may be able to satisfy Rule 11 by advising the defendant of the statutory maximum penalty, the defendant should be entitled to know whether his sentence will be doubled by the proof of certain adjustment factors. A guilty plea will turn into as much work, if not more, than a trial.

This letter contains only initial reactions to a review of the proposed guidelines. It is my understanding that the commission is open to change and sincerely wants critique. It also wants concrete suggestions. More judicial discretion and less mathematical precision needs to be built in several of the above-referenced areas as well as in evaluating the impact of criminal history on sentences. The continued viability of Rule 11 plea agreements should be acknowledged and the court and counsel allowed to reach Rule 11 agreements outside the guidelines.

I would urge the Advisory Committee on the Federal Rules to not only discuss its concerns with the preliminary draft but also recommend that Congress revive discretionary motions to modify sentences. Any system, particularly this one, needs some flexibility to consider the individual offender as well as changed circumstances.

Very truly yours,

Judy Clarke

JUDY CLARKE
Executive Director

JCC:teh
Enclosure

APPENDIX E

WRITTEN SUBMISSION OF
PHYLIS SKLOOT BAMBERGER
FOLLOWING THE
UNITED STATES SENTENCING COMMISSION HEARING
OF OCTOBER 21, 1986

October 31, 1986

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A review of the draft sentencing guidelines (hereinafter "draft") raises concerns with respect to both the concepts upon which the draft is based and particular provisions. I shall deal with some conceptual difficulties first and then the particular problems.

A. MODIFIED REAL OFFENSE SENTENCING (MROS)

1. Rejection of crime of conviction as the basis for sentence is based on faulty premises and incomplete analysis of criminal procedures.

I believe the crime of conviction should provide the basis for sentencing for the reasons set out in the previously submitted position paper filed by the Federal Defenders. The disadvantages of the crime of conviction system described in the draft (p.14-15) are overcome by easily accomplished modification of criminal procedures. The Commission was concerned that many statutes are written in general terms, leaving the precise methods of committing the crime unspecified. Therefore, concluded the Commission, the details of the crime charged are unspecified, making difficult determination of a sanction commensurate with the method of commission. For example, fraud committed against an inexperienced elderly person may be viewed as more reprehensible than a fraud against an experienced and greedy businessman. However, the cure for this imprecision rests not with MROS, but with simple modifications to existing procedures which will describe the specifics of the illegal conduct. The requirements

for the indictment can be modified to include precision in charging rather than merely a statement of the statutory language. Even if the language of the charging document is not modified, the government can be required to supply through discovery procedures (F.R.Crim.Proc. 16 and notes) the information of the specific means of commission. Finally, in a plea allocution a defendant could be required to outline the details of the conduct constituting the actus reus of the crime. In sum, MROS should not be used to cure a lack of specifity in the governing statute because there are more precise and appropriate cures for this long-noticed defect.

The second reason given in the draft for using MROS is that aspects of a crime, which are not elements of the crime, are nonetheless relevant to sentencing. However, the examples given by the Commission and the cross references indicate that many aspects of the crime of conviction are either other crimes, which should be separately charged by proven, or characteristics of the offender, which are not affected by MROS and are taken into account in other guideline provisions. The Commission's concern that conduct constituting an element of the crime of conviction may be performed in a more or less aggravated manner and that such conduct should be sanctioned in proportion to the level of seriousness is well taken. However, such punishment is not based on MROS, but on conduct that constitutes an element of the crime of conviction.

The third reason given for not using the crime of conviction is that it provides potential for enhanced prosecutorial power, that is, the prosecutor will be able to determine the sentence by including in the indictment whatever crimes are necessary to cumulate to the sentence he wants to have imposed. However, it is not the use of offense of conviction sentencing that is the source of the prosecutor's enhanced discretion. Rather, it is only if the Commission insists on mandatory cumulative sentencing that the prosecutor would have the power to control the sentence through the number of counts charged. If cumulative sentencing is not mandatory, an appropriate sentence can be imposed, whatever the number of crimes charged, which does not reach the cumulated sentence for all counts. (While the Commission appears to leave cumulation an open question (pp.167-69), it also appears to require it (p.10)).

2. MROS as set out in the draft is over-inclusive.

The draft makes clear that real offense sentencing is modified by requiring that there be a specific cross-reference to other crimes in order for them to be considered in sentencing. While the idea of using cross-references is an appropriate one, MROS as envisioned in the draft is too broad and, as such, raises due process issues. The definitions of MROS, which vary significantly on different pages of the draft, and the examples on pp.15-16 demonstrate this over-inclusiveness:

> It [MROS] means that an offender will be sentenced on the basis of the conduct necessarily involved in the offense of conviction, plus the conduct done in furtherance of the offense of conviction and any injuries resulting from such conduct.

P.5.

> These include unlawful acts or omissions that were done in furtherance of the crime of conviction, as well as threatened, attempted, or completed injuries or harms that resulted therefrom.

P.10.

> . . . only those real elements (not necessarily found as elements of the crime charged) that are importantly bound up with the conduct that constitutes the crime charged.

P.15.

> . . . [harm that is] related to and results from the [crime].

P.16.

The examples included in the draft illustrate the breadth afforded by these definitions:

Example 2 (p.16): the child hit by the speeding getaway car driven by the co-defendant after the bank robbery. The speeding getaway is said, in the draft, to be in furtherance of the crime. In fact, the getaway is not part of the robbery, but occurs afterward. Further, the act causing the injury (driving the car dangerously) was not performed by the defendant, and there is no indication that the defendant knew or approved of use of a speeding car. Thus, aspects of the conduct are treated as

sanctionable based on a standard of strict liability. The use of the strict liability standard would subject the defendant to sanctions even if the defendant planned something other than the use of a speeding vehicle or even disapproved of its use.

Example 4 (p.16): a death resulting from a drug sale is treated as a sanctionable homicide. The death should not be sanctioned as part of the sale unless the seller knew that the dosage or the nature of the drug was likely to cause death. The imposition of the sanction in this example, as in the prior example, is based on strict liability. The seller may have in fact warned the buyer of the strength or potency of the drug or been misled as to the lethal nature of the drug, but the seller would still be subject to sanctions due to the death.

Example 8 (p.17): punishment for conspiracy to forge and cash one check is enhanced by the forgery of twenty other checks without any finding that the twenty checks were part of the conspiracy rather than separate illegal acts. They result in sanctions although they may not have been be forged and cashed in furtherance of the conspiracy of which the defendant was convicted.

3. A proposed standard for limiting the scope of MROS.

Any use of MROS should be limited to consideration of the crime charged, acts in furtherance of the crime charged, and the harm intended or caused by the defendant's recklessness. If the aggravating accompanying conduct is a new crime, all the elements of the new crime should have to be established by the

prosecutor at sentencing. Application of the above standard by the judge should be required as a threshold determination before cross-referencing is applied to enhance the sanction. Cross-referencing will not be automatic, but premised on a finding that conduct and harms are adequately related to the crime and the offender.

MROS also requires additional substantive revision allowing the defendant to interpose defenses to cross-referenced crimes. These may include coercion, duress, self-defense, or mental impairment.

B. PROCEDURES AND FUNDING NECESSARY FOR ACCURATE FACT-FINDING AND DUE PROCESS

The additional fact-finding required by MROS demonstrates the need for incorporation of procedures into the sentencing process which assure that the fact-finding is accurate. The failure of the draft to include such procedural due process reveals another significant problem.

Due process requires that information used to determine sentencing be accurate. The complexity of MROS, the numerical value system, and the mandatory use of the factors and numerals emphasize the need for accuracy and reliability in fact-finding. Currently the judge is free to disregard a factor that is difficult or time-consuming to prove and resolve. Under MROS, this will no longer be possible.

At the hearing on October 21, 1986, Commissioner Robinson

asked why the present fact-finding process used in a system which allows the judge to disregard a disputed assertion, but does not guarantee that the judge actually does so, is not sufficient in the proposed system. The presently used fact-finding system is not adequate to protect against all use of mistaken fact. Moreover, retaining the present procedure along with the proposed system for sentencing insures a greater frequency of due process violations because the judge has no discretion, must consider every factor raised by the case, and must determine if each factor is established by a preponderance of the evidence. Thus, to avoid violation of due process, the Commission must demand the necessary funding for the Probation Department and the defense attorneys assigned under the Criminal Justice Act, and must seek expanded procedures, regardless of the time they require, to assure accurate fact-finding.

1. Adequate Funding for Probation Departments and assigned counsel.

Under amendments to Federal Rules of Criminal Procedure 32(a)(1) and 32(c)(2)(B), which are to take effect in November 1987, the probation officer must determine the sentencing classifications and categories, the sentencing guideline range believed to be applicable to the case, and any mitigating or aggravating factors warranting sentencing outside the guidelines. Rule 32(a)(2)(D) and (E) requires the pre-sentence report to state the financial, social, psychological and medical cost to

victims, and the extent of non-prison programs and resources available to the defendant. Thus, the burden of beginning the sentencing process and providing the groundwork for the sentencing decision rests with the Probation Department. Each of the many factors listed in the draft and given sanction points must be evaluated by the probation officer and guideline range must be suggested.

In making these judgments the Probation Department cannot rely on unverified hearsay and conclusory investigative agency reports and on the part of the pre-sentence report now labelled "prosecutor's version of the crime." Rather, the judge must be provided with the appropriate kind of information necessary to determine whether a particular factor is established by a preponderance of the evidence. There must be independent verification of information relied upon in sentencing and a standard of reliability must be required if the numerical evaluation is to be fair. Thus, the Probation Department's investigation must be far more extensive than it is currently. This will require training, additional staff, access to experts (particularly with respect to the physical or psychological condition of any victim, the damage to property, and the scope of the crime), and whatever funding is otherwise necessary. For example, while it may be sufficient to include in the present sentencing system assertions based on unverified hearsay and conclusory investigative agency reports because the judge can

disregard them, such information is not sufficiently reliable for the judge to make a finding that a factor in the guidelines is present. The probation officer will have to conduct an interview with the source of the information, have an expert available to examine a witness for psychological injury, or determine if the defendant was a drug abuser ten years earlier.

Similarly, assigned counsel must have the staff and funding necessary to investigate, to refute allegations made by the prosecutor and the probation officer, to supply complete information, and to prepare its own case on the relevant scored factors. Counsel must have experts to evaluate a victim's claim of injury or to evaluate property damage. Counsel must be able to investigate and produce evidence of defenses to cross-referenced crimes and specific offense characteristics. Accordingly, funding for assigned counsel and defense experts and investigators must be increased and adequate numbers of lawyers made available.

2. <u>The required evidentiary hearing to satisfy due process requirements must be included in F.R.Crim.Proc. 32</u>.

The hearing to be afforded is of critical significance. Amended Rule 32 does not envision an evidentiary hearing. To the contrary, it provides counsel only with an opportunity to comment on the pre-sentence report and to speak on behalf of the defendant, and allows the defendant personally to present any information in mitigation. It does not provide for any evidentiary hearing at which the government is required to produce evidence and testi-

mony on disputed relevant issues and during which the defendant is given the opportunity to cross-examine witnesses and produce its own witnesses.

The draft (p.17) talks of the government's burden and level of proof and the right to present witnesses and cross-examine. However, it does not explicitly require a sentencing evidentiary hearing, and affords no due process procedures. For example, it does not require that the government produce witnesses rather than rely on hearsay, so there may be no witnesses present to be cross-examined by the defense. Indeed, amended Rule 32 authorizes only an adjournment of a sentencing hearing until any disputed issue is resolved and then refers only to counsel's right to speak, implying that the issues will be resolved without an evidentiary hearing.

In addition, p.8 of the draft permits a sentence to be based on any information produced at trial, in the pre-sentence report, or the sentencing hearing. However, as discussed above, disputed information in the pre-sentence report often can only be tested at an evidentiary hearing. Significantly, under the proposed system probation officers are required to make assessments that are usually reserved for judges. The enhanced role of probation officer and the report emphasizes the need for a procedure to provide the opportunity to contest the assessments. The trial evidence is also not necessarily appropriate for consideration at sentencing. Evidence at trial relates to far more than the

elements of the crime. However, the jury verdict relates only to finding the elements of the crime and should not be used as verification of evidence not needed to establish the elements. Furthermore, an item of evidence not relevant to an element of the crime may remain unchallenged at trial because it is irrelevant to guilt or innocence. A challenge to such evidence at trial may be prejudicial to the defense on the issue of culpability. For example, a defendant claiming he is not the one who committed a bank robbery is not going to contest the amount of money allegedly stolen. The use of such unchallenged evidence at sentencing without an evidentiary sentencing hearing is certainly unfair and possibly unconstitutional, for it requires a defendant to dilute his trial rights in order to protect his sentencing rights, or to protect his trial rights and risk being sentenced on inaccurate information.

The Commission's assurances, expressed by Judge Wilkins, that there will exist a right to an evidentiary hearing are welcome but the draft does not include an explicit requirement for a hearing. In addition, Judge Wilkin's assurances must be translated into a specific request for a change in Rule 32 if they are to have the force of law. Absent a stipulation with the defense, the government must be required to prove at the sentencing hearing every specific offense characteristic or cross-reference and all other factors it will want to rely upon. Furthermore, the defense must have early access to the pre-

sentence report and its recommended guideline as well as the right to compulsory process in order to prepare, respond and defend.

C. THE LACK OF AVAILABILITY OF PROBATION UNDER THE DRAFT IS CONTRARY TO THE STATUTE AND ITS LEGISLATIVE HISTORY

1. The statutory requirement of an initial in-out determination.

In the testimony of Chief Judge Jack Weinstein and at the conclusion of the October 21, 1986, Regional Hearing, a question arose concerning the use of alternate guidelines to authorize probation. The Commission appeared to believe that a probation guideline as an alternative to an imprisonment guideline could not be provided for because of 28 U.S.C. §994(b) and the requirement that imprisonment ranges must include no more than a 25% or a six month difference between the maximum and minimum sentences. As I understand the reasoning, only a score of sanction points which permits a maximum sentence of six months in custody also permits a sentence of probation, and probation can never be imposed if the maximum prison term is more than six months.

However, this view of the statutory mandate is incorrect. The determination of whether probation is an appropriate sentence should be an independent decision and not one that is merely a function of a point system designed to determine the length of incarceration. The design of the draft is, therefore, inconsis-

tent with the statute and its history, both of which rest on an assumption that the primary and initial sentencing decision is whether probation or imprisonment is the appropriate punishment for a particular defendant who commits a particular crime.

The statutory language makes clear that the in-out decision is separate from the decision of how long to incarcerate. The equal treatment of probation and custody as alternate sanctions is manifest from 28 U.S.C. §994(a)(1)(A) and (a)(1)(B), which set out the type of sanction as the first sentencing decision and the length of the type of sanction as the second sentencing decision. Under 28 U.S.C. §994(b), the 25% or six month differential applies only if the first decision is that the defendant should be imprisoned; the 25% or six month differential does not affect the choice of sanction. 18 U.S.C. §3551 and §3553 reinforce the dual nature of the sentencing decision and the independence of the two parts of the decision. Section 3551 states that both probation and incarceration are sentences. Section 3553(a)(2) describes factors to be considered by the judge in deciding the sentence. These factors go beyond those numerically quantified by the draft and include promotion of respect for the law, "just" punishment, provision to the defendant of needed educational and vocational training, medical care or other treatment in the most effective manner, as well as an appraisal of the kinds of sentences available. In many instances these factors will indicate that

probation is the appropriate sentence. These factors are not quantified by the draft and are not capable of being quantified. They are, however, a required part of the court's sentencing decision and instruct that the court must make an initial in-out determination based on these considerations.

2. An appraisal of the probation system is needed to establish probation guidelines as required.

As noted, to determine the range of offender and offense characteristics for which probation is an appropriate sanction, the judge must consider "just" punishment, provision to the defendant of needed educational and vocational training, medical care or other treatment in the most effective manner, as well as an appraisal of the kinds of sentences available. To enable the judge to make such considerations and to prepare probation guidelines, the Commission should undertake a review of federal probation services, their actual supervision levels and potential levels, and the available services and programs in each community which can be imposed as conditions of probation and alternatives to incarceration. The study should seek to determine those categories of offenders, including both those who are now sentenced to probation and those now sentenced to custody, properly sanctioned by probation with appropriate conditions. Any study must necessarily include private and public programs for drug and alcohol rehabilitation, family counselling, education, vocational training, special programs for unmarried

mothers, and community service. Appraisals of program needs and the costs as well as the relative merits of public or private facilities must be examined. The Probation Departments must be consulted and the expertise of federal probation officers sought. Indeed, probation officers in the federal system who regularly supervise probationers in a variety of programs subject to a range of conditions are among the best sources of information about these critical subjects.

Accordingly, to comply with the statute, the Commission should revise the proposed structure to incorporate as a separate decision governed by appropriate guidelines, the in-out decision, and by setting up an entirely separate set of guidelines for length of probation terms which do not come within the statutory 25% differential limitation, and for conditions of probation.

D. SOME PROBLEMS WITH PARTICULAR PROVISIONS

1. The presumption in the income tax provision that unreported income is unlawfully obtained income (p.44) is violative of the Tot - Gainey - Leary line of Supreme Court decisions requiring that the fact presumed is more likely than not to be derived from the fact proven.

2. The shift, in the income tax section, of the burden of proof to the defendant to show his income was legally obtained (p.44) violates the due process presumption of innocence and the Fifth Amendment right against self incrimination.

3. The relative weights attached to various special offense characteristics resulting in add-on sanction points are irrational. Example: the use of a person of less than 18 years of age to assist in a drug offense requires an add-on of 18 points to the base value (p.58); by contrast, if the defendant and another go in disguise on a highway or on another's premises with intent to hinder exercise of a civil right only 12 points are added to the base offense value (p.84).

4. The double counting of offender and offense characteristics is unfair and appears vindictive. Example: 21 U.S.C. §848, makes it a crime to commit a continuing series of narcotics violations (three or more violations), while supervising five or more people and obtaining substantial income from the conduct. The draft requires that such a crime be given 120 sanction points or the total of the points for the three or more predicate acts, whichever is greater (pp.58-59). Paragraph 2 on page 59, to the extent that it is comprehensible, appears to require that the base offense values of any of the three or more predicate offenses resulting in convictions before the §848 conviction then be added again to the base offense value for the §848 offense. Then, §A311 (role in the offense) requires a doubling of the sanction points with no additional conduct beyond that in the statute (playing a major role is the essence of the statute), and without consideration of the factors listed in §A311. Then,

§C323 authorizes a sentence beyond the guideline range if the pattern of conduct yields a substantial portion of the defendant's income. The result is that although Congress has described behavior punishable by a minimum term of ten years, the guidelines require 24 years, with no aggravating behavior, by counting the same conduct four times.

5. There are inconsistencies with the statute. Example: the guidelines (p.127) require 3 points if the offender is determined to have been an opiate abuser within 10 years of the current conviction, or if the offender failed a urine test at arrest or while on bail. However, §994(d) permits consideration only of current drug addiction and only if relevant to sentencing. Example: Option 1 (p.142) requires use of all sanction points, but mistakenly equates those points with the maximum term in a guideline range and requires that punishment be at the maximum of the range. This conflicts with the requirement of §994(b) that the judge have sentencing discretion if a 25% range is used in the guidelines. Example: restitution must be made regardless of income (p.158). The statute says a restitution order must consider income (18 U.S.C. §3664) and modification is permissible if income changes (18 U.S.C. §3663(g)).

6. There are internal inconsistencies. Example: there are instructions to multiply the adjusted offense score by the adjustment for criminal history (p.10), which are inconsistent with instructions that the two are to be added (p.131).

APPENDIX F

WRITTEN SUBMISSION

OF

LUCIEN B. CAMPBELL

FEDERAL PUBLIC DEFENDER

WESTERN DISTRICT OF TEXAS

FOLLOWING THE

UNITED STATES SENTENCING COMMISSION HEARING

OCTOBER 29, 1986

ATLANTA

November 26, 1986

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I. INTRODUCTION

My name is Lucien B. Campbell. I have been Federal Public Defender for the Western District of Texas since 1975, and I was a Texas prosecutor previously. The Federal Defenders appreciate the opportunity to participate in the process of developing sentencing guidelines, and to address the Commission at this hearing.

I have focused my attention on Chapter Four of the Draft Guidelines,[1] "Determining the Sentence", where the Commission has identified certain issues as particularly appropriate for comment. I will speak to the issue of choosing between sentences of imprisonment and sentences other than imprisonment. I believe my remarks will address the dilemma identified by previous witnesses and some of the Commissioners, namely, how to achieve a proper degree of flexibility within the statutory framework.

I would first like to make some preliminary general comments on the Draft.

A. The Draft produces unduly harsh results.

First, the numbers. I know the offense values and modifiers in the Draft are tentative, and that impact analysis is premature, but I feel I must register my view that the results of

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[1]Preliminary Draft Sentencing Guidelines, United States Sentencing Commission, September 1986 (hereafter "Draft").

the Draft would be unduly harsh. The language in 28 U.S.C. § 994(m) that ". . . in many instances, current sentences do not accurately reflect the seriousness of the offense . . ." should not be read as meaning the incidence of, and length of imprisonment must increase. The Senate Report[2] does not so interpret that language. It says the Commission may well find some sentences are too high.[3] It says explicitly that it is not the expectation of the Committee that average sentences will be materially different under guideline sentencing, but instead that for the most part the average time served should be similar to that served today in like cases.[4]

The harsh results of the Draft are especially acute at the top and the bottom of the guideline table. At the bottom, more persons would be imprisoned for a short time; at the top, more persons would be imprisoned for life. This is a very powerful notion, moving from a system where most sentences are at least legally parolable after ten years. Lowering the offense values and modifiers, however, is only a partial solution to the harsh effect of the present Draft. The lack of flexibility in application must also be addressed.

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[2]S.REP. NO. 98-225, 98th Cong., 1st Sess. (1983) reprinted in 1984 U.S. Code Cong. & Admin. News 3182-3717 (hereafter "Senate Report").

[3]Id. at 61.

[4]Id at 116.

B. The Draft Guidelines are unduly complex.

I am concerned also with the complexity of the system. Because the guidelines will be used by all participants in the system (defense counsel, prosecutors, probation officers, and judges--most working independently in early stages of the case), the guidelines must lead to consistently reproducible results. I am not convinced that they do so in their present form. There is virtue in a system which though difficult to set up, is easy to use in the field.

The form of the Draft implies that the initial effective version will attempt an extraordinary degree of detail. I do not perceive any requirement that guideline sentencing be hatched out full-grown. While the concept of presumptive guideline sentence is revolutionary to the federal system, its development might best proceed in an evolutionary manner. The interest of achieving the fullest measure of certainty in sentencing must be weighed carefully against the need to avoid unfair results. Excessive detail in the first version of the guidelines, with no base of experience to draw upon, carries the greatest risk of unforeseen or inadvertent unfairness.

II. CHAPTER FOUR - DETERMINING THE SENTENCE

Presumptive guideline sentencing is a very powerful mechanism, which argues for great care and circumspection in its implementation. In the Draft the decision to incarcerate has

been reduced to a formula of numbers which will often turn on factors which are of little significance in themselves. The choice of probation or imprisonment may turn on whether a person transported four, or five aliens; ten, or eleven aliens (with a 20% discount for acceptance of responsibility); or whether $5,000 or $5,001 was stolen; or whether a "pound" of marijuana was a few grams over or under weight. The degree of detail in the guidelines which might be proper in a precatory guideline system may not be desirable in a mandatory guideline system.

In non-capital cases which carry possible imprisonment, the prime decision is whether to incarcerate. That prime decision has been reduced to a cipher in the Draft. The Commission has placed probatable sentences in the bottom range of the sentencing guideline table,[5] the guideline whose ranges may not exceed 25%.[6] What I am going to suggest is that the probation decision does not belong in the imprisonment guideline table at all, but instead must be the subject of a separate guideline. It would necessarily be a more subjective guideline, probably taking a narrative form.

It is clear, of course, that the "determination whether to impose a sentence to probation, a fine, or a term of imprison-

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[5]Draft at 140.

[6]More precisely, the maximum of the range may not exceed the minimum by more than 25%. 28 U.S.C. § 944(b), as amended by Pub.L. 99-363 to except six month ranges at the bottom and the range including life at the top.

ment" must be the subject of a guideline.[7] It is interesting to note that 28 U.S.C. § 994(j) suggests that the guidelines should call for a sentence other than imprisonment, in the case of a non-serious, non-violent first offender. In addition, the Senate Report contains numerous references to Congressional expectation that there be guidelines calling for probation in appropriate cases.[8]

The Commission has not done so in this Draft--the lowest guideline range which is probatable is also punishable by up to six months actual imprisonment. This seems a distinct departure from current practice, because it implies that only in a case where today a defendant might be considered for a symbolic (parolable) sentence no higher than eighteen months, may he also be considered for probation. Real sentencing today--not unwarrantedly disparate sentencing, but sound sentencing--considers a broader range than that. The new law considers a broader range to be legally probatable, since it only excludes A or B felonies, offenses expressly excluding probation, and cases where the defendant is otherwise sentenced to imprisonment.[9] It would be necessary to move the probatable sentence range further up the imprisonment guideline table to match current sound, proper sentencing practice, but of course this is mathematically impossible

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[7]28 U.S.C. § 994(a)(1)(A).

[8]Senate Report at 75 n. 162, 92, 172-175; see also 59, 76-77.

[9]18 U.S.C. § 3561(a).

under § 28 U.S.C. § .994(b)--only the range with a six month ceiling can have a zero floor. It may be that the Commission resisted the notion of a published guideline calling for probation in fear that such guidelines might diminish the deterrent effect of the penal statutes. This potential problem is avoidable, as explained below.

All of these considerations suggest to me that the probation decision does not belong in the imprisonment guideline table. I believe it is not only desirable that the probation versus imprisonment decision be the subject of a separate, threshold guideline, I believe the statutes require it. We should not lose sight of the fact that the first stated purpose of this Commission is to establish policies and practices which will "assure the meeting of the purposes of sentencing".[10] Those purposes are summarized as just punishment, deterrence, incapacitation, and rehabilitation.[11] The Senate Report makes it clear that one object is not favored over another.[12] In a given case, one object may have more bearing than the others, and in some cases, there may be only one identifiable object to be served in imposing a criminal sanction.[13]

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[10] 28 U.S.C. § 991(b)(1)(A).

[11] See 18 U.S.C. § 3553(a)(2)(A) through (D).

[12] Senate Report at 68, 76-77 and n. 166.

[13] Id. at 77.

The court is required to consider those core purposes of sentencing, among other things,[14] in determining the sentence to be imposed. I submit it is not possible to reduce those purposes of sentencing which lie at the heart of the scheme to a mathematical computation. Put another way, it is not possible for the Commission to subsume all of those mandatory goals into a formula of numbers.

One of the core purposes of sentencing, which carries equal weight, is rehabilitation. References to the "outmoded rehabilitation model" in the legislative history only mean that imprisonment cannot be expected to rehabilitate an offender.[15] The sense of the Senate Report is that the sentencing purpose of rehabilitation is still important in determining whether a sanction other than imprisonment is appropriate in a particular case; however, rehabilitation is to be sought out of the prison setting.[16] I do not believe that the sentencing judge's assessment of a defendant's rehabilitative potential, based on face to face contact and discourse in open court, can be supplanted by a number calculated in advance. Conversely, whether a defendant needs to be isolated can be hinted at by numbers, but I am not

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[14]The other things are: the nature and circumstances of the offense and history and characteristics of the defendant; the kinds of sentences available; the guidelines; the policy statements; and the need to avoid unwarranted sentence disparities. 18 U.S.C. § 3553(a).

[15]Senate Report at 38; see also 28 U.S.C. § 994(k).

[16]Senate Report at 76-77, 91.

satisfied that it can be more reliably determined in that manner than by direct judicial assessment informed by a pertinent guideline.

The first listed purpose of sentencing, summarized as just punishment, also includes the component of promoting respect for the law.[17] The Senate Report gives the example of an offense of little notoriety, not frequently committed, with little likelihood of recidivism, thus presenting the paramount purpose of rehabilitation, as a case which "may well almost mandate a sentence to probation."[18] I note that none of those factors lend themselves to numerical quantification.

Another purpose of sentencing is deterrence.[19] If it is within the knowledge of the sentencing judge that a particular type of crime is increasing rapidly in a particular area at a particular time, that judge may well wish to give more weight to the purpose of deterrence than a prefabricated guideline might permit.[20]

My fundamental objection to regulating the probation versus imprisonment decision by the mathematical formula of the Draft is that it fails to consider any non-numerically quantifi-

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[17] 18 U.S.C. § 3553(a)(2)(A).

[18] Id. at 92.

[19] 18 U.S.C. § 3553(a)(2)(B).

[20] See Senate Report at 92.

able factors--indeed, by definition, it is incapable of doing so. Yet the achievement of the specified purposes of sentencing (which I suggest do not lend themselves to numerical measurement) is one of the principal goals of the system.

The purposes of guideline sentencing can best be achieved by a threshold guideline which informs the determination of type of sentence, as between incarceration and probation in the first instance. It should explicate the purposes of sentencing as set out in the statute, emphasizing that no one goal is paramount--that instead, the selection of a type of sentence requires the judge to identify which goal or goals of sentencing may be served in a particular case, and to rank those goals as to priority. This guideline could be augmented by one or more policy statements providing more detailed guidance as to its application.

While such a guideline will not produce a number result, it is nowhere written that all guidelines must yield mathematic precision. Some guideline subjects may be amenable to such treatment; the determination of whether to imprison a person is not. To govern the imprisonment decision by mathematic formulas is to risk the appearance of trivializing the most important decision to be made in a non-capital case which carries the possibility of any imprisonment.

III. RESPONSE TO JUDGE BREYER'S QUESTION

During the Atlanta hearing, Judge Breyer questioned whether the imprisonment decision can be handled any way other than the Draft solution, in light of the provisions of 28 U.S.C. § 994(b).[21] Put another way, how may the guidelines say on the one hand that if an offender is imprisoned for eight years, that term of imprisonment may not vary outside its 25% range, but on the other hand the offender may be placed on probation.

The answer must first be sought in the language of § 994(b) itself. The 25 percent rule applies only if the sentence specified by the guidelines includes imprisonment. If Congress intended to impose this degree of restriction upon every sentencing decision, it certainly knew how to say so. Instead, the remaining first sentence of § 994(b) speaks to the full spectrum of sentencing options in this way: "The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." Thus, the Congressional mandate is that the guideline scheme as a whole comply with Title 18, and that sentences of imprisonment within the guidelines comply with the 25 percent rule. The rigidity of

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[21]Section 994(b), of course, states in part: "If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 per centum."

the imprisonment rule should not be gratuitously extended to other sentencing decisions which are not amenable to such treatment. As discussed above, whether an offender is to be imprisoned is such a decision.

The proposal in this paper for a type-of-sentence guideline is faithful to § 994(b) by effectuating the first sentence of that subsection. It would require that the sanction type be selected in accordance with 18 U.S.C. § 3553(a), the most pertinent section of Title 18. Such a guideline, necessarily more subjective than most others, would still be a guideline, subject to review for "incorrect application".[22] If reversals for incorrect application of the type-of-sentence guideline would be infrequent, this is inherent in the nature of the sentencing judge's decision. Subsections (3) and (4) of 18 U.S.C. § 3553(a) would seem to require the judge to consider what the length of the imprisonment term would be if it were selected. It would be proper, at any rate, for the guideline or the policy statement to require the judge to consider the length of the indicated imprisonment term in deciding whether to imprison an offender.

IV. OTHER OBSERVATIONS ON CHAPTER FOUR

A. Probation is a sentence.

In current practice, probation is sometimes thought of as an alternative to a sentence. Under federal guideline

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[22] 18 U.S.C. § 3742(a)(2).

sentencing, probation is a sentence, rather than the absence of a sentence or the suspension of a sentence.[23] Probation is, of course, an alternative to imprisonment, and a powerful one.[24]

The manner in which probation is imposed under the new law is significant. Under current law, there are two forms of probation: sentence imposed but execution suspended, and imposition suspended.[25] The former is more common, and when the sentence imposed is less than the maximum, this constitutes a form of leniency because the sentence may not later be increased. Under the new probation law, every sentence to probation will take the form of deferring the selection of the imprisonment sanction which means the full maximum statutory range will be available upon any revocation. Any intervening misconduct which formed the basis for revocation may worsen the person's position in the guideline. This enhances the deterrent effect of probation.

Unlike the very general treatment of conditions of probation in current law,[26] the new law is quite specific.

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[23]18 U.S.C. § 3551(b).

[24]The Senate Judiciary Committee did not consider a sentence of imprisonment to be the only form of sentence carrying deterrent or punitive weight. "It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose." Senate Report at 92.

[25]18 U.S.C. § 3651.

[26]18 U.S.C. § 3651.

First, for any offense, it is a mandatory condition that the defendant not commit another offense,[27] and, for a felony, it is a mandatory requirement that the defendant pay a fine, or restitution, or do community service as a condition of probation.[28] For the first time, nineteen discretionary conditions are specified by statute.[29] Also new is a provision for custody in intervals, such as nights or weekends, as a condition of probation.[30]

The Draft has called attention to other alternatives to straight imprisonment which may imposed as conditions of probation, such as community confinement and home detention, community service, restitution, and order of notice to victims.[31]

B. Fines are an enhanced alternative to imprisonment.

Until the Comprehensive Crime Control Act of 1984, fines played a more limited role as criminal sanctions. The Act has not only increased fines to a meaningful level,[32] it has greatly enhanced the collection process. It has created the

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[27] 18 U.S.C. § 3563(a)(1).

[28] 18 U.S.C. § 3563(a)(2).

[29] 18 U.S.C. § 3563(b).

[30] 18 U.S.C. § 3563(b)(1).

[31] Draft at 147-49.

[32] 18 U.S.C. § 3571.

civil remedy of a lien,[33] a provision for plenary resentencing upon knowing failure to pay a fine,[34] and a new criminal offense for willful failure to pay a fine.[35]

The Senate Report makes it clear that the Congressional intent was to create a full range of sentence options.[36] The bill requires the judge to consider all sentences, and it is neutral on what sentence is appropriate for a given offense,[37] except as explicitly stated.[38]

V. TECHNICAL PROBLEMS IN CHAPTER FOUR OF THE DRAFT

Certain portions of Chapter Four of the Draft do not comport with the statutes governing guideline sentencing, as detailed below.

A. Conditions of probation.

Guideline § A412.c, Conditions of Probation, is couched in mandatory language: "When a term of probation is imposed, the court shall impose the following conditions of probation in each case".[39] There follow fourteen of the nineteen discretionary

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[33] 18 U.S.C. § 3613.

[34] 18 U.S.C. § 3614.

[35] 18 U.S.C. § 3615.

[36] Senate Report at 59.

[37] Senate Report at 78.

[38] See, e.g., 28 U.S.C. § 944(h), (i) and (j).

[39] Draft at 143.

conditions of probation specified in 18 U.S.C. § 3563(b). However, 28 U.S.C. § 994(a)(2)(A) states that conditions of probation are to be the subject of policy statements rather than guidelines. Furthermore, § 3563(b) itself states that discretionary conditions may be added only to the extent they are reasonably related to certain of the statutory sentencing factors and only to the extent that they involve only such deprivations of liberty and property as are reasonably necessary for the § 3553(a)(2) sentencing purposes. The Senate Report states that it is certainly not intended that all the conditions suggested in subsection (b) of § 3563 be used for every defendant, but rather that conditions be tailored to each defendant to carry out the purposes of probation in his case.[40] This is certainly the soundest approach, since pointless and vexatious conditions diminish respect for the law and can be counterproductive to the goals of a sentence of probation.

B. Conditions of supervised release.

Whether to impose supervised release, and the length, are proper subjects for guidelines.[41] However, the conditions of the term of supervised release, which are governed by a guideline in the draft (§ A413.c[42]) are to be the subject of a policy

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[40]Senate Report at 95.

[41]28 U.S.C. § 994(a)(1)(C).

[42]Draft at 146.

statement instead.[43] Moreover, discretionary conditions of supervised release are not to be imposed automatically in every case as the Draft guideline would require, but only if they meet the multipart test of 18 U.S.C. § 3583(d).

VI. CONCLUSION: THE BALANCE BETWEEN CERTAINTY AND FAIRNESS

The challenge of guideline sentencing is to achieve greater certainty without compromising fairness. The twin goals of certainty and fairness are mentioned twice in the statutes,[44] and they are coupled together both times. The Draft Guidelines would achieve a great measure of certainty, but at considerable expense to fairness.

The purpose of guideline sentencing is to "avoid unwarranted sentencing disparities",[45] not to eliminate all apparent disparity, which is neither possible nor desirable. The Senate Report's section analysis of 18 U.S.C. § 3557 on sentence review says that the "procedures introduced by this bill are designed to eliminate from Federal criminal law the plainly disproportionate sentence."[46] Elsewhere, the Report states that "[t]he Committee does not intend that the guidelines be imposed

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[43] 28 U.S.C. § 994(a)(2)(B).

[44] 28 U.S.C. §§ 991(b)(1)(B) and 994(f)

[45] 28 U.S.C. § 991(b)(1)(B).

[46] Senate Report at 86, emphasis added.

in a mechanistic fashion."[47]

The enunciation of the purposes of federal sentencing for the first time[48] is a significant improvement. This, coupled with the requirements that the sentencing judge consider them, and state the reasons for imposing a particular sentence,[49] and the advent of sentence review, will in themselves achieve significant reduction of unwarranted sentencing disparities. The Commission should resist the idea of going further than the law requires, by imposing the strict mathematic precision (or pseudo-precision) of the imprisonment guideline table on all judicial decisions. To do so risks the sacrifice of fairness in pursuit of certainty.

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[47]Senate Report at 52.

[48]In 18 U.S.C. § 3553(a).

[49]18 U.S.C. § 3553(c).

APPENDIX G

FEDERAL DEFENDER POSITION PAPER ON FACT FINDING IN GUIDELINE SENTENCING

Introduction

This is the first of several position papers which the Federal Defenders intend to submit to the Sentencing Commission. In this paper, we submit our recommendations with respect to procedures which a sentencing court should use to determine all findings of fact relating to sentencing so as to comport with procedural due process. More narrowly, this paper will also suggest ways in which the unadjudicated conduct of a defendant might best be handled at sentencing under the new guideline structure so as to comport with traditional notions of reliability and fairness.

A. The Expanded Importance of the Sentencing Hearing.

Under the new determinate sentencing plan, a court's discretion will be somewhat curtailed, yet its role as a factfinder will be greatly increased. In imposing any sentence, a court will be required to state the reason why a particular sentence is imposed, whether within or without the guideline range. 18 U.S.C. § 3553(c). These factual determinations are appealable by either of the parties. 18 U.S.C. § 3742. Therefore, the choice of a punishment (whether incarceration, fine, probation with conditions, restitution, post-release supervision), as well as its severity, will depend upon a variety of factual determinations to be made by the sentencing court and which relate specifically to particular characteristics of both the offense and the

offender. 18 U.S.C. § 3553; Feinberg, Federal Reforms for Sentencing Criminals, N.Y.L.J., Feb. 6, 1985, at 3.

Where a dispute arises at sentencing as to the applicability of a particular sentencing guideline, and most especially where the court seeks to consider the unadjudicated conduct of a defendant as a basis for a particular sentencing decision, the need for adequate procedural safeguards before the sentencing court is essential to a fair hearing on the issue of punishment and is necessary to insure a defendant the opportunity to make an adequate record for meaningful appellate review.

B. Offense Characteristics: What is Appropriately Considered At Sentencing?

Under the present sentencing law, in the ordinary federal criminal case, the only factfinding normally made is for a sentencing court to determine whether a defendant's conduct satisfies all of the essential elements of the crime or crimes charged. After the adjudicatory stage had ended, whether through a plea of guilty or a trial on the merits, a court is ordinarily not required to conduct any additional formal factfinding. The institution of guideline sentencing, however, will require sentencing courts to make additional factual determinations at the sentencing stage except in those cases where the facts are not in dispute.

The factfinding process at sentencing will, therefore, clearly became a crucial and oftentimes difficult stage in many cases. The issue thus becomes one of how these additional facts

should be determined, i.e., what procedures should be enacted to ensure that the factfinding process is reliable and fair.

In this regard, it is perhaps helpful to distinguish among three different classes of facts relevant to a sentencing decision: 1) facts which are elements of the crime of conviction; 2) facts which are related to the offense of conviction but which are not elements of that offense, nor do they establish any other offense; and, 3) facts which relate to the offense of conviction and which would establish other, unadjudicated offenses.

The first class of facts needs no discussion inasmuch as these facts will necessarily have been established at the adjudicatory phase of the case. In this instance, clearly no further factfinding need be made. For example, if a defendant has pleaded guilty to the felony theft of government property of a value of $100 or more (18 U.S.C. § 641), the factual basis of the guilty plea itself, admitted to by the defendant, establishes for sentencing purposes that the offense of theft was committed and that the amount of loss was $100 or more.

The second class of facts includes most of the circumstances surrounding the commission of a given offense such as the amount of loss, the number of victims, whether the defendant engaged in substantial planning in the commission of the offense, and the like. To amplify on the previous example, the Commission may decide that, in a § 641 case, an offense should fall into a higher or lower sentencing category depending upon whether the

loss exceeded $10,000.00. In this circumstance, a factual issue may arise at sentencing as to the actual amount of loss sustained by the Government. The sentencing court will then be required to make a factual determination as to the amount of loss (unless, of course, the defendant specifically admits the amount at a plea of guilty as a basis for determining the appropriate sentencing guideline range. Where a factual determination becomes necessary, as in the example, it is clear that a defendant must be afforded the opportunity, as a matter of right, to present evidence which might place him in a lower guideline range or to rebut the Government's proof. (See sections F, G and H, infra.)

The third class of facts includes those which, if proven, would show that a defendant was additionally guilty of other crimes with which he was not charged or which he has not admitted. For example, if a defendant has pleaded guilty to bank larceny over $100 under 18 U.S.C. § 2113(b), his use of force or violence against a person in doing so is a fact which, if proven, would make him guilty as well of the more serious offense of bank robbery under 18 U.S.C. § 2113(a). It is this third class of facts, viz., those which relate to offenses which a defendant has neither judicially admitted nor been convicted of, which is an area of special concern in light of traditional, historical concepts inherent in the jury system. This area requires examination in depth.

C. Consideration of a Defendant's Unadjudicated Conduct Which, if Proven, Would Establish the Commission of Other or Additional Crimes.

There exists the substantial likelihood that use by a sentencing court of unadjudicated facts showing that a defendant is guilty of other uncharged or unadjudicated crimes, apart from the offense of conviction, may cause problems of constitutional dimension depending upon how such facts are treated. State jurisdictions, most notably Minnesota and Washington, specifically address this problem area, and each state has adopted procedures designed to remedy any fundamental injustice to a defendant. These states' approaches are instructive and will be detailed more fully below.

The Federal Defenders recommend that the Commission adopt what we understand to be the system utilized in Minnesota and Washington. These states prohibit the use of unadjudicated offenses in a sentencing determination where any dispute as to the commission of the other offense arises. Such unadjudicated offenses may only be properly considered by a sentencing court when a defendant has specifically admitted the conduct which establishes the other offense.

Our reasons for advocating this position are two-fold. First, if Congress thought that the "other crime" fact was of such significance that it merited a more serious punishment, that "other crime" fact should be established in the way Congress has

approved, i.e., a trial on the merits or a plea of guilty. Second, any other system would permit a defendant to be sentenced for more serious conduct (resulting, of course, in a greater sentence), even though the prosecution's case might have had fundamental defects or may not have been strong enough to prove guilt beyond a reasonable doubt. In other words, giving a sentencing court the power to find as a factual matter that the defendant committed additional crimes, where such facts are in dispute, effectively bypasses the jury system and all constitutional notions of criminal law and procedure.

D. The Washington State Approach.

In dealing with the issue of unadjudicated offenses in the context of determinate sentencing, the state of Washington enacted the following statute:

> In determining any sentence, the trial court may use no more information than is admitted by the plea agreement, and admitted to or acknowledge at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The real facts shall be deemed proven at the evidentiary hearing by a preponderance of the evidence. Real facts that establish elements of a higher crime, a more serious crime, or additional crimes cannot be used to go outside the presumptive sentence range except upon stipulation.

R.C.W. 9.94A.370 (emphasis added).

E. The Minnesota Approach.

Under Minnesota's determinate sentencing plan, a commission established "presumptive", fixed sentences for those offenders for whom imprisonment was deemed appropriate. MINN. STAT.ANN. § 244.09, subd. 5(2). While departure from a presumptive sentence is permitted, a sentencing court must make specific findings as to any circumstances justifying departure. Those circumstances must be both "substantial and compelling." State v. Bellanger, 304 N.W.2d 282 (Minn. 1981).

Since the enactment of determinate sentencing guidelines in Minnesota, a body of case law has developed as to the scope of a sentencing court's authority to consider a defendant's unadjudicated conduct as a basis for departure from a presumptive sentence. Under the guidelines as construed, a sentencing court is entitled to consider a defendant's admitted underlying conduct in committing the offense of conviction, even if that conduct includes unadjudicated offenses. However, a Minnesota sentencing court is prohibited from making any independent determination as to a defendant's guilt of unadjudicated offenses if any factual dispute exists. A few of the leading cases are illustrative.

In State v. Garcia, 302 N.W.2d 643 (Minn. 1981), the defendant was charged with criminal sexual conduct in the first degree. Through plea negotiations, that charge was reduced to kidnaping. At the plea, the defendant admitted not only his conduct in kidnaping the victim, but also admitted committing

various forcible sexual acts during the course of the kidnaping. Id. at 645. In departing from the presumptive sentence of 26 months, the sentencing court specifically considered the sexual acts admitted to by the defendant. In affirming the sentence, the Minnesota Supreme Court noted that the trial court's reliance on the admitted sexual conduct, an offense to which the defendant had not pleaded guilty, was proper, stating that:

> We believe that the sentencing court in sentencing on the kidnaping conviction should be permitted to consider what happened during the kidnaping.

Id. at 647.

In the same manner, in State v. Rott, 313 N.W.2d 574 (Minn. 1981), the Minnesota Supreme Court upheld a sentencing court's decision to depart from the presumptive sentence on the basis of the unadjudicated conduct of the defendant. There, the unadjudicated conduct fell within specific statutory criteria for an aggravated sentence and, significantly, the defendant admitted that she had committed all of the offenses, including the uncharged offenses, which were part of a common criminal scheme. Id. at 575.

In contrast to the results in Garcia and Rott, the Minnesota Supreme Court in State v. Womack, 319 N.W.2d 17, 20 (Minn. 1982) held that, where a defendant disputes the commission of unadjudicated offense conduct, the sentencing court may not act as an independent factfinder in order to justify departure from

presumptive sentencing guidelines. In Womack, the defendant was charged with possession of a pistol by a felon, and with assault in the second degree. Pursuant to a plea agreement, the assault charge was dismissed, and the defendant pleaded guilty to possession of the firearm. Throughout the case, the defendant disputed his guilt as to the dismissed assault charge claiming that he had acted in self-defense. At sentencing, the court stated that it did not believe the defendant's claim of self-defense and determined that the defendant had, in fact, committed the assault as alleged. The court imposed a sentence of 30 months' confinement. On appeal, the Supreme Court reduced the defendant's sentence to the presumptive 16 month term specified by the guidelines.

The crucial factor in Womack was that the defendant disputed his guilt as to the dismissed count. In this circumstance, the Minnesota Supreme Court has declared that a defendant does not surrender his right to have a jury determine guilt or innocence.

> It is one thing for the sentencing court to look at the conduct underlying the offense to which the defendant pled guilty if the defendant admits that the underlying conduct occurred, but it is quite another thing when the defendant denies that such conduct occurred.

Id. at 19 (emphasis added).

Thus, while Minnesota does not prohibit a sentencing court from considering the unadjudicated conduct of a defendant,

its power to do so is limited to consideration of specific factors outlined in the guidelines, and to conduct admitted to by the defendant. Where a dispute arises in the area of uncharged or unadjudicated offenses, the sentencing court is strictly prohibited from acting as an independent factfinder, including determinations as to credibility. In this way, many obvious constitutional due process problems are eliminated.

F. Procedural Due Process Requirements in a Factfinding Proceeding: The Twin Goals of Reliability and Fairness.

As under the old sentencing law, the presentence report retains its place as a sentencing court's primary source of facts as to the defendant and the offense. 18 U.S.C. § 3552. This is especially so where a case is resolved by a negotiated plea of guilty. In this circumstance, the presentence report is often the only source of information a sentencing court has regarding the facts underlying the offense.

Our experience shows that, even for those defendants who go to trial, the presentence report often contains serious errors or omissions, and frequently presents information in a manner which is overtly and improperly antagonistic to a defendant. Information presented to the court by the prosecutor at sentencing may also be incorrect or incomplete.[1]

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[1] "The principal problem inherent in the use of the presentence report is its potential for introducing inaccurate or misleading information into the sentencing decision. . ." "[T]he opportunity for inclusion of misinformation is particularly acute after the guilty plea, when the probation officer engages in a new investigation of the offense without the use of traditional adversarial and evidentiary safeguards for ensuring fairness and accuracy." Fennell & Hall, Due Process at Sentencing, 93 Harv. L. Rev. 1615, 1628-29 (1980). (This article was prepared under contract with the Federal Judicial Center.)

Given the enlarged factfinding role of a sentencing court, the most crucial issue is what procedural protections are due a defendant.[2] Historically, where a new finding of fact is required which is not an element of the offense of conviction, "the full panoply of due process protections" may be triggered. Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326 (1967). These protections traditionally include the right to counsel, the opportunity to be heard, the right to confront and cross-examine the Government's witnesses, the right to present evidence, and the right to factual findings sufficient to facilitate a meaningful appeal from the factual determination.

In recent years, the Supreme Court has instituted a more flexible approach to due process than was required in Specht. See e.g., Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Although these cases were decided in the context of parole and probation revocation proceedings, the Supreme Court's approach to due process is instructive in the area of determinate sentencing where the factfinding role of the sentencing court is enlarged.

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[2]Due Process is, of course, required even under the present subjective sentencing process. While a sentencing court is given wide latitude in the information it may consider, it is precluded from reliance on information that is mistaken or upon assumptions that are baseless. The material used to determine sentence must be reliable and accurate. Gardner v. Florida, 430 U.S. 349, 359 (1977) (plurality opinion); United States v. Tucker, 404 U.S. 443, 447 (1972); Townsend v. Burke, 334 U.S. 736 (1948).

In Morrissey, the Supreme Court considered the issue of what, if any, procedural protections were due a parolee prior to the revocation of his parole. The court determined that the question of whether any procedural protections were due depended upon whether an individual would be "condemned to suffer grievous loss." Id., 92 S.Ct. at 2600, citing, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951). The Supreme Court acknowledged that unqualified liberty, and its termination, did indeed constitute a "grievous loss" and therefore required certain minimum procedural due process protections before an individual's liberty could be taken away. Morrissey v. Brewer, 92 S.Ct. at 2601, 2604. In the context of a parole revocation, the Supreme Court held that minimum due process required: 1) written notice of the claimed violations; 2)disclosure to the parolee of the evidence against him; 3) the opportunity to be heard in person and to present witnesses and documentary evidence; 4) the right to confront and cross-examine adverse witnesses unless "good cause" was shown for denying confrontation; 5) a neutral and detached hearing body; and 6) a written statement by the fact finders as to the evidence relied on and the reasons for revocation. Id., 92 S.Ct. at 2604. In Gagnon v. Scarpelli, the Supreme Court held that the same due process protections required in Morrissey were equally applicable in a probation revocation setting.

Thus, where a significant liberty interest is involved, the Supreme Court has required procedural protections approaching those applicable in the context of a criminal trial. Obviously, in the context of a sentencing determination, a defendant stands to suffer a "grievous loss" because a sentencing court may not only take away a defendant's liberty, but must determine how long such deprivation will endure. Clearly, procedural protections at least as great as those afforded in the context of a parole or probation revocation proceeding are mandated when the potential loss of liberty to a defendant is equal to or greater than that of a probationer or parolee.

G. Procedural Due Process Considerations.

In enacting policy statements and procedures to implement sentencing guidelines, we urge the Commission to be sensitive to the following areas of constitutional concern:

1. Vagueness. Due Process demands explicit definitions as to what conduct may be considered by a sentencing court for placement within a guideline range. Otherwise, as in the case of any vague or overbroad legislation, there will exist the dual problems of lack of fair notice to a defendant, Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), and the danger of discriminatory application, Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Only through the establishment of specific factual considerations can the Commission hope to achieve the goal of

"certainty and fairness" in sentencing decisions so as to avoid unwarranted disparities.

2. Notice. A Defendant must be given notice of the facts that will be considered for sentencing. Notice can be provided through the presentence report, the prosecutor's statement, or by the court itself. In this regard, the prosecutor's evidence at trial as to facts which are not essential to prove the elements of the crime of conviction should not constitute adequate notice of the intent to rely on such information at sentencing. Notice must be given sufficiently in advance of the sentencing hearing to provide the defendant with the opportunity to respond to the information. Particularly since the "clearly erroneous" standard of appellate review applies to factual determinations, due process requires a right to notice so as to afford the defendant the opportunity to make an adequate record.

3. Confrontation and Cross-Examination. The defendant must have the right to confront and examine the sources of unfavorable information to test reliability. The same right should be afforded the prosecutor.

4. Presentation of Evidence. The defense must have the right to present written evidence and oral testimony favorable to the defendant's position and to rebut, correct, or complete evidence presented by the prosecutor. This would also include use of the trial transcript to correct a mistaken presentation of facts. (Interestingly, it frequently happens that

presentence reports contain facts which are unequivocally inconsistent with those adduced at trial.)

5. Burden of Proof. Each party should have the burden of proving the assertions it presents by clear and convincing evidence.

6. Rules of Evidence. The Federal Rules of Evidence should apply.

H. Procedural Safeguards Under Rule 32, F.R.Crim.P. Are Constitutionally Inadequate.

At present, and under the new legislation, Rule 32, Federal Rules of Criminal Procedure, governs the statutory scope of a defendant's procedural protections at the sentencing hearing. Rule 32(a)(1), as amended to take effect November 1, 1986, affords counsel the right to "comment" upon a probation officer's calculation of the sentencing classifications and guideline range believed to be applicable in the case. Rule 32(c)(3) directs that "the court shall afford the defendant and his counsel the opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information directly relating to any alleged factual inaccuracy contained in it." (Emphasis added.)

Given the expanded importance of factfinding at the sentencing hearing, Rule 32 is constitutionally inadequate to afford a defendant minimum procedural due process protections because the defendant's opportunity to rebut evidence, or to introduce mitigating material on any factual issue, lies solely

within the discretion of the court. Lack of procedural protection is especially critical when there is a dispute as to facts which the sentencing court might consider as a basis for sentencing within a higher guideline range.

We, of course, recognize that the Sentencing Commission itself does not have the authority to amend Rule 32. While the Commission may set forth procedural protections in its policy statements, we would only note that a sentencing court need not follow policy statements, and no appellate rights exist for non-compliance. We therefore urge that the Commission use its good offices to recommend to Congress and/or the Supreme Court the desirability of an amendment to Rule 32, Federal Rules of Criminal Procedure to ensure a defendant's right to fully participate in any factfinding proceeding as it relates to sentence.

For the time being, and in the absence of any changes to Rule 32, we urge the Commission to draft its policy statements and instructions to probation officers in such a way as to prohibit the use by a sentencing court of any facts which have not been reliably proven through either a plea of guilty, trial on the merits, or a judicial admission by the defendant.

In sum, as to those facts which must be found by the sentencing court, we believe that, in order to comport with due process, the defendant must be guaranteed the right to present information which will place him within the guidelines believed appropriate by the defense. The defendant must also be guaranteed

the right to rebut the assertions made by the prosecutor and contained in the presentence report. Further, the defendant must also be allowed to present mitigating facts which will enable him to show that a sentencing decision below the normally applicable guideline range is warranted and to rebut the claim of aggravating circumstances which may be used to take him above the guideline range.

Further, the new scheme under 18 U.S.C. § 3742 for appellate review of a guideline sentence requires that a defendant be guaranteed the right to present a defense case on sentencing. The defendant will be unable to make a proper objection to preserve an issue for appeal, or to respond to the government's appellate claims, if he is precluded or improperly limited in the presentation of his case to the sentencing judge.[3]

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[3]Indeed, even under present law, objections made to the sentencing court are a prerequisite to challenging factual data on appeal. See United States v. Fatico, 579 F.2d 707,713 (2d Cir. 1978).

Conclusion

The sentencing reform provisions of the Crime Control Act of 1984 offer the promise of introducing order and rationality to the sentencing process. This promise will be fulfilled only if the fact-finding responsibilities imposed upon judges by those provisions are carried out under rules which afford the defendant being sentenced due process protections which assure fairness and reliability. The Federal Defenders believe that adoption of the proposals set forth above are essential to the achievement of these goals.

Submitted: February 14, 1986

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12-3-86

U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

December 3, 1986

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

Dear Judge Wilkins:

Enclosed are the Department of Justice's comments on the preliminary draft of sentencing guidelines that has been published by the Sentencing Commission to encourage public review. As noted in the preface to the comments, we have attempted to cover most of the general issues presented by the draft, but have identified some particular points that appear to warrant separate attention. We will acquaint the Commission with our views on those matters as soon as practicable.

We believe that the Commission has made remarkable progress, during its relatively short existence, toward achieving the sophisticated kind of sentencing guideline system envisioned by the supporters of the legislation that became the Sentencing Reform Act of 1984. Although a great deal of work remains to be done, a great deal has already been accomplished. Most encouraging is the Commission's clear determination to develop a comprehensive, detailed system that will stand as a tremendous advance over all prior attempts at guideline systems. The preliminary draft represents a substantial basis for development of a system of sentencing guidelines that provides appropriately severe sentences for severe offenses, and that ensures optimal consistency and uniformity in judicial sentencing decisions.

To devise a system that aims candidly at the achievement of both just punishment and crime control, and to do it in a fashion that assures that similar offenders committing similar offenses will receive similar sentences -- no matter where, or by whom,

they are sentenced -- is a very important task. It is clear that more progress has been made by the Commission in the short time available than most of us would have considered possible. The preliminary draft will allow for expeditious completion of the Commission's task. We believe that with continued determination and effort and significant revisions to the draft designed to more fully implement the basic principles underlying the Sentencing Reform Act, the Commission will be able to achieve the ambitious goal set for it by the many proponents of sentencing reform.

I emphasize our recognition of the Commission's progress because any governmental institution inviting critical comments will receive just that -- critical comments. Certainly the comments we are providing dwell almost exclusively on changes we hope to see in the next draft of the guidelines. In reviewing those criticisms, however, we ask that the Commission keep in mind the fact that we are pleased with the Commission's overall direction. We strongly believe that it is on the right track in attempting to achieve a highly sophisticated, interrelated system that undertakes to assure common results rather than simply to provide general guidance. Our comments seek to point out improvements that we believe necessary to the draft's evolution into a more final form. We will continue to offer all the support we can in the Commission's further efforts to complete its work within the time allotted.

It is in this light that we offer the enclosed comments, and commend them to the Commission's attention.

Sincerely,

Stephen S. Trott
Associate Attorney General

Enclosure

CO117
12-4-86

STATEMENT OF DONALD E. O'BRIEN

Chief U. S. District Judge
Northern District of Iowa
Before United States Sentencing Commission
December 3, 1986

* * * * *

Thank you for giving me the opportunity to appear before you and comment on the preliminary draft of the Sentencing Guidelines. I have been privileged to be present all of yesterday and this morning, and the many fine speakers who have preceded me have covered the subject very well. I am not going to point out specific proposed guidelines that I think need improvement. I would like to adopt the pertinent remarks of Judge Heaney, who has completed his presentation, and I would also adopt the remarks of Chief Judge Weinstein of Brooklyn, who appeared before you on October 21 in New York City. I felt that those two presentations were particularly adaptive to the problems that I and the other judges of the Eighth Circuit have encountered.

I feel that the Guidelines are a fact. Congress has given them to you, and you've got to do something about them. They will not go away. However, I think that it is well to point out that if nothing else would happen except that the Parole Commission was abolished and a sentence now must be fully completed, those two changes would be more substantial than anything that has come to pass in the last hundred years. Therefore, I believe you could hold down to a minimum any specific guidelines that you felt had to be presented to Congress with the understanding that, because of the drastic basic changes, you would like to approach the

the problems after the luxury of having experience demonstrate more precisely what needed to be done.

As I said earlier, I acknowledge, and I know you do, the Guidelines are a fact. The changes mentioned above will be made. For that, you have a mandate. However, I do not believe it would be wrong for you to tell Congress in your report that you have not given them as many precise guidelines as they may have intended. You can tell them you have traveled the country, heard from every advocate of every position, and you have found that

THE SUBJECT IS TOO SERIOUS;

THE JOB IS TOO BIG;

THE CHANGE IS TOO DRASTIC;

THE RAMIFICATIONS ARE TOO IFFY.

Discretion is the better part of valor. I don't believe that any of your peers or anyone in the Congress would fault you if your proposed guidelines were not all encompassing.

I think it would be appropriate to remind Congress of the minority views of the respected senator from Maryland, Senator Mathis, who is retiring this year, where in the Senate Report No. 98-225 at page 792, the Senator said as follows:

> The federal judges and the U. S. Parole Commission are two of the most visible actors in our current sentencing system. Not surprisingly, they are the targets of this bill which would abolish the latter and consign the former to the task of operating a sentencing decision machine designed and built by somebody else. Underlying this bill is a profound mistrust in the federal bench.

Senator Mathis went on to say,

> Of course, by drastically reducing judicial discretion in sentencing, this law in no way eliminates discretion from the system. It merely displaces it from the courtroom, where it is exercised under the scrutiny of

> the public, to other venues. It will turn up in the office of the United States Attorneys, whose individual charging and plea bargaining policies will dictate the sentence for the vast majority of defendants who plead guilty. It will creep into the work of the probation officers, who will, under this bill, have the awesome responsibility of transforming a complex array of facts about the offender and his or her offense into one box on a grid of "offense and offender characteristics." And it will, of course, become the daily bread of the United States Sentencing Commission, a body of presidential appointees without life tenure. I doubt that the public will be better served when instead of a U. S. District Judge, all of these people--and therefore, no one of them--are responsible for the sentence imposed upon a federal criminal defendant.

Since the House of Representatives is of course directly involved in your reporting requirements, you might respectfully remind them of the additional views of Representative John Conyers, Jr. contained in House of Representatives Report No. 98-1017 at page 243, wherein Congressman Conyers said:

> [I]t is questionable whether any reforms we enact will have more than a marginal impact on the crime rate. The proposed reforms are limited to the federal courts: yet, less than one percent of the criminal cases prosecuted in this country are prosecuted in the federal courts.

Congressman Conyers went on to say at page 245:

> Since discretion (and the cause of any resultant disparity) is currently divided among the court, the prosecutor, the police, and the Parole Commission, any curtailment of the discretion of one sector through guidelines will merely increase the power of the others without really addressing disparity.

Congressman Conyers went on to say at page 250:

> The policy question posed is the necessity and propriety of correcting occasional abuses of power by a few "too mericful" judges by enhancing the power of all prosecutors. This would enable all prosecutors, good and bad, to challenge the sentences of all judges, good and bad. The remedy is grossly out of proportion to the problem.

In reviewing the informational release of the Commission

concerning its membership, it is easy to see that several of you, along with your staff, have Minnesota backgrounds. Being from Iowa, I think this is quite appropriate. However, the real reason, obviously, is that Minnesota has been a forerunner in this sentencing reform area.

In an effort to find out how it was working in Minnesota, I talked to three different judges. They had varied comments. The first was that the word "guidelines" was a misnomer; that in the beginning they were supposed to be advisory, but what were guidelines turned into rules; that it was originally sold to the people of Minnesota on the basis that it would make sentencing more uniform and make sentences stiffer in most instances. One judge informed me that it did in fact get rid of disparity, but that, as it has developed, it has done nothing for lengthening sentences, and in fact, the Supreme Court of the State of Minnesota has recently put out a mandate that says that the district judges and sentencing judges must give more attention to the use of the various rehabilitation halfway houses and the like. Another of the judges told me he did not like the Minnesota sentencing guidelines. He felt that the people had been hoodwinked by the whole situation and that if people only knew it, they would be devastated because of the light sentencing. Another one said that in narcotics cases, they take all of them to the federal courts because the lightness of sentencing as mandated in narcotics cases is not nearly tough enough, and the Minnesota federal courts, without any guidelines, are a much better place for the prosecution. Another of them told me that the State of Washington had contacted him and

said they were going to put the Minnesota guidelines in effect in the State of Washington and wondered if he would be willing to testify. He was a chief judge in one of the larger cities and said,he would. They then asked him how he would testify, and he indicated that he would not be favorable. He said they told him, "Don't call us; we'll call you," and he never heard from them again.

I don't give you this information to malign the Minnesota plan. I know that some of your staff were very close to that and did great work over the years. I only mention it to bolster what I have said above--that the subject is very serious, and the ramifications are very iffy, and therefore, even in the great State of Minnesota, with all the learned minds that they have there, there is less than unanimity as to how this reform is working.

As I said earlier, I am representing the Eighth Circuit. I have received letters from almost every district judge in the Eighth Circuit, giving me all kinds of specific exceptions to the guidelines, but I doubt that any of them would be new to you, based upon all of the witnesses that you have so graciously listened to. I think, however, that it might be appropriate just to give you an idea of a couple of the letters I received. As you know, the Eighth Circuit runs from Canada all the way to Texas. At the top is North Dakota. I received a very well-thought-out letter from William D. Broom, Chief Probation Officer of the District of North Dakota. He pointed out something to me that I don't believe any other speaker may have covered. Mr. Broom, in

pertinent part, said as follows:

> While surely not intended, racial discrimination in the form of sentence disparities will result if the Commission insists on counting the tribal arrest records of native Americans. Approximately 42% of the defendants involved in criminal actions in North Dakota in the 12-month period ending June 30, 1986 were native Americans. Most of these defendants had tribal records casually related to alcohol abuse, the number one social and legal problem on reservations, for such offense as to public intoxication, driving while intoxicated, resisting arrest, assault, and failure to support dependents.
>
> Indian reservations in North Dakota, as permitted in the Indian Civil Rights Act of 1968, make no provision for the appointment of legal counsel for indigent defendants even in those instances where the possible penalty is a period of confinement in tribal jail. The Sixth Amendment to the Constitution provides a 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 made it essential for sentencing purposes to determine whether or not a defendant was represented by counsel or waived counsel on any prior conviction when the right to counsel applied. To factor in a native American's criminal history as required in part C of Chapter 3 of the proposed Guidelines would result in increased penalties for native American defendants who without due process protection have tribal convictions. Such a procedure will result in racial disparities in sentencing.

At the bottom end of the long Eighth Circuit is the great state of Missouri, and from Chief Judge John F. Nangle, I received the following comments:

> I expect a goodly number of senior judges to refuse to handle criminal cases once the Guidelines go into effect. There are three senior judges in this district who presently carry a full load of criminal cases. Each one of these senior judges has told me that he will cease handling criminal cases when the Guidelines become effective. Frankly, I would guess that more judges will take senior status sooner than they would have in order to avoid getting into all the details and rigidity proposed.
>
> Sentencing in criminal cases is the toughest job I have. Like most judges, I would be happy to utilize a computer or any similar scientific device as a substitute for my

> judgment if it worked. However, all sentencing judges know that sentencing does not lend itself to simplistic solutions. Before these Guidelines are adopted, I urge the rethinking of this whole approach. Better to admit error now than to adopt measures which will prove unjust and costly beyond prediction.

Years ago, I was a new United States Attorney. I went to a preliminary meeting, and it turned out that out of about ten new United States Attorneys that I was meeting with, seven or eight came from Georgia, Mississippi, Alabama and Louisiana, what I then would have called the deep south. After about ten days together, I got to know them quite well. Finally, one of them said to me, "Do you have any admiralty cases?" and I said, "No." Another one said, "Do you have any civil rights cases?" and I said, "No." Another one said, "Do you have any white lightening cases?" and I said, "No." They all then looked at me and one of them said, "What the hell do you do?"

I tell you this story to show that there is much disparity in this great land of ours, not just from the top of the Eighth Circuit to the bottom, but all around the country. And the Guidelines that we are talking about are just too serious and too iffy to fit the whole mold.

I have made an effort to talk to people who know each of you quite well. I have been impressed by the very flattering things that have been said about each of you. Some of you probably would have voted for these guideline enactments if you were in Congress, and others of you, I am sure, would not have done so. It is my understanding that your consensus is that "we've got the Guidelines, we have to make the best of them," you want to make good Guidelines, and make them as tasteful as possible. I would

respectfully suggest to you that you keep your specific Guidelines to a minimum, that you remind Congress of some of the things that I have said and many others much more pertinent that have crossed your mind.

Congress' mandate to you may properly be considered by you as strong and precise. However, as you know, § 991(a) clearly states that you are an "independent" commission of the judicial branch of the government. Let's underline independent. As you further know, the legislative history of this legislation, P.L. 98-473 (U. S. Code and Cong. and Admin. News, p. 3235), has this supporting congressional intent:

> The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

Adopt some of the innovative things that you have heard at your various hearings. You are not the employees of the Congress; you have patiently listened to everyone; do not take the position that we must give Congress a great number of specific guidelines or we will not have fulfilled our mandate. Many of us feel that Congress expects you to be strong, innovative and fully cognizant of the fact that if your original submission is not perfect that you can smooth it out in the years to come.

Thank you.

Hoffman 00118
12-4-8

STATEMENT BY JUDGE LOUIS F. OBERDORFER
BEFORE THE U.S. SENTENCING COMMISSION

DECEMBER 3, 1986

MY COLLEAGUES AND I ARE GRATEFUL FOR THIS OPPORTUNITY TO GIVE YOU SOME OF OUR THOUGHTS AND CONCERNS ABOUT THE PROPOSED SENTENCING GUIDELINES. AT THE RISK OF CARRYING "COALS TO NEW CASTLE," LET ME HIT SOME HIGHLIGHTS.

WE HAVE A PARTICULAR CONCERN ABOUT THEIR APPARENT EFFECT ON PROBATION. OUR CONCERN IS IN PART A REFLECTION OF THE HIGH ESTEEM WITH WHICH WE REGARD OUR PROBATION OFFICE. WE WILL BE LOOKING TO THE PROBATION OFFICE TO DO THE SPADE WORK FOR APPLICATION OF THE GUIDELINES IN THEIR PRESENTENCE REPORTS. OUR PROBATION OFFICERS ARE WELL TRAINED AND EXPERIENCED IN LEARNING THE BACKGROUND OF DEFENDANTS, ADVISING US ABOUT THAT, AND MAINTAINING OFTEN PRODUCTIVE HANDS-ON SUPERVISION OF PROBATIONERS. THIS NEW TASK WILL APPARENTLY REQUIRE A NEW BREED OF PROBATION OFFICERS. PROBATION OFFICERS WILL NOW BE REQUIRED TO GATHER HARD EVIDENCE, ADMISSIBLE IN COURT. THEY WILL BE REQUIRED TO PERFORM TASKS FOR WHICH FBI AGENTS AND OTHER CRIMINAL

INVESTIGATORS ARE NOW RESPONSIBLE.

IT IS MY OPINION, AND OF THAT OF MOST OF MY COLLEAGUES, THAT THE GUIDELINES, AS DRAFTED, WILL PRODUCE OVERLY SEVERE SENTENCES. WE HAVE RUN SOME PILOT STUDIES -- APPLYING THE GUIDELINES TO PREVIOUSLY SENTENCED OFFENDERS. FOR EXAMPLE, A JURY CONVICTED A PUBLIC HOUSING TENANT OF ASSAULT ON A POSTAL SERVICE MAIL CARRIER. THERE WERE EXTENUATING CIRCUMSTANCES AND AGGRAVATING ONES. I IMPOSED AN AGGREGATE SENTENCE OF SIX MONTHS PLUS THREE YEARS PROBATION -- THE STATUTORY MAXIMUM WAS 36 MONTHS -- THE SENTENCING GUIDELINES WOULD RANGE FROM 54 TO 66 MONTHS. UNDER THE GUIDELINES I WOULD HAVE NO ALTERNATIVE BUT TO IMPOSE THE 36 MONTH MAXIMUM.*/ THERE COULD BE NO SPLIT SENTENCE OR NO PROBATION. THERE ARE OTHER ILLUSTRATIONS.

SOME OF US ARE IN RESPECTFUL DISAGREEMENT WITH THE GUIDELINE THAT ENHANCES THE SENTENCE OF A DRUG USER. A LARGE SEGMENT OF OUR CRIMINAL DOCKET INVOLVES USERS AND ADDICTS WHO COMMIT OTHER CRIMES IN ORDER TO FEED A HABIT. OUR PROBATION OFFICE HAS

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*/HE HAD 67 SANCTION UNITS.

CONSIDERABLE RESOURCES FOR PROVIDING DRUG TREATMENT SERVICES TO PROBATIONERS AND PAROLEES. IF WE HAVE TREATMENT RESOURCES AVAILABLE FOR THESE OFFENDERS, WE SHOULD PROVIDE SUCH TREATMENT -- WITH CLOSE SUPERVISION AND MONITORING.

I HOPE THAT BEFORE THE GUIDELINES ARE FINAL, THE COMMISSION WILL HAVE, IF IT HAS NOT ALREADY HAD, AN OPPORTUNITY TO SEE AN EMPIRICAL STUDY OF THE RESULTS OF PROBATION (WITH AND WITHOUT SPLIT SENTENCES), ACCOMPANIED BY DRUG AFTERCARE AND CLOSE, SUSTAINED SUPERVISION.

WITH RESPECT TO PROBATION AND THE INSTITUTIONS SUPPORTING IT, WE URGE THE COMMISSION TO:

> RECONSIDER THE LIMITS NOW PLACED ON PROBATION AND SPLIT SENTENCES AS SENTENCING OPTIONS. THESE OPTIONS SHOULD BE MADE MORE BROADLY AVAILABLE THAN THE PRESENT GUIDELINES CONTEMPLATE;
>
> GIVE STRONG SIGNALS TO THE AO AND THE CONGRESS TO INCREASE THE STRENGTH, TRAINING AND RESOURCES OF THE PROBATION OFFICE;
>
> MAKE THE SKILLS OF YOUR STAFF AVAILABLE TO PROBATION OFFICERS FOR THE PURPOSE OF TRAINING A CADRE OF PROBATION OFFICERS IN GUIDELINE MATHEMATICS.

YOU HAVE PROBABLY ALREADY BEEN TOLD AND OBVIOUSLY KNOW INDEPENDENTLY THAT THE SENTENCES WHICH ARE LIKELY TO BE IMPOSED

UNDER THE GUIDELINES WILL INCREASE THE PRISON POPULATION DRAMATICALLY.

IN ADDITION, IT IS MY VIEW AND THE VIEW OF MY COLLEAGUES THAT THE GUIDELINE PROCESS WILL SERIOUSLY REDUCE THE INCENTIVE FOR GUILTY PLEAS. MOREOVER, THE REQUIREMENT THAT OFFENSES CHARGED IN SOME DROPPED COUNTS MAY BE CONSIDERED AS AGGRAVATING FACTORS SEEMS TO FURTHER REDUCE THE INCENTIVE TO PLEAD. THE IMPLICATION OF THIS CHANGE FOR THE ALREADY OVERCROWDED COURTS IS OBVIOUS.

WE ARE VERY CONCERNED ABOUT SENTENCING PROCEDURE. THE STATED STANDARD OF PROOF AUTHORIZES US TO "RELY ON ANY INFORMATION PRODUCED AT TRIAL, IN THE PRESENTENCE REPORT, OR AT THE SENTENCING HEARING THAT THE COURT FINDS IS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE."

DOES THE PROBATION OFFICER HAVE TO TAKE THE STAND AND BE EXPOSED TO CROSS-EXAMINATION?

WHO WOULD REPRESENT HIM?

WHAT WILL BE THE SEQUENCE OF THE HEARING CONCERNING THE PRESENCE OR ABSENCE OF SENTENCING FACTORS IN RELATION TO DELIVERY OF THE PRESENTENCE REPORT BY THE PROBATION OFFICE AND THE ACTUAL IMPOSITION OF SENTENCE? SOME OF MY COLLEAGUES ANTICIPATE THAT EACH SENTENCE COULD REQUIRE THREE SEPARATE HEARINGS: (1) TO IDENTIFY THE FACTORS WHICH WILL BE AT ISSUE; (2) TO HEAR THE EVIDENCE ON THOSE FCTORS AND MAKE A RECORD; AND (3) TO ANNOUNCE FINDINGS

AND IMPOSE SENTENCE.

WON'T MOST DEFENDANTS REPRESENTED BY INDEPENDENT COUNSEL DEMAND STRICT PROOF -- PARTICULARLY AFTER A PLEA OF GUILTY?

DOES THE GOVERNMENT HAVE TO OFFER EVIDENCE TO SUPPORT PROOF OF UNTRIED COUNTS?

DOES THE DEFENDANT HAVE A RIGHT TO CROSS-EXAMINE THE WITNESSES FROM WHOM THIS PROOF IS ADDUCED?

DOES THE DEFENDANT HAVE A RIGHT TO CALL WITNESSES ON HIS OWN BEHALF WITH RESPECT TO THE UNTRIED COUNTS?

CAN WE PERMIT THE DEFENDANT TO BARGAIN AWAY THAT RIGHT?

WHERE FACTORS NOT CHARGED IN DISMISSED COUNTS ARE TO BE CONSIDERED, WHAT NOTICE AND OPPORTUNITY TO DEFEND MUST BE AFFORDED?

IS THE DEFENDANT ENTITLED TO DISCOVERY?

WHAT KIND OF PROCEEDING AND WHAT KIND OF EVIDENCE WILL BE PROBATIVE WHERE THE DEFENDANT PUTS AT ISSUE QUESTIONS OF REMORSE, MALICE, COOPERATION?

WE NOTICE THAT JUDGE WEINSTEIN ASSUMED THAT THE RULES OF EVIDENCE WOULD BE RELAXED. IT WOULD BE HELPFUL IF THE COMMISSION TOOK AN INITIATIVE TO SEE THAT THAT IS DONE.

IN McMILLAN V. PENNSYLVANIA, 106 S. CT. 2411, THE SUPREME COURT, BY A 5-4 VOTE, PERMITTED PENNSYLVANIA TO ENHANCE A SENTENCE UPON PROOF BY A PREPONDERANCE OF THE EVIDENCE. DID THIS DECISION TURN ON DEFERENCE TO FEDERALISM AND THE AUTOMONY OF STATES? SEE ID. AT 2416. WILL THE SUPREME COURT REACH THE SAME

RESULT WITH RESPECT TO SOME OR ALL OF THE PROPOSED ENHANCEMENTS OR WILL IT REQUIRE PROOF BEYOND A REASONABLE DOUBT?

ANOTHER SERIOUS CONCERN, ABOUT WHICH YOU HAVE UNDOUBTEDLY HEARD ALREADY, IS THE POWER OF THE PROSECUTOR TO BARGAIN AWAY ENHANCEMENT FACTORS AS PART OF THE PLEA. CAN SUCH A PLEA BARGAIN BE MADE BINDING IN LIGHT OF RULE 11? HOW DOES A COURT FIND, FOR EXAMPLE, THAT THERE WAS NO GUN AND THEREFORE NO ENHANCEMENT ON ACCOUNT OF ONE WHEN THE POLICE REPORTED, AND THE GRAND JURY WERE OF THE VIEW, THAT THERE WAS A GUN INVOLVED IN THE CRIME?

ALL OF THIS CAN BE SUMMED UP BY AN OVERARCHING CONCERN THAT THE AUTOMATION OF SENTENCES WILL SERIOUSLY REDUCE THE OPPORTUNITY FOR INDIVIDUALIZED DISPOSITION OF OFFENDERS AND INTRUDE HARMFULLY ON THE DISCRETION OF DISTRICT JUDGES, EACH ATTUNED TO COMMUNITY AND REGIONAL NEEDS AND MORES.

WE HOPE THAT TO THE EXTENT THAT YOU HAVE NOT ALREADY DONE SO, YOU WILL CONSIDER THESE THOUGHTS AND CONCERNS IN THE DEVELOPMENT OF THE FINAL GUIDELINES.

ATTACHED ARE PUBLIC COMMENTS
RELEVANT TO YOUR DRAFTING
AREAS.

00114
Hoffman

STATEMENT OF

JUDGE ABNER J. MIKVA

U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BEFORE THE

UNITED STATES SENTENCING COMMISSION

December 3, 1986

My name is Abner J. Mikva. I am a judge of the United States Court of Appeals for the District of Columbia and have served on that Court for over seven years. I previously served five terms in the United States Congress and five terms in the Illinois state legislature. During my legislative service my primary interest was in criminal law reform. I shepherded a new criminal code through the Illinois legislature and served as a member of the Brown Commission which proposed a new federal criminal code. Indeed many of the concepts that I see in the preliminary draft of the Sentencing Commission were first advocated in the Brown Commission Report. I have been designated by my Chief Judge, Patricia Wald, to state generally the views of our Circuit. There has not been time to submit this statement for specific reaction from my colleagues on the Circuit, but I believe it generally reflects their views.

My non-judicial experience may be more relevant to some of the comments I want to make. I leave to my distinguished colleague, Judge Lewis Oberdorfer, the task of addressing specific concerns about the preliminary draft. My comments must of need be more general because of the limited role that our

Circuit plays in the criminal law field. Because we are situated in Washington, a place of unique sovereignty, we see fewer criminal cases in our court than do most of the other federal courts. Even under a "worst case" scenario, therefore, our circuit court does not anticipate being inundated with sentencing appeals. While we suffer from the general case backlog that most circuit courts are experiencing, we would not anticipate a quantity of sentencing appeals that would put our court totally under water. We recognize that the D.C. circuit is unique in this respect and in no way disparage the concern expressed by some of our sister circuits. Even with our smaller criminal case load, we are concerned about the impact on our district court. As Judge Oberdorfer will tell you in more detail, some of the procedures called for in the Commission's draft may overtax the capacity of the trial courts.

Perhaps because of our close physical proximity to the Hill and because our docket deals so largely with the legislative product of Congress, we may be more sympathetic to the Herculean task given to this Commission by the Congress. We are aware of the time constraints under which you operate and that it was not intended for you to be a study commission dealing generally and philosophically with the problems of sentencing. The mandate of 28 U.S.C. § 991(b) is pretty specific. Taking all of those obvious observations into account, I join in the concern that has been expressed by others that the Commission may have bitten off more than the courts are able to chew.

The late Senator Sam Ervin and I collaborated on the Speedy Trial Act. It is far from a perfect piece of legislation. Nevertheless it has been moderately successful in achieving the goals that its sponsors hoped to achieve. In a much smaller but nevertheless similar way the Speedy Trial Act also sought to change some deeply engrained patterns and procedures in the federal courts. I believe that the reason it succeeded was that it contained safety valves, escape hatches, pressure-relieving devices that allowed the courts -- and the lawyers -- some leeway in the behavior-changing command set forth in the statute. While it is probably true of all law reform, it is especially true that judicial reform must be incremental.

I am not unaware of the mood in Congress and in the country that created the head of steam which led to the statute under which you labor. I have seen the legislative history and I was in Congress for much of the early debate on this whole concept of sentencing reform. I do not think incrementalizing the cause of sentencing reform in any way violates your mandate or congressional intent. The statute creates the Commission as an ongoing body. Since it took us 200 years to create the problems that Congress sought to solve, it demeans the legislative process to suggest that Congress expected you to come up with instant solutions to these difficult problems. Congress wanted "truth in sentencing"; Congress wanted to address the problems of disparity in sentencing; Congress wanted to emphasize the protection of society over the previously unsuccessful hopes and aspirations for rehabilitation of criminals. Those legislative aims and

aspirations would not be violated if the guidelines included some of the relief valves mentioned above.

For example, the sentencing guidelines now make probation a very sometimes thing. Yet you have heard over and over again that the federal probation service is a very effective institution and that probation has been an effective sentence in many cases. Perhaps the guidelines could authorize a variation of the existing "split sentence." The trial judge would calculate the prison sentence under the guidelines but would still be authorized to grant probation. If probation was violated the defendant would be obliged to serve the guideline sentence. Such a device might alleviate some of the current concerns that the proposed guidelines will overwhelm the physical capacities of our prisons. Such a relief valve might also diminish the concern that plea bargaining will never take place under the guidelines. If the bargain can at least include the possibility of probation, there is reason for such bargaining to take place.

I do not think it is likely that such a proposal would swallow up the rest of the guidelines. Judges know the responsibility they have for deciding that a convicted felon should not be incarcerated. Disallowing its utilization all at once creates more consequences than our justice system can digest.

From reading the testimony of other judges and from newspaper accounts, there has been substantial criticism of the actual numbers used in the proposed guidelines. There has also

been criticism of the "mechanistic" nature of the proposed process. If as it appears the specific numbers used will mean substantially longer incarceration for more federal offenders, I earnestly hope the Commission will change those numbers. I say this not because of any overwhelming compassion for people who are convicted of violating our federal laws. I have visited a lot of prisons in my life. Most of the inmates of those institutions deserve to be there, even though all profess their innocence. My concern is for the institutions.

Congress has nowhere indicated its readiness to spend the billions of dollars that could be necessary to house an increased number of federal prisoners for substantially longer periods than is now the case. If the federal system of penal institutions becomes overloaded in the same manner as many of our local and state institutions, the fruits of this reform will be very bitter indeed. We have had examples, here in Washington D.C., of local law enforcement officials keeping felons on a prison van driving around the city waiting for some spaces to open up in the D.C. jail. We have used up a substantial quanity of public resources simply litigating these overcrowding problems. Despite some of the individual speeches of a few congressmen, I do not read the legislative history of the sentencing reform provisions to mandate that kind of result. Indeed, the legislative history and the language of the statute itself nowhere indicate a consensus in the Congress that the present "sitting time" of federal felons is inadequate. If the consequences of the numbers proposed by the Commission are anywhere near as dire as predicted, the prison

overcrowding problem will overwhelm any good that might otherwise be achieved. I would urge the Commission to avoid this result.

As I indicated at the beginning, my comments have been general. As judges on the least impacted Court of Appeals (with a possible exception of the Federal Circuit) I and my colleagues can afford to be dispassionate and objective about the consequences of the proposed guidelines toward our case load and court work. However, as federal judges concerned about the entire system of justice we want to see the product of this Commission's effort be successfully integrated into that system of justice and achieve some, if not all, of the salutary purposes intended by the Congress.

As someone who has worked in these vineyards for a long, long time, I have a special interest in wanting to see the Commission's efforts succeed. I share the belief of my former colleagues in the Congress that the parole system as we have implemented it in this country has not worked. I joined in earlier efforts to bring about some of the reforms that were ordained by the two recent Congresses and which have become your task to implement. As one of your strongest rooters, I hope you can pare back sufficiently to allow our courts and our penal system to digest your product. It would be a tragedy if unintended but predicted chaos ensued in 1987 which will cause a subsequent Congress to diminish or negate this great opportunity to improve our system of justice.

00124
12-5-86

PRESIDENT'S COUNCIL on INTEGRITY & EFFICIENCY

DEC 3 - 1986

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004
Attention: Guidelines Comments

U.S. Sentencing Commission:

This is in response to the request of the U.S. Sentencing Commission for comments on your preliminary draft sentencing guidelines which were released in September 1986. As you may know, the President's Council on Integrity and Efficiency (PCIE) is particularly interested in preventing and detecting fraud, waste, and abuse in government operations. Where it occurs, we seek an appropriate remedy to correct the problems.

Consisting of Inspectors General and representatives from other investigative agencies, PCIE members have frequent interactions with the federal criminal justice system. Our work and interests primarily involve white collar criminals and fraud against the government. We are pleased to see that the incarceration of white collar criminals will become more of a possibility under your sanction unit approach to sentencing. We seek to focus our comments, however, on the financial issues of sentencing, particularly restitution and fines. These sentencing areas have a tremendous impact on economic crime, victims, and society at large. As victims in numerous government fraud cases, the various federal agencies that are represented on the PCIE have an integral interest in these issues.

We have three primary concerns to address.

1. There is much discussion in the guidelines about utilizing the criminal's "ability to pay" in establishing the sentence. The criminal element is often expert in concealing assets and other financial information. A thorough analysis by skilled financial investigators, at a minimum, would be required to develop "ability to pay." When one considers the difficulties the experts in the Internal Revenue Service have developing reliable financial information on non-criminals, you can begin to appreciate what it takes to

realistically develop "ability to pay" on criminals. It is extremely difficult, if not an impossible task, to develop sound financial information on criminals, particularly in the short time frame before sentencing. The federal system currently provides some financial information for sentencing in the probation officers' pre-sentence report. However, probation officers are poorly equipped and lack the necessary time to develop the degree of information needed to make "ability to pay" the primary consideration in setting fines. Therefore, sentencing guidelines should downplay the significance of defendant financial data developed during the pre-sentence investigation. This defendant "ability to pay" information, should not be considered a primary criteria for setting fines, unless the preponderance of evidence shows that this information is complete and correct.

2. When restitution is appropriate in a sentence, full restitution should be ordered to make the victim whole. This should include damages due to the full scope of the criminal acts (and not just the damages due to the conviction counts); the costs of detection and prosecution; and interest at an appropriate rate. In fraud against a trust fund, as an example, the direct loss as a result of the fraud is only a fraction of the amount required to make the trust fund and government whole. In addition to the direct loss, substantial resources are invested to detect and prosecute the defendant. Also, there are time value of money losses until full recovery is made. The criminal should be required to make the victim whole and the full extent of loss should be addressed in the sentence.

3. The restitution portion of the sentence must clearly address the particulars if the order is to be efficiently and effectively carried out. Orders for restitution presently do not address basic issues needed to enforce the order. In keeping with your commitment to "truth in sentencing," we believe that specifics need to be addressed in restitution orders. These include: who is to pay, what amounts are to be paid, when are the amounts

to be paid, and where is the amount to be paid. These specifics are necessary to allow all involved to really understand the sentence and more importantly, to allow the government collection officials to efficiently enforce the order.

In accordance with your request in the guidelines, we are attaching written comments relating to specific guideline sections and have included these on separate pages.

Should your staff wish to discuss these issues further, please call John C. Martin, Inspector General, Environmental Protection Agency, at 382-3137.

Respectfully,

Joseph R. Wright, Jr.
Chairman
President's Council on
Integrity and Efficiency

Enclosures

Page 124 Subsection B321 Acceptance of Responsibility

The PCIE strongly supports the concept of encouraging the defendant to make voluntary restitution of a substantial nature to the victim prior to sentencing. Eligibility for up to a 20% reduction in the sentence should only be considered when the defendant has actually made substantial restitution prior to sentencing; mere promises should not result in any reduction to the sanction unit total.

Background

All defendants should be formally notified, as soon as guilt is determined, that they may be eligible for up to a 20% reduction of the total offense value of the sentence if they voluntarily make restitution of a substantial nature prior to sentencing. This is a necessary incentive to encourage prompt restitution before assets can be dissipated.

The PCIE study showed that criminal defendants are often caught in a rapidly deteriorating financial situation. From the standpoint of the harm done to the victim and society, early and complete victim restitution is clearly more beneficial and important and should receive a higher priority than asset forfeiture, divorce and property settlements or a continuing standard of living that was achieved by means of criminal activities. Thus, it is imperative that every effort be made as early in the process as possible, to seek and secure victim restitution.

Unless extraordinary circumstances exist which make victim restitution impossible, victim restitution should be made paramount in considering whether the defendant sincerely accepts responsibility for his or her wrongdoing. Anything less than substantial restitution should not result in 20% reduction of total sanction unit value.

Page 143 Subsection A412 Probation

The sentencing guidelines should require, as a specific condition of probation, full restitution to the victim(s). This is necessary to ensure that the defendant has a strong incentive to comply with the requirements of the restitution order.

Background

The Victim and Witness Protection Act of 1982 specifically mandates that the defendant make restitution to any victim of the offense. As currently set forth in the guidelines, restitution is not a mandatory condition of probation. We believe that this would give the defendant a greater incentive to make restitution. Failure to make a good faith effort to comply with the restitution order can bring about revocation of probation. In fact, we believe that the minimum standards of compliance for probation should include a requirement to make restitution.

Victim restitution as a mandatory condition of probation is an effective way to ensure that restitution actually occurs. Probation officers monitor the activities of defendants assigned to them. If victim restitution is a mandatory condition of probation, the probation officer will be responsible for monitoring the defendant's progress at making restitution. Including victim restitution as one of the conditions of probation raises the significance and the importance of making restitution. If the defendant is not making satisfactory progress in making restitution payments, the probation officer must report back to the court that the defendant is violating one of the standards of probation. Depending on the circumstances, this can result in revocation of probation and return to incarceration. The desire to stay out of prison is a strong incentive to ensure that the defendant complies with all conditions of probation.

Requiring full victim restitution as a mandatory condition of probation would help ensure that the rehabilitative process for the defendant and the victim is complete.

We propose the following addition to the sentencing guidelines at:

Subsection A412. Probation, c, 1., N

"The offender comply with the order of restitution directed by the court."

Page 145 Subsection A413 Supervised Release

The sentencing guidelines should require, as a specific condition of supervised release, full restitution to the victim(s). This is necessary to ensure that the defendant has a strong incentive to comply with the requirements of the restitution order.

Background

The Victim and Witness Protection Act of 1982 specifically mandates that the defendant make restitution to any victim of the offense. As currently set forth in the guidelines, restitution is not a mandatory condition of supervised release. We believe that it should be so that the defendant has a greater incentive to make restitution. Failure to make a good faith effort to comply with the restitution order can bring about revocation of supervised release. In fact, we believe that the minimum standards of compliance for supervised release should include a requirement to make restitution.

Victim restitution as a mandatory condition of supervised release is an effective way to ensure that restitution actually occurs. Probation officers monitor the activities of defendants assigned to them. If victim restitution is a mandatory condition of supervised release, the probation officer will be responsible for monitoring the defendant's progress at making restitution. Including victim restitution as one of the conditions of supervised release raises the significance and the importance of making restitution. If the defendant is not making satisfactory progress in making restitution payments, the probation officer must report back to the court that the defendant is violating one of the standards of supervised release. Depending on the circumstances, this can result in revocation of supervised release and return to incarceration. The desire to stay out of prison is a strong incentive to ensure that the defendant complies with all conditions of supervised release.

Requiring full victim restitution as a mandatory condition of supervised release would help ensure that the rehabilitative process for the defendant and the victim is complete.

We propose the following addition to the sentencing guidelines at:

Subsection A413. Supervised Release, c, 1., N

"The offender comply with the order of restitution directed by the court."

Page 148 Subsection A416. Restitution

The Sentencing Commission should require the judge to ensure clarity and specificity in restitution orders by adequately addressing the questions of who is to pay, what amounts are to be paid, when are the amounts to be paid, and to where are payments to be made. In particular, the Sentencing Commission should require that restitution orders provide for repayment of the cost of investigation and prosecution, provide that repayment be made at the earliest possible date, and specify that interest will accrue if full immediate payment is not made.

Background

In an effort to establish clarity in sentencing and in keeping with the theme of the Sentencing Commission regarding "Truth in Sentencing", the PCIE requests improvements be made to the guidelines in the complex area of restitutions.

The sentencing phase of the Criminal Justice system is the final chapter regarding the disposition of a criminal defendant. The sentencing process is the culmination of a lengthy criminal procedure. The sentencing by the Judge has an effect on many people: the defendant, the victims, and various Government offices in carrying out the sentence, among others. As the official pronouncement on the case, the sentence should be clear and concise to be fair and to serve the needs of all interested parties. Those attending the sentencing should clearly understand what is required of the defendant and how the sentence is to be carried out. The interested parties that rely on and utilize the written sentencing order should be equally clear on what is required of the defendant and how the sentence is to be carried out and the case resolved.

If the sentence is imprisonment, the length of time should be made clear. In the same respect, if restitution is ordered, the requirements must also be clearly enunciated at sentencing and written into the sentence order. Above all, the restitution order should be fair to the victims.

The courts use a written document to memorialize the sentencing, the Judgment and Probation/Commitment Order, commonly referred to as the J & C. This document lists the sentence and should clearly document the event for those who must rely on it, particularly if they were not in court at sentencing. The J & C is the source document that instructs interested parties, such as Government collection officials, on the sentence so that they can carry out the courts' instructions. In particular, Government collection officials utilize this source document as authority to create accounts receivable, take collection action, distribute recovered restitution to victims, etc. Many times, the J & C is unclear and confusing as to many of the standard questions that must be addressed relating to restitution or if restitution is not ordered in the full amounts necessary to compensate all victims.

We believe that the J & C should either include all necessary specifics on the complex question of restitution, or that the J & C require submittal to the court (within a specified time period) of a comprehensive restitution order for review and approval by the court. We believe that victims are entitled to restitution for all expenses related to the crime and that if immediate payment is not made, interest should accrue on any unpaid balance.

We propose the following insertion to Subsection A416 of your guidelines to emphasize these concerns using a "who, what, when, where" format.

Subsection A416. Restitution

c. The Judgment and Probation/Commitment Order shall provide the specific information for understanding and resolving restitution orders, as discussed in subsection d below, or it shall require such information to be developed and submitted to the court, within a specified timeframe, for inclusion in a separate restitution order to be approved by the Judge.

d. When restitution is ordered, the order must address the following points:

1. Be specific about who is responsible for payment. Indicate whether there is joint and several liability for the amount of restitution ordered from each offender when there are multiple offenders involved in a crime.

2. Be specific about who restitution is for. List the victim(s) entitled to restitution. If the U.S. Government is a victim, it is necessary to specify the account for which the restitution is to be paid. This is necessary to differentiate restitution payments to be credited to Treasury miscellaneous receipts, for example, from payments to be credited to a particular agency trust fund.

3. Specify the total amount the defendant is to repay to each victim. When there are multiple victims, specify how partial payments are to be distributed to the victims.

4. In determining the amount of restitution for each victim, the overriding goal is to make the victim whole. Accordingly, in addition to any direct losses the victim suffered, all related victim expenses should be considered. In addition, interest should be ordered if full restitution is not made immediately.

5. Specify that restitution is due immediately. If full immediate payment is not possible, express a sense of urgency about the need to pay the restitution now due and require that the defendant complete full restitution at the earliest possible time.

6. Specify where payments are to be made.

7. If restitution is ordered as a condition of probation or supervised release, specify that the full amount is due and payable whether or not the probation or supervised release period expires before the payments are completed.

The following pages discuss these issues and provide some indication as to why this guidance is needed. They include examples of actual language from J & C orders.

The sentencing guidelines should require that the sentence, as reduced to writing on the J & C or a separate restitution order, clearly indicate the defendant(s) responsible for making restitution payments. Presently, restitution orders for crimes involving multiple offenders are unclear.

Background

Sentences are prepared without addressing the question of joint and several or individual liability when there are multiple defendants. Since the sentencing order is the source document that is used to establish the account receivable, this omission results in confusion among collection officials as to who is responsible for the restitution and the total amount due. The accuracy of the account receivable and the efficiency of the accounting and collection effort depend upon clearly written orders and a valid source document.

Examples

1. "Defendant is to make full restitution to the United States and .....Bank in the amount of $726,472.51."

   Essentially, the same language was utilized for each of seven different defendants on seven different J & C's. This language instructs the collection official to establish receivables totaling $5,085,307.57 (presuming the United States and Bank are to share the restitution). In reality, only $726,472.51 total restitution was meant to be ordered. By not indicating joint and several liability on the order, receivables can frequently be overstated and collection effort wasted. Of further concern, all who rely on the order can be misled.

2. "Defendant shall make restitution in the amount of $24,476.25 at the direction of the Probation Office."

   This same language appears on the J & C for each of two defendants. In this case, the court actually meant to impose $48,952.50 in restitution, half to be paid by each defendant. In contrast to the first example, these orders would result in the collection official establishing the proper amount of receivables. However, comparing this to the first example shows how confusion enters the process.

3. "It is ordered that judgment of restitution be entered in the amount of $13,700 jointly and severally with (other defendants)."

   This language made it clear to the collection official that the total amount was $13,700 and that multiple defendants jointly and severally owed the amount.

The sentencing guidelines should require that the order for restitution clearly indicate the victim(s) to receive the amounts recovered. Presently, orders are sometimes unclear and parties other than the judge certify the victims for repayment.

Background

The J & C or separate restitution order should clearly identify the victims entitled to restitution. Including this information in the order for restitution makes it part of the official record and helps to ensure its accuracy. It also provides the collection officials with an authoritative judicial statement on who is to receive recoveries under restitution orders. The order is or should be the source document authorizing payments to specified victims when recovery is made.

Examples

1. "Defendant is directed to make restitution as directed by Probation Officer."

   In these type sentences, the probation officer determines the victim(s) to receive amounts recovered. This appears to place the probation officer as a judge over this portion of the proceedings. A list of victims should be required on an officially signed court order that has been reviewed and approved by the judge.

2. "(Defendant is to)..... make restitution in the amount of $220,000."

   In these type sentences, there is no instruction as to who restitution is for. The collection officials must use their discretion and/or make inquiry to resolve the question. This informal approach is risky. The J & C or separate restitution order should be the source document for all information needed by collection officials.

3. "Further ordered that payment be made to the U.S. Department of Justice and the Department will disburse the payments to the 135 victims."

   The sentence order does not list the victims. Without getting an official record from the court, the collection officials can never be sure the names they obtain are correct.

4. "A special condition of probation is that the defendant make restitution to the U.S. in an amount which is ten(10) percent of her income during the probation period under the supervision of her Probation Officer. The amount of restitution may be adjusted should the defendant's income increase."

   This order provides for restitution to the U.S. Government. It does not specify the account for which restitution is being made. Does this money properly belong to a trust fund? Should it be credited to Treasury miscellaneous receipts? If it properly belongs to a trust fund but is credited to miscellaneous receipts, the trust fund is deprived and the transfer is not appropriate. When the U.S. Government is the victim in general, the restitution order must be specific about which particular account (program/fund/activity) in Government, the money is intended.

Page 148 - Restitution - What amount is to be paid?

The sentencing guidelines should require that the order for restitution clearly indicate the amount the victim is to receive. Presently, this is sometimes not addressed or addressed in an unclear fashion.

Background

Restitution orders are prepared without indicating the amount of restitution to be paid. In these cases, parties other than the judge determine and certify the amount. When sentencing orders attempt to indicate the amount, they are sometimes unclear. Without this information on the source document (order for restitution), there is confusion and inefficiency in setting up the receivable account and in the collection effort. There is also a question whether anyone other than the judge has the legitimate authority to make this determination.

Examples

1. "A special condition of probation is that the defendant make restitution to the United States under the direction of his Probation Officer in such amounts as he deems appropriate."

   We believe only the judge should have the authority to determine to whom restitution is paid and the amounts to be paid. This information should be specified on an order signed by the judge.

2. "Defendant directed to make restitution."

   In this case, the order does not identify the party to determine how much restitution is due. How much is to be collected? Who decides? Collection officials need an authoritative source document not only to collect but also to distribute the restitution collected.

3. "A special condition of probation is that the defendant make partial restitution to the United States for the property stolen in the amount of One thousand five hundred and no/100 dollars ($1,500.00) during his probationary period and under the supervision of his Probation Officer."

   Is the $1,500 the amount of the property stolen or is that figure the amount that must be repaid? The order only requires partial restitution of the property stolen. This is a confusing order.

Page 148 - Restitution - What amounts do each of multiple victims receive and in what order are they paid?

When there are multiple victims, the sentencing guidelines should require that the amount for each be clearly identified and the method for distributing partial payments be established. Presently, this is not generally addressed.

Background

If there are multiple victims, there is a need to identify the amount of restitution to be paid to each. Also, since defendants frequently make periodic partial payments over time, there is a need to address how the partial payments are to be distributed to victims. Just ordering that restitution be made is insufficient to resolve these issues.

Examples

1. "Defendant shall make restitution of $300 per victim totaling $40,500 to be paid during the five years of probation. Further ordered that payment be made to the U.S. Department of Justice and that Department will disburse the payments to the 135 victims."

   Lacking a specific order from the court, the Justice Department must decide how to distribute the partial payments received under this order. Some offices would pay off the first victim on the list and proceed in order through the list (note such lists are frequently alphabetical). Other offices would allocate the payments to all victims. Allocating a $300 partial payment to 135 victims may or may not be appropriate but it is more resource intensive than the first approach. Without a court instruction, numerous other approaches are also possible and fairness to victims is not assured.

2. "Defendant is directed to make restitution in the amount of $113,295.88 as directed by the probation officer."

   Upon further inquiry, the collection office determined that there are three victims and utilized the amounts provided by the probation officer for each. Allocation of partial payments remains unresolved. Also unresolved is what happens after the period of probation is over.

3. "Defendant to furnish such financial information to the Probation Office as requested and to make restitution of total amount of money received by

defendant and his wife as result of fraudulent claims under such terms and conditions as directed by the Probation Office."

The victims, amounts, and method of allocating partial payments are not established in the order. In this case, after further inquiry it was determined that nine insurance companies are to receive fairly large amounts of restitution in an unspecified manner. Do the insurance companies fight among themselves to determine this question or does the restitution just go to the most aggressive company? With some advance thought and specific language, a fair approach can be devised.

Page 148 - Restitution - What must be ordered to make the victim whole?

Restitution should be ordered for the full amount necessary to make the victim whole. Presently, restitution is not ordered for the full amount necessary to make the victim whole as time value of money and all victim expenses are not considered.

Background

The general idea behind restitution as a concept is that the defendant should be required to make the victim whole. This implies that all victim losses and related costs should be included. Frequently, only the easily identifiable direct loss is included. Other costs for the victim, such as the cost of the investigation in a Government fraud case are not included. Also, the time value of money is generally not addressed in restitution orders. Victims, including the U.S. Government when it is a victim, suffer millions of dollars in lost restitution orders because restitution is not ordered for all related expenses and interest is not assessed.

Other problems also occur if restitution is not ordered for all victim expenses, including costs for investigation and prosecution. A civil hearing may be required to obtain these expenses. This causes a great deal of duplication between the civil and criminal proceedings and wastes government resources. Also, if investigative costs are included in the fine rather than the restitution order, as discussed on page 161 of your guidelines, the recovery will not be credited to the proper government account. For example, if trust fund money pays for an investigation, the restitution order should seek to make the trust fund whole, including reimbursement of investigative costs.

One possible method of ordering full restitution, with a minimum of administrative and accounting overhead, lies in a model provided by existing legislation. The Civil Monetary Penalties Law (CMPL) (42 U.S.C. 1320) provides a formula approach to recovery. It provides for a penalty of $2,000 for each item or service which is falsified, and an assessment of twice the face amount of the claim. The penalty and assessment can be viewed as compensating for the cost of investigation. A formula approach eliminates the problem of calculating the precise amount of the costs of investigation and prosecution.

Examples

1. "Defendant is placed on probation for a period of five years, on the special condition that he make restitution to the Social Security Administration in the amount of $6,481.81 at the rate of $100 per month."

The direct loss to the Social Security trust fund during the fraudulent act is not the only amount for which restitution should be ordered. The related costs for investigation and losses due to the time value of money should also be ordered. The trust fund should be entitled to recover all costs and losses, including interest for the period from the loss to the point of recovery. This sentence is also confusing because it implies that after the period of probation expires (five years), restitution requirements stop even though a balance will still be due at that time. It should be noted that most restitution orders do not address interest on the principal amount during the period or repayment. Without it being specified in the order, collection officials do not accrue interest for the victim and victims suffer substantial losses even where the the amount in the court order is paid.

2. "Defendant shall make restitution in the sum of $26,602.06. Said restitution shall be made within five years after the defendant is released from confinement."

   The language in this order does not address interest for the victim. The collection official was not able to begin collection effort during the period of incarceration even though the defendant was believed to have assets because of the language in the order. Upon release from jail, the offender advised the Justice Department that he will not make any payments on the restitution order until the end of the five year period specified in the court order. The offender anticipates banking the money and earning interest until the end of the five year period. At that time, if the offender pays, the victim will receive an amount that deflated during the defendants incarceration period plus the five year period specified in the order. The Justice Department cannot enforce earlier collection because of the language in the order.

3. "The defendant is to use her best efforts to pay the restitution of $13,700 during the period of her probation through the U.S. Probation Office."

   Based on the order, it appears that the defendant need not pay the balance of restitution due at the end of the probation period. Since most defendants pay small periodic installments, it is likely that the victim will never be fully compensated because

the probation period will likely expire before full payment is received. No further amounts will then be due. Also, since interest was not ordered, the victim suffers further losses.

4. "Defendant shall pay restitution in the amount of $33,500. Said restitution payments shall be paid as directed by Probation Office if defendant is placed on parole following release from confinement."

   This order prohibits collection officials from seeking restitution during the period of confinement, thus allowing the defendant time to hide or use his assets. There is no order for interest. Restitution will be due if, after confinement, the offender is placed on parole. If he is released without parole, there is apparently no restitution due.

Page 148 - Restitution - When are payments due?

The sentencing guidelines should require judges to make it clear that restitution is due immediately. If immediate payment is not possible, the maximum possible payments should be required at the earliest possible time. Presently, orders do not convey any sense of urgency over making payments.

Background

Victims should receive full restitution at the earliest possible date. Orders do not convey urgency for making restitution payments. Offenders are given time to hide or use assets before collection officials can act and offenders are allowed to benefit at the victim's expense.

Examples

1. "Defendant shall make restitution in the sum of $26,602.06. Said restitution shall be made within five years after the defendant is released from confinement."

   This defendant, previously discussed, cannot be forced to pay until five years after release from confinement. This provides him the period of incarceration plus five years interest free, at the expense of the victim. It also provides him the time to arrange his financial affairs (hide assets, etc.), so that restitution can never be enforced.

2. "Defendant make restitution to his victims in the total amount of $142,000 in such amounts as determined by the probation department during the defendants five year probationary period."

   This order provides the probation officer with full discretion over when payment is to be made. Despite having a presentence investigation report showing the defendants financial status, the order does not require an immediate lump sum payment nor does it establish minimum periodic payments. It does not provide for interest. If the probation period expires before the full $142,000 restitution is made to the victims, the balance remaining is apparently forgiven.

3. "Defendant is to make restitution as directed by Probation Officer."

   In this case, the restitution due was established at $284,737. The probation officer has directed the defendant to make payments of $200 monthly. The same problems arise here as discussed in the preceding example.

4. "Defendant directed to liquidate all assets and apply those assets to restitution with the exception of his interest in his business and his household furnishings."

   This is an example of an order where the judge was more interested in getting a large restitution payment. Unfortunately, there were no time periods specified for liquidation so the defendant may legitimately take several months or possibly much longer to make restitution.

Page 148 - Restitution - Where are payments to be made?

The sentencing guidelines should require clear identification of where payments are to be made. Presently, victims, the Probation Office, and the Justice Department interpret orders that are not always specific, resulting in confusion over who is to collect.

Background

When restitution is ordered as a condition of probation, Probation has primary responsibility for ensuring payment. If it is not ordered as a condition of probation, the payee can be designated to be the Attorney General (for the victim) or to the victim directly. Without a clear instruction from the court, Probation and the Justice Department must decide whether they have responsibility for collecting and they will not always agree.

Example

1. "The defendant is to make restitution in the amount of $2,377.28."

   On the J & C, this appears to be typed in a section reserved for special conditions of probation. Because it is not entirely clear if it is a condition of probation, Justice Department must contact Probation and they must reach an agreement on who is to collect. This is inefficient, and recognizing that it is not always easy to reach agreements, collection effort is jeopardized. This type of order can result in the Justice Department presuming that Probation is responsible for collection and vice versa.

2. "The defendant is placed on probation for a period of five(5) years on count 1 of the information and make restitution of $6,768.45."

   This language does not clearly indicate whether restitution is a condition of probation. The Probation Office and Department of Justice must then agree on who is primarily responsible for collection. If agreement cannot be reached, collection effort is jeopardized."

Page 148 Subsection A416. Restitution

We also propose to add subparagraph "e" to subsection A416:

"e. When restitution has been ordered, the probation service of the court shall be directed to provide to the debt collection staff of the U.S. Attorney's Office the defendant's financial information obtained during the presentence investigation."

Background

As it presently stands, the debt collections staff receives minimal information concerning the defendant's financial information, even though it is responsible for collecting court ordered restitution. This situation severely limits the ability of the staff to effectively and efficiently collect restitution and it requires the debt collection staff to collect routine information that Probation already has.

If pertinent financial information is made available at the time of sentencing, the staff can then aggressively take steps to perfect liens, seize assets, garnish wages, etc., to protect the Government in those cases where the defendant stops making restitution.

Rule 32 (c)(e) currently allows only the defendant, his attorney, and the attorney for the Government access to the presentence investigation report, unless the court otherwise directs. We would like the courts to routinely direct that financial information from the presentence investigation report be provided to the debt collection staff when restitution is ordered. This financial data can be prepared on a tear sheet of the presentence report which would then be forwarded separately.

Page 149 Special Assessments

The Sentencing Commission should require sentences to specifically identify special assessments under P.L. 98-473 and require immediate payment.

Background

The guidelines do not discuss special assessments. These apply to all federal convictions and convictions in cases in which the Government is applying state criminal law under the Assimilated Crimes Act. Special assessments must be addressed in each sentence on such convictions. If special assessments are not required in the J & C, it makes collection difficult or impossible even though they are required under P.L. 98-473. Further, the J & C should require immediate payment of these numerous, but relatively small amounts. Because special assessments are frequently only between $50 and $200 on a given sentence, immediate payment is usually possible. If it is not obtained, the number of accounts receivable skyrocket and the cost of collecting the small amounts will exceed the total due.

Rather than provide examples, we wish to indicate that many J & C's that we reviewed did not address special assessments. Further, collection officials complained that defendants refuse to pay special assessments unless the amounts are specifically stated in the J & C.

We request that the Sentencing Commission create a new subsection on special assessments in the guidelines. This subsection should require that sentences address special assessments in all federal convictions and other appropriate convictions. Immediate payment should also be required.

Violating the restitution order should be considered a serious violation of the terms of probation or supervised release. Probation officers should have some discretion in dealing with violations of the restitution order. However, there should be a standard point in time where failure to pay restitution results in a revocation hearing with the judge.

Background

The defendant is placed on probation or supervised release so that he can begin to re-enter society in a way which will be productive for both the defendant and the public at large. This level of supervision is mandated to ensure that the rehabilitative process is effective. One of the strongest indicators of a defendant's sincere acceptance of responsibility and rehabilitative potential is his willingness to restitute the victim(s). Every effort must be made to live up to the restitution order during the term of probation or supervised release so that the victim can be made whole and defendant will have completely paid his debt to society. Violations of the terms of the restitution order can be an indicator that the defendant is not sincere about his responsibilities to the conditions of probation or supervised release.

There can be many reasons for not meeting the terms of the restitution order. Probation officers are in the best position to develop the facts related to the defendant's nonpayment of restitution. However, we believe that in order to ensure that restitution is a high priority during probation or supervised release, the court should maintain close control over the restitution process. In this regard, the probation officer as part of supervision, works with the defendant and makes every effort to have the defendant keep current with restitution. The strong incentive to keep current with restitution however, is the formal report of the violation to the court with the potential for another appearance before the judge.

To maintain effective restitution, the threat of a violation report and court appearance must be real. There must be a routine trigger mechanism to avoid the wide variances that individual decisions by probation officers bring to the system. Probation officers would continue to have full discretion over forcing a court appearance prior to the mandatory date. Delays or missed payments of more than three or six months for example, should automatically require the probation officer to formally report the violation to the court.

The sentencing guidelines should down play the importance or significance of a defendant's "ability to pay" as determined during the presentence investigation when establishing the amount of a fine. Judges should not use a defendant's "ability to pay" as the primary criteria for setting fines.

Background

The process of developing accurate defendant ability to pay data is weak and ineffective. There are numerous constraints and roadblocks which work to prevent probation officers from identifying the defendant's true financial condition. Defendant financial data provided to probation officers during the presentence investigation is often sketchy and based on obvious income and expense factors. Hidden financial assets, real estate or other valuable property may never come to light during a presentence investigation. Defendants with assets to hide can often avoid full disclosure and thus potentially avoid having a judge set a realistic fine based on actual ability to pay. As a result, sentencing judges should recognize the fairly restricted effort that goes into developing financial information contained in the presentence investigation when attempting to determine the defendant's ability to pay a fine.

Currently, in accordance with Rule 32 (c) of the Federal Rules of Criminal Procedure, probation officers conduct a presentence investigation of the defendant's background, personal history, and financial situation. The presentence investigation also develops information on the extent of harm, including physical, psychological, and financial harm done to the victim(s) by the defendant. Probation officers only have between 20 and 30 days to conduct their investigation and have a report of findings typed for presentation to the judge. This timeframe is necessary to ensure that sentencing occurs in a timely manner. This timeframe may also be shortened by the need to disclose the presentence investigation to the defendant and his attorney prior to sentencing.

The PCIE study found that even under ideal circumstances, this extremely short time deadline does not allow the probation officer to independently verify statements made by the offender regarding his financial situation. Probation officers must frequently just accept information provided by the criminals. Probation officers consistently told us that they do not have the time to do investigative work to search for hidden assets even if they suspect that the offender is hiding something. Even if the probation officer knows which banks or financial institutions the offender used, many will not cooperate and provide financial information without a formal subpoena. Some banks require that requests for financial information be handled through their legal department which slows down the entire process even more.

The problem of analyzing financial information received from or about criminal defendants is acute. A thorough analysis by skilled financial investigators such as professional auditors would be required to develop good "ability to pay" information. Indirect tests of income, etc., would have to be performed. When considering the difficulties the experts in the Internal Revenue Service have developing reliable financial information on non-criminals, it is easy to see that probation officers have a nearly impossible task developing realistic "ability to pay" information in a short timeframe on criminal defendants who are attempting to hide assets.

When conducting the presentence investigation, probation officers may have very little independent information to begin their task. Often, even though an investigative agency may have spent months following a defendant and documenting his activities, the investigative report is not always available. Or, if the investigative report is available, the offense may have been a bank robbery or other property offense and the report may only document the facts necessary to get a conviction. In these cases, the report has nothing to do with the defendant's financial condition or his ability to pay a fine.

Many defendants simply refuse to cooperate with the probation officer during the presentence investigation. If, in addition to the criminal prosecution, the Government is pursuing double damages through civil litigation, the defendant's attorney may have instructed him not to disclose his assets pending the outcome of the civil litigation. Probation officers told us that this makes it extremely difficult for them to develop any substantive financial information on the defendant's ability to pay a fine.

Probation officers are not generally trained or skilled in analyzing financial information provided by convicted felons. Probation officers told us that this task frustrated them because they had neither the time nor expertise to gather defendant financial information or do other than rudimentary analysis of the defendant's financial condition. This is evidenced by copies of excerpts of the financial section from several presentence investigations we saw. Each was prefaced by the fact that the defendant reported the following assets, liabilities, and recurring monthly expenses and income. None attempted to evaluate the defendant's ability to pay restitution or a possible fine, they simply listed the information provided by the defendant. None made any reference to financial information gathered independently by the probation officer.

We were told that defendants are motivated by an interest to keep their probation officer happy while doing all they can to protect their financial situation. Thus, a probation officer may think that the defendant is cooperating and providing accurate and complete financial information when in reality hidden assets are not being reported. They have no easy way to determine this.

Another kind of problem that can frustrate the process occurs when a defendant delivers voluminous financial records to the probation officer. These records can be totally useless to the probation officer if the resources are not available to pour over the data to develop an accurate financial picture.

We also found that there is a legitimate concern of some probation officers that the proposed sentencing guidelines will make it more difficult for them to deal with defendants during the presentence investigation. If full and complete agreements as to restitution and/or fines to be ordered are not hammered out during a plea agreement process (if this is applicable), the defendant may have no incentive to cooperate with a probation officer during the presentence investigation.

The new sentencing guidelines may place greater limits on the judicial system's flexibility to recognize and reward cooperation during the sentencing process. Thus, even though with judicial prerogative there is the potential for a 20% reduction of sanction units, the defendant may not believe he has enough to gain by being overly cooperative with the probation officer. Limited cooperation or the appearance of cooperation may be the best the probation officer gets from the defendant during the presentence investigation.

Ability to pay should not be the primary criteria for setting fines. It is not realistic to think this information can be developed in the short timeframes before sentencing. Also, the skills of professional auditors would frequently be required to do in-depth examinations and even then, skilled criminals will frequently defeat the system.

We propose to add this paragraph.

"When fines have been ordered, the probation service of the court shall be directed to provide to the debt collection staff of the U.S. Attorney's Office the defendant's financial information obtained during the presentence investigation."

Background

As it presently stands, the debt collections staff receives minimal information concerning the defendant's financial information, even though it is responsible for collecting the fines. This situation severely limits the ability of the staff to effectively and efficiently collect fines and it requires the debt collection staff to collect routine information that Probation already has.

If pertinent financial information is made available at the time of sentencing, the staff can then aggressively take steps to perfect liens, seize assets, garnish wages, etc., to protect the Government in those cases where the defendant stops paying fines.

Rule 32 (c)(e) currently allows only the defendant, his attorney, and the attorney for the Government access to the presentence investigation report, unless the court otherwise directs. We believe the courts should routinely direct that financial information from the presentence investigation report be provided to the debt collection staff when fines are ordered. While this information can be incomplete, it may provide the collection staff leads so that they can immediately begin to enforce collection action. This financial data can be prepared on a tear sheet of the presentence report which would then be forwarded separately.

Page 161 Chapter Six-Other Issues, Part A-Fines 3. Additional Issues

The Commission's concern whether the cost of investigation and prosecution of a case should be taxed to the convicted defendant as part of a fine, is also a concern of the PCIE. The PCIE would like to limit their comment to cases where the Government is the victim. When the Government has been victimized, the PCIE strongly supports the ordering of restitution over the imposition of a fine. Many of the frauds perpetrated against the Government involve trust fund monies. In order to assure monies are properly returned to the trust funds, restitution must be ordered. If the defendant were fined, those monies would not be returned to the affected trust fund.

When the Government has been the victim of an economic crime, the PCIE believes that making the Government financially whole is a legitimate and desirable goal of the criminal sentence. The ordering of full restitution can also alleviate the need to initiate civil proceeding to make the Government whole.

When considering the cost of investigation and cost of prosecution, the Commission may wish to consider including the following items:

- o Direct time of the professionals working the case [i.e., investigators, auditors, etc.].
- o Per diem and travel costs associated with the investigation.
- o Direct time of the prosecutor.
- o Witness fees paid for witnesses before both the Federal grand jury and petit jury.
- o Any other costs which can be directly attributable to the investigation or prosecution, (i.e., computer costs, laboratory costs).

As discussed in our comments on subsection A416, these considerations should be included in the restitution order rather than the fine.

Sentencing guidelines should require judges to reject plea agreements that do not include, when appropriate, full and complete victim restitution agreements.

Background

Plea agreements are entered into when the Government sees an advantage to resolving the case in this manner. The defendant also participates in the agreement process because it is in his self interest to do so. During these negotiations, the Government is in a strong position to promote victim restitution and require the defendant's cooperation. Simply pleading guilty without acknowledging the need for restitution to the victim(s) is a self-serving attempt to minimize the judge's sentence. Full victim restitution, when appropriate, should be included as a standard feature of all plea agreements. This figure should include the totality of the losses suffered by all victims, not just the monies related to offenses agreed to in the plea agreement.

One of the objectives of the Victim and Witness Protection Act of 1982 was the concept that it was necessary to make the victim of a crime "whole" again. The idea of restitution to make the victim whole includes adding up all costs incurred as a result of the crime. This information is presented in the Victim Impact Statement at the time of sentencing. Guidelines for the Victim Impact Statement include actual monetary losses (actual theft, embezzlement, etc.) and related expenses suffered or incurred by the victim as a result of the crime. Thus, the amount of restitution in the plea agreement should include: (1) payment for actual monetary losses suffered to the full scope of the defendant's crimes and not just the damages due to the conviction counts, (2) the costs of detecting, investigating and prosecuting the defendant, and (3) interest at the appropriate Treasury bill rate if restitution is not paid immediately.

00125
12-5-86

Federal Bar Association

Council on Administration of Justice
Law Observance Committee

Commemorating the Bicentennial of the U.S. Constitution—1987

December 2, 1986

Mr. Paul K. Martin
Communications Director
United States Sentencing
Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Martin:

I herewith transmit a copy of the comments of an Ad Hoc Committee of the Federal Bar Association on the Preliminary Draft of the Sentencing Guidelines, under a cover letter from the Honorable Robinson O. Everett, Chairperson of the Administration of Justice Section. I hope that these comments will be of some assistance to the Commission.

Sincerely,

Arthur L. Burnett, Sr.
Section Coordinator

ALB/irb

Enclosure



Federal Bar Association

December 1, 1986

Honorable Arthur L. Burnett, Sr.
United States Magistrate
United States District Court
U.S Courthouse
Room 1114
3rd & Constitution
Washington, D.C. 20001

Dear Art:

Transmitted herewith are comments on the Preliminary Draft to the Sentencing Guidelines prepared by the United States Sentencing Commission. I appointed a 5-member Ad Hoc Committee to evaluate these proposals, but time was too short for this committee to fully perform its function. However, the Chairman of the Committee has prepared the attached comments based in part on the Committee's discussions but mostly on his own evaluation. While I have not had time to review these comments in great detail, I have read them and I believe it would be appropriate to submit them for consideration by the Sentencing Commission. I also have asked the Ad Hoc Committee to continue in existence for the purpose of evaluating any guidelines which are submitted to Congress.

If you have any question, please let me know at your earliest convenience. In the meanwhile with good wish, I am

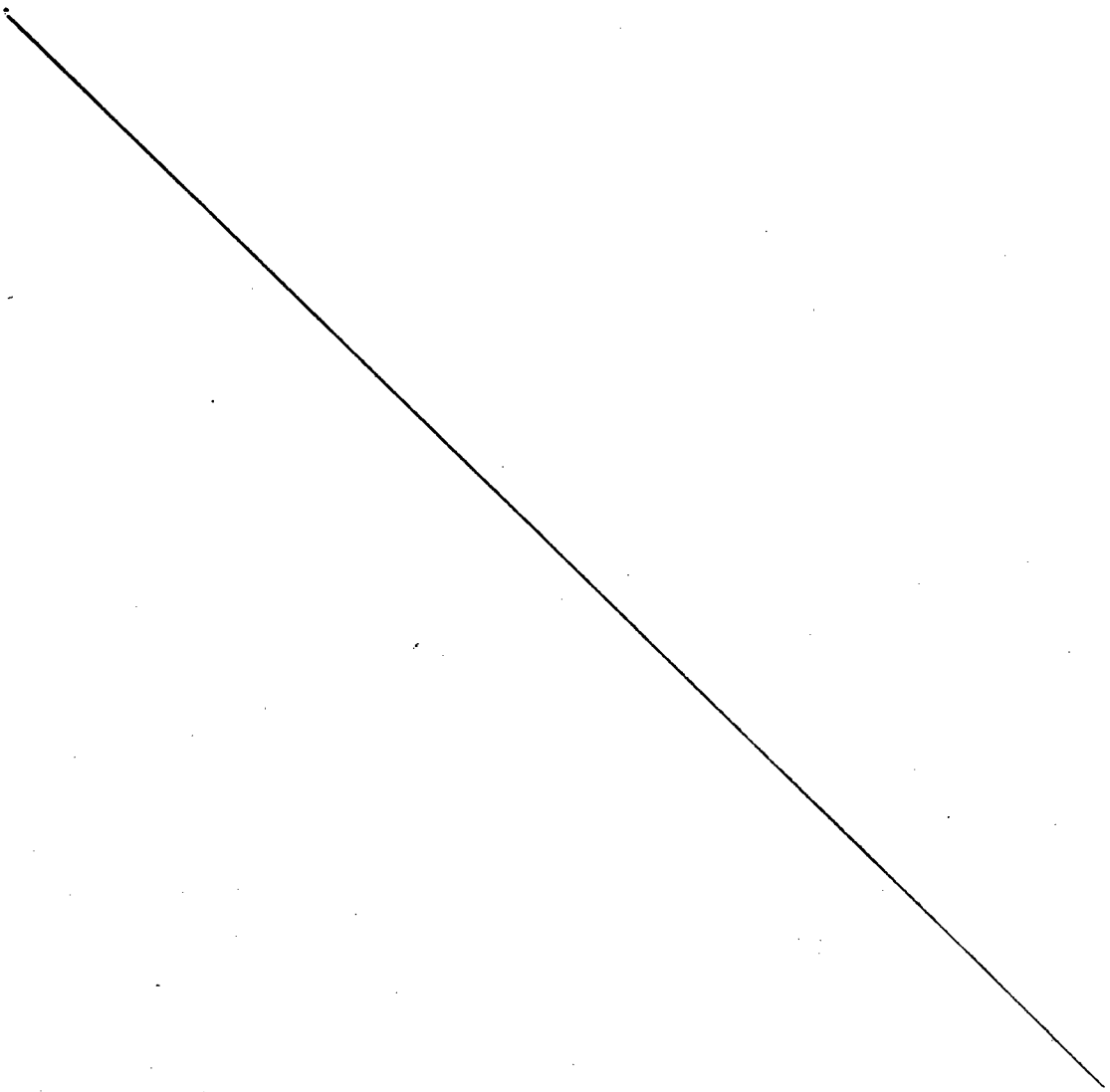
Sincerely,

Robinson O. Everett
Chairperson
Administration of
Justice Section

Enclosure

The following comments are submitted regarding the Preliminary Draft of the Sentencing Guidelines proposed by the United States Sentencing Commission in September 1986, recognizing that the question whether there should be any guidelines at all has been finally determined by Act of Congress and is not the basis for comment at this point:

*1. A scoresheet such as the one on the next page should be developed for the federal sentencing guidelines. Use of such a scoresheet would simplify application of the guidelines and would ensure that all parties to a trial would know pretty much what was at stake.



3

Rule 3.988(c)
Category 3: Robbery
section 812.13

1. SOCIETY NO. (PRIMARY OFFENSE)	2. COUNTY	3. JUDGE	4. DATE OF SENTENCE
5. SOCIETY NO. (ADDITIONAL CASES)	6. NAME	7. DATE OF BIRTH	8. SEX M F
	9. DATE OF OFFENSE	10. PRIMARY OFFENSE AT CONVICTION	11. RACE
	12. PROBATION VIOLATION / COMMUNITY CONTROL VIOLATION	13. PLEA: G TRIAL	14. GUIDELINE SENTENCE IMPOSED / DEPARTURE FROM GUIDELINE

I. Primary offense at conviction

Degree	Number of Counts 1	2	3	4	Points
Life	103	122	133	148	
1st punishable by life	82	98	107	119	
1st	70	84	91	101	
2nd	50	60	66	78	
3rd	34	41	44	54	

Primary offense counts in excess of four (from back)

II. Additional offense at conviction

Degree	Number of Counts 1	2	3	4	Points
Life	20	24	26	28	
1st pbl	17	20	22	24	
1st	14	17	18	19	
2nd	10	12	13	14	
3rd	7	8	9	10	
MM	1	2	3	4	

Additional offense counts in excess of four (from back)

III. A. Prior record

Degree	Number of Prior Convictions 1	2	3	4	Points
Life	100	210	330	460	
1st pbl	80	168	264	368	
1st	60	126	198	276	
2nd	30	63	99	138	
3rd	10	21	33	46	
MM	2	3	8	12	

Prior convictions in excess of four (from back)

B. Prior convictions for Category 3 offenses

Number prior convictions ____ × 25 = ____

IV. Legal status at time of offense

No restrictions	0
Legal constraint	17

V. Victim injury (physical)

None	0
Slight	7
Moderate	14
Death or severe	21

Total ____

Guideline Sentence:

Sentence imposed, indicating length and type (Please print or type)

FOR OFFICE USE ONLY:

Offense Code

Statute

Degree

Points

Sentencing Judge

State Attorney

Defendant/Defense Counsel

Sentencing Preparer

Reasons for departure:

3

SG3 — effective 7/1/84

DISTRIBUTION
White — Court File
Green — Sentencing Guidelines Commission
Canary — State Attorney
Pink — Defendant/Defense Counsel
Goldenrod — Sentencing Preparer

1. Please print or type the information entered upon the scoresheet and use sufficient pressure to ensure that all copies will be legible.

2. Enter the court case, court file, or docket number for the primary offense.

3. Enter the docket numbers for the additional cases presently before the court for sentencing.

4. Enter the name of the county where the sentence is imposed.

5. Enter the name of the sentencing judge.

6. Enter the date sentence was imposed.

7. Enter the defendant's full name.

8. Enter the defendant's date of birth.

9. Enter the defendant's sex.

10. Enter the date of the primary offense. If there are multiple counts of the primary offense, occurring on different dates, enter the earliest date.

11. Enter the common title of the primary offense or convictions with sufficient specificity to distinguish it from other offenses within the same chapter.

12. Enter the statutory felony degree of the primary offense. The following abbreviations may be used:

L Life felony
1pld first-degree felony punishable by life
1 first-degree felony
2 second-degree felony
3 third-degree felony

13. Check the appropriate box if the sentence is imposed for a violation of probation or community control.

14. Indicate whether adjudication was obtained by plea or trial. If convictions were obtained by trial for some offenses and by plea on other counts, check the trial box.

15. Indicate whether the guideline sentence has been imposed or whether the sentence represents a guideline departure.

Category 3
Robbery

Points	Recommended Range
34–53	any nonstate prison sanction
54–65	Community Control or 12–30 mos. incarceration
66–81	3 yrs. incarceration (2½–3½)
82–101	4 years (3½–4½)
102–121	5 (4½–5½)
122–151	6 (5½–7)
152–183	8 (7–9)
184–229	10 (9–12)
230–295	15 (12–17)
296–357	20 (17–22)
358–417	25 (22–27)
418–453	30 (27–40)
454+	Life

The following factors shall be used when counts of primary offense, additional offenses or prior record exceed four. These tables are used only for those counts in excess of four. The point total for the counts in excess of four should then be entered on the face of the scoresheet.

I. Number Primary Offense Counts Above 4

Degree			
Life	____	× 15 =	____
1st pld	____	× 13 =	____
1st	____	× 10 =	____
2nd	____	× 10 =	____
3rd	____	× 10 =	____

II. Number of Additional Offense Counts Above 4

Degree			
Life	____	× 2 =	____
1st pld	____	× 2 =	____
1st	____	× 1 =	____
2nd	____	× 1 =	____
3rd	____	× 1 =	____
MM	____	× 1 =	____

III. Number of Prior Convictions Above 4

Degree			
Life	____	× 130 =	____
1st pld	____	× 104 =	____
1st	____	× 78 =	____
2nd	____	× 39 =	____
3rd	____	× 13 =	____
MM	____	× 4 =	____

DEPARTURE FROM GUIDELINES

Section 3553(b) of Title 18 permits departure from the guidelines range which applies to the circumstances of the case if "the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." This provision could render the guidelines meaningless if it is not strictly limited. Chief Judge Bryner of the Alaska Court of Appeals has well stated the problem regarding fixed statutory terms for repeat offenders as follows:

> Under the view espoused by the legislature, a presumptive term [set out in AS 12.55.125] represents the appropriate sentence for cases that fall within the middle-ground between the opposing extremes of the most and least serious conduct for a given crime. It is to be expected, then, that sentences equalling or varying only slightly from the presumptive terms will generally be suitable when presumptive sentencing applies. Minor adjustments for aggravating or mitigating circumstances might be appropriate in a significant number of cases; only in unusual cases, however, can it be anticipated that substantial deviation from the presumptive term will be called for.
>
> When viewed in the light of the fundamental goals of the new sentencing statutes, the rationale for this relatively inflexible sentencing framework is readily understood. If sentencing courts were permitted, under the presumptive sentencing scheme, to deviate routinely and substantially from the presumptive terms prescribed by law, the fundamental purposes of eliminating disparity and establishing reasonable uniformity in sentencing would be completely undermined. Unless the provisions of AS 12.55.155 are adhered to strictly, and unless a

> measured and restrained approach is taken in the adjustment of presumptive sentences for both aggravating and mitigating factors, then the prospect of attaining the statutory goal of uniform treatment for similarly situated offenders would quickly be eroded, the potential for irrational disparity in sentencing would threaten to become reality, and the revised code's carefully fashioned system of escalating penalties for repeat offenders would be rendered utterly ineffective.

Juneby v. State, 641 P.2d 823, 833 (1982). The presumptive term system is sufficiently like the proposed guidelines that these comments apply here as well.

The problems that departure from sentencing guidelines can create for the system have been addressed by Judge Lehan of the District Court of Appeal of Florida, Second District, in his separate opinion in Middleton v. State, 489 So.2d 201, 202-203 (1986), as follows:

> The guidelines provide relatively few criteria as to when there may properly be departures. Essentially the task of establishing proper standards for departure has fallen upon the appellate courts on a case by case basis. But determining those standards cannot be accomplished solely from either necessarily correct logic based upon guidelines' wording or from legislative history. Those determinations, in the final analysis, may depend to a substantial extent upon judges' perceptions of the proper basic philosophy of the guidelines. Yet there appear to be underlying differences of opinion among various of the judges of the district courts of appeal as to proper perceptions of that philosophy. Thus, there has developed a marked lack of consistency among the district courts of appeal in deciding guidelines departure cases, with differing results as to particular issues being supportable under differing views of that philosophy. . . .
>
> A view that the trial court's basis for departure in this case was proper may seem supported by a philosophy that discretion of

> trial judges in the sentencing process was not to be wholly taken away by the guidelines. . . . To simply say that there may not be an abuse of the trial court's discretion would not seem to provide a clear cut answer to all these types of issues. A determination of how much of an exercise of discretion constitutes an abuse of that discretion may involve how strongly the sentencing guidelines philosophy is perceived as being to preserve that discretion, as contrasted with taking away that discretion in the interests of uniformity of sentencing for like crimes under like circumstances.
>
> The guidelines' "Statement of Purpose" in rule 3.701b, begins with the sentence, "The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process." Thus, any debate as to the underlying philosophy of the guidelines might seem to be resolved. That is, uniformity of sentencing standards is the goal. . . . Nonetheless, the extent to which trial courts are to be guided towards that goal in the exercise of discretionary functions, and the extent to which the work "guide" is to be viewed as mandatory as compared to only directory, does not seem entirely resolved.
>
> Accordingly, in the consideration of various types of issues involving whether trial courts' departures from the guidelines are proper, it appears that the law can be firmly established only as the Supreme Court pronounces its views as those issues appear before it. It may be that the more the rulings of the trial courts may be seen to evidence a reluctance to achieve the foregoing goal, the more the trial courts will be guided in a mandatory fashion towards that goal.

The scope of this problem is shown by the fact that "there have been over 750 opinions filed" in Florida appellate courts challenging "a sentencing guidelines departure," not counting "the per curiam affirmed cases." Bullock v. State, 492 So.2d 857, 858 (Fla. App. 1986).

The Florida experience with departure sentences gives warning that the federal sentencing guidelines are subject to the same

kinds of problems. If the federal system is to function efficiently, these problems must be reduced to a bare minimum, so acceptable reasons for departure must be only the most extraordinary circumstances. An example of very similar reasons for departure which have been held both valid and invalid may be found at note 3, pages 740 and 741 of 492 So.2d. This illustrates the kind of problem that must be avoided if the guidelines are to be effective in reducing sentencing disparity.

Several suggestions may be considered to reduce the effect of departures to manageable limits. First, no departure should be allowed which exceeds two or three levels of the Guideline Table. Second, if the guidelines are to be departed from, "the judge must refer the case for sentencing to a specially constituted three-judge panel," which would fix an appropriate sentence in the first instance. This panel should be the same for each circuit so there is still some measure of uniformity. See Juneby v. State, 641 P.2d at 831. Third, "factors already taken into account in calculating the recommended guidelines sentence" should not be the basis for departure. See Bailey v. State, 492 So.2d at 740. Unlike Florida, however, the federal courts should strictly construe this limitation and only permit reasons which are entirely separate from those which are already scored. Finally, departure sentences should be subject to de novo review by the court of appeals.

*2. Under the proposed modified real-offense sentencing plan, the sentence would be based only on those real elements that are importantly bound up with the conduct that constitutes the crime charged, even if not found as an element of the crime charged. (P. 15.)# The judge must find by a preponderance of the evidence the existence of conduct which was not found as an element before such conduct may be considered for sentencing. This conduct is presented as an offense characteristic or an adjustment factor. (P. 8.) Examples of this plan follow:

a. If a child was struck by a car during the get-away after an armed bank robbery and the child was permanently paralyzed, the offense value for the child's injuries is added to that for the bank robbery. (P. 16-#2)

b. If a person distributes cocaine and the judge finds by a preponderance of the evidence that the purchaser died as a result of ingesting the cocaine, the offense value for the death is added to the offense value for the drug distribution. (P. 16-#4)

c. If a person is convicted of obstruction of justice by assaulting a federal police officer, but a count specifically alleging the assault on the officer is dismissed, the offense value of the assault (which was dismissed) can be added to the offense value for the obstruction of justice. (P. 17-#7)

d. Following conviction of conspiracy to steal and forge one social security check, the judge at sentencing finds by a preponderance that the offender stole, forged, and cashsd 20 checks. (P. 17-#8)

Page references are to the blue-covered copy of the Guidelines.

Under the present system the judge bases the sentence on information contained in the presentence investigation, after the offender has had a chance for rebuttal. There is no way to tell how much weight the judge gives to particular factors, and various judges could give various weights to similar factors. The statements in the PSI can be presented in a variety of ways which have varying degrees of reliability. Even if the offender contests allegations and the judge says they will be disregarded, one can never be sure that is the case. A principal defect of this system is that the judge assesses these factors with almost unlimited discretion to do with them as he sees fit. There are few procedural safeguards to prevent acceptance of an exaggerated picture of the offense or the offender. This situation, however, is not completely addressed by a system which sets standard values for common factors in offenses. The determination that these factors apply must be far more accurate than it is now.

It must be remembered that requiring proof beyond a reasonable doubt before one can be convicted is not merely an academic exercise. The function of this process is to provide the most reliable assessment of the conduct of a person before he is subject to punishment. Thus, the Constitution says that no person may be imprisoned or fined unless it is determined beyond a reasonable doubt that he did what he is charged with. This decision does not extend only to the question whether the offender violated the law, for that is not the sole determinant of the

sentence. Other discernible facts bear directly on the issue of the extent of punishment. The law does not provide that every person who commits offense A will receive the maximum punishment unless that person establishes to the satisfaction of the judge that certain factors are missing. No! The process is that the Government must establish the facts that support the sentence beyond a reasonable doubt. If only some of those facts have to be proved by that standard, what good is the standard? A person should not receive a greater sentence for using a firearm to threaten a bank teller than that person would receive just for robbing that bank unless the trier of fact found that the offender used the firearm in that manner. There is no justifiction for saying that certain aspects of the offense must be established by one standard while other, equally significant, factors may be established by a lesser standard. The sentence will be the total of those factors and that total should be established by the same standard. Just because sentences have been wrongly determined for years is no reason to perpetuate the wrong in this basic reevaluation of the sentencing scheme of the federal courts. If a person is to serve 10 years in jail, the factors prompting that time determination should be established by the same process. There is no reason other than convenience for saying otherwise. If a factor cannot be proved by the same amount of proof as other factors, it has no place in the sentencing decision.

The Supreme Court (by 5-4: Burger, C.J. concurring) has said that due process is satisfied if a state judge finds by a

preponderance that the offender visibly possessed a firearm and was thereby subjected to a mandatory minimum term of 5 years. McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986). However, this does not mean that Congress should not provide greater protection for an offender, especially when such burden is not demonstrably larger than that already on the prosecution and the courts. Fairness dictates that higher standards apply in federal courts, at least in this instance.

No doubt persons convicted under the identical statute should be sentenced in a way that reflects the differences in their conduct, absent overriding considerations in connection with plea agreements. However, saying this does not mean that the exact nature of the conduct in excess of the statutory requirements must always be determined by the judge. There is no reason why the decision cannot be made by the jury. A bank robbery indictment can contain a statement of the amount taken, of whether weapons were used, and of whether anyone was injured and to what extent. The standard should not be less than that for establishing the other elements of the crime, for these factors are just as much elements as what is set out in the statute. Elements of a crime are those factors which establish the nature of the conduct to be punished, and an element is an element is an element regardless of the name given it. The weight to be given such element is an entirely different matter, once its existence is established.

It is no answer to say that the verdict beyond a reasonable doubt sets the maximum, but setting an amount less than that is an

entirely different process. That is simply not so! How much of a sentence one receives is a single process based on facts and not on guesswork. The discretion in sentencing occurs in deciding the weight to be given the facts in the case; it is not the method of deciding what those facts are.

All persons convicted of the same offense should not necessarily receive the same sentence because there is a tremendous variation in the nature and circumstances of the offense. Making sure that does not happen is a very worthwhile goal of a sentencing system. Saying that does not establish that the judge can decide what additional factors to weigh beyond those found by the jury. The judge's role should be to weigh whatever factors are presented to him after their validity is independently determined. These factors could easily be presented by adding them to the charge under the heading aggravating factors. Thus, the primary objection to the charge-of-conviction system is more imaginary than real.

It is argued that requiring the conduct to be charged and found by the jury before use on sentence increases the amount of influence the prosecutor has to determine a sentence. However, this should carry little weight because the prosecutor already cannot be ordered to charge offenses if he doesn't want to do so. Besides, the judge's function is to decide matters submitted to him, not to dig up such matters in the first place, so there is no room for the judge to complain if the prosecutor does not present all the aggravating factors. Otherwise the judge assumes the role

of prosecutor and should be disqualified. It must be recognized that the prosecutor is responsible for presenting the most appropriate case for the people under the circumstances, and the judge is then to exercise his responsibilities based on what he is given. It cannot be presumed that the prosecutor will neglect his duty.

This role for the prosecutor is consistent with the Commission's statutory mandate to lessen disparity, not simply to transfer the source of the disparity (p. 15), because the disparity at issue concerns the sentencing decisions, not the charging decisions. Whether there is disparity in sentences depends on the existence of a substantial variance in the treatment by judges of similar facts presented to different judges, not on whether prosecutors treat one person differently from other people. The latter decision is an entirely different matter, for the Commission is not addressing the exercise of prosecutorial discretion. The source of the disparity is crucial to this debate and is also determinative of the view taken of the effect of the disparity. Judicial disparity is the evil to be addressed, not disparity in the exercise of prosecutorial discretion. Thus far, courts have very little control over the exercise of the executive discretion involved in the action of the prosecutors, and this is not the occasion to undertake reform of prosecutorial actions. Disparity in sentences is reduced when judges impose similar sentences for similar kinds of conduct as presented to them.

The Commission rejects the alternative that if a real-offense element constitutes a separate crime, the Government must charge that offense separately, because "the existence of separate crimes often depends upon the happenstance of factors creating federal jurisdiction." (P. 17.) However, this response overlooks the numerous federal crimes that could be prosecuted, including those under the Assimilative Crimes Act. Only if an act is not a crime under federal law would it not have to be prosecuted separately. No reason is given why this should not be done. If the evidence is insufficient to establish the separate offense, there is no justification for punishing it anyway. That is a simple way of saying a person may be convicted and punished for an offense which is not proved beyond a reasonable doubt. The Constitution does not permit that. The fact that the Commission relies on explicit cross references to offenses in other sections shows that those referenced offenses could be prosecuted separately. Then the issue would be whether they were separately punishable.

The foregoing discussion leads to the conclusion that the child's injuries set out in example (a), the cocaine-related death in (b), the assault in (c), and the 19 additional checks in (d) should not be used to determine the sentence for the offense of which the offender was convicted. Those offenses should have been submitted as separate counts, or included in the count which was submitted to the jury. If they cannot be proved beyond a reasonable doubt, they should not be used against the offender.

The cocaine-related death (b) and the extra checks (d) are especially egregious examples of unfairness in sentencing because there would be serious issues of causation for the death requiring very difficult factual determinations, and bringing in 19 additional checks after the jury only found one is grossly unfair. This is not to say that those matters are not legitimate factors in sentencing. The problem is in having the judge make the decision by a preponderance. Whatever standard is set, and it should be at least greater than a preponderance, there is no reason why the jury couldn't make the decision. There could be a bifurcated proceeding if different standards govern but the decision should be made by the jury.

It is now proposed that a sentencing hearing will be less formal than a trial. But witnesses may be called and cross-examined; the rules of evidence will generally apply; and the prosecution will bear the burden of proving aggravating factors. [Pp. 17-18] This comes pretty close to being a full-fledged trial, except for instructions. Yet those instructions would be fairly uncomplicated, so there is very little reason why the jury could not resolve this issue.

*3. Because physical injury (A 222 - A 225) is included in the cross-references to so many offenses, it should be a separate section as is psychological injury (A 251), which is also a cross-reference. Including physical injury under the section on Assault and Battery makes it appear that there is an add-on for an

assault and battery which was not changed, when in fact the add-on is for injuries resulting from conduct already found by the jury.

*4. The levels of physical injury (A 222 - A 225) are differentiated on page 27. However, the differences in those levels , as well as the levels for psychological injury (A 251), are so subtle and so esoteric that it would be far more reliable if a jury decided the level of such injury, rather than one judge.

*5. Application of the cross-reference to physical injury is very difficult. For example, criminal sexual conduct by aggravated force or coercion (A 231) carries a base offense value of 150, with an add-on for physical injury from A 222 - A 225 (from a high of 120 to a low of 20). Yet criminal sexual conduct means a sexual act accomplished by means of aggravated force or coercion; aggravated force is actual force of an aggravated nature used to overcome the victim or threaten death or use of a deadly weapon. So if A 231 already covers aggravated force, how much additional force is necessary before the add-on comes into play? It is very difficult to answer this, so this cross-reference may not be useful.

*6. It is proposed that emotional or psychological injury would only be considered where it is shown the injury is substantially different from what would be expected for an offense of the nature involved. This recognizes that the base offense value already covers a certain amount of such injury. The major

problem would be a showing that the injury does exceed what would normally be expected. This could only be authoritatively done by expert opinion subject to cross-examination, and that would create another battle of experts which would be overly time-consuming and could very well divert attention from the main issue. Because of the extreme difficulty in quantifying the extent of such injury, the judgment of more than one person would be required to provide a fair assessment of the extent of such injury. A major problem is that the extent of such injury would depend on the environment in which one lived. For example, the armed robbery in Washington, D.C., of a person from Kansas may have an entirely different effect than that on a person from Southeast Washington who has to face such problems on a daily basis and at some point becomes hardened to it out of necessity. Should the crimes be punished differently because of where the victim lives? Doesn't this raise serious equal-protection questions? The base offense value already covers emotional and psychological injury to some extent. That should be enough.

*7. The punishment for an attempt or an assault with intent to commit criminal sexual conduct (A 234) should not always be the same as that for the completed offense. There should be gradations depending on how close to completion the conduct was. There is a significant difference between grabbing a female, throwing her to the ground, pointing a pistol at her, removing her pants, tugging at her underwear, unzipping his pants, and then

departing, versus continuing to remove her underwear and then having intercourse with her. Contrary to the Commentary (p. 31), the difference between an attempt and the completed act does not depend in every case on the occurrence of only a slight intrusion. This treatment of attempts and assaults with intent to commit criminal sexual conduct is inconsistent with Congressional intent, since assault with intent to commit rape [18 USC § 113(a)] is punishable by 20 years, while rape (18 USC § 2031) is punishable by life imprisonment; assault with intent to commit carnal knowledge [18 USC § 113(b)] is punishable by 10 years, but carnal knowledge (18 USC § 2032) carries 15 years for a first offense and 30 years for other offenses. These distinctions exist in fact, at least as to these most serious acts of criminal sexual conduct, no matter how close to completion the offense was.

*8. Criminal sexual conduct by other means (A 232) involves a sexual act by the use of a simple assault and battery, or when drugs are used to initiate the offense. Thus, one who has intercourse with a 25 year old female after slapping her in the face once is guilty of this offense. This is highly questionable, to say the least.

*9. While the duration of an unlawful restraint is significant for purposes of sentencing, all restraints in excess of one hour should not be treated the same (A 242.a.3). A person who is restrained for 3 days suffers far more than one who is restrained for 3 hours. If this suffering is already included

under psychological injury, it should not be treated again. If it is not included, there should be gradations in the add-on: for example, if the restraint lasts less than 12 hours, add 12; if it lasts 12 hours but less than 24 hours, add 24; and for every 24 hours after that add 6, up to one week; over one week add 100.

*10. When property with significance or worth beyond the monetary value (p. 37) is stolen, this is no reason for a sentence outside the guideline range. If property has minimal value and the theft does not cause at least significant psychological injury (A 251), the offense is simply not that serious.

*11. The text of D 213 (attempts and conspiracies) is broader than the Commentary (last paragraph). The text suggests that a person can be punished for a conspiracy and for the corresponding substantive offenses, which appears to be contrary to 28 USC 994(*l*)(2) (consecutive terms for a conspiracy and for its substantive object are generally inappropriate). The Commentary recognizes this by saying that a conspiracy is separately punishable only for transactions in addition to those which are the subject of substantive counts of conviction. This should be made explicit in the text. Also, saying that the offense value for a conspiracy or attempt to commit a drug offense shall be the same as if the object had been completed means that the conspiracy is punishable the same as the completed act, not that only the completed act can be punished. The Commentary is very explicit and its language should be substituted for the first sentence in D 213.

*12. The method for determining the amount of drugs when there is no seizure (D 214) is more guesswork than factual, so the proposed alternative methods cannot even be treated as circumstantial evidence. Prices and market values vary according to purity and availability; the financial records may be phony; prior transactions may have been better buys than normal; some laboratories are more efficient than others; and the catch-all is open to all kinds of supposition. Perhaps the most potentially accurate method is the reference in the Commentary to negotiations and reasonable ability to get what was promised. For this reason, the base offense value in D 211(A) and (B) should be fixed by what is proved in fact, or the base offense value should be set high enough so that only the largest amounts warrant greater punishment, while the smallest amounts may receive less punishment.

*13. Harboring illegal aliens (L 213) because of political or humanitarian concerns is no excuse or justification or mitigation. No distinction based on such motives should be included.

*14. Acceptance of responsibility is one factor which should be left for the judge to decide because it relates to the accused and not the offense, and much more information can be considered about the offender. In determining applicability of this factor, the strength of the Government's case should carry great adverse weight because the offender may do 1 - 5 in B 321 because he figures he has nothing to lose and he might as well make some

points. This is especially the case concerning a guilty plea, so an automatic sentencing reduction is not appropriate for a guilty plea. Likewise, an automatic reduction for a guilty plea creates the appearance of penalizing a person who exercises the right to trial. On the other hand, it would seem appropriate in assessing acceptance of responsibility to consider that a person went to trial and raised a frivolous defense. Also, guilty pleas should be encouraged by being considered good evidence of acceptance of responsibility, depending on the circumstances. In the final analysis, however, this factor will provide a potential basis for substantial disparity.

*15. There is even more danger of undermining the effort to prevent disparity in the cooperation (E 331 - 333) factor which is entirely dependent on the whim of the US Attorney. (See paragraph Third, p. 15.) This could very well encourage an offender to lie against other offenders, especially if the certification depends on whether convictions result from the person's aid. The alternative would be to advise the judge of how many arrests and convictions there were and how much drugs or property was obtained. Yet, this also provides a motive to fabricate.

*16. The differences between acceptance of responsibility and cooperation are not so great that there should be a 20% difference between the amount of adjustment possible in the sentence. Each should be subject to a 30% adjustment range.

*17. Although a concurrent sentence should not be treated the same as a consecutive sentence, it should not be ignored either. (Pp. 128 - 29). Otherwise a concurrent sentence would be meaningless, even though it does figure into decisions regarding parole. Yet, the conviction still exists under a concurrent sentence; the offender just was not sentenced separately for it. The appropriate measure of its significance is to score at least 1 point for it in the criminal history score. It should be treated as an aggravating factor.

*18. The assumption on pp. 128 - 29 regarding time served for prior convictions should not be used because the burden of showing applicability of a particular aspect of the criminal history score table should be on the prosecution. After all, the object is to increase the accused's punishment. The real goal seems to be to reduce the probation officer's work, but that should not be the accused's job. If the records are difficult for the prosecution to get, how can the accused be expected to do better? It seems unlikely that the accused's word would be sufficient, and the accused probably will not have a verified document showing the release date. This is a significant fault in relying on time served in assessing the seriousness of a prior conviction.

*19. The criminal history score (CHS) table (p. 131) and the alternative (multiplier) approach on pp. 131-132 differ very little, except that the numbers for the 18-23 and 60+ base offense values (BOV) in the table are somewhat less than those in the

alternative. The table provides ease of conversion and should be used, but the numbers should correspond to those that would result under the alternative approach. For example:

Bov	CHS			
	5	7	9	11
18-23	10(9)	14(13)	18(17)	22(21)
60+	25(24)	35(33)	45(43)	55(52)

[The numbers in parentheses ( ) are from the table.]

*20. The criminal history score (p. 127) should be replaced by a fixed term of years to be added based on the number and nature of the prior convictions, as follows:

add 2 years for the first prior felony
add 4 years for the second prior felony
add 6 years for the third prior felony
add 8 years for the fourth prior felony
add 10 years for the fifth prior felony
add 2 years more for each additional prior felony

Add double the number of years provided above for any prior felony involving a violent offense or a drug offense. For example, the added term for a theft (1979), robbery (1982), and another theft (1985) conviction would be 2 + 8 + 6 = 16 years. This term would not be subject to good time. If an offense is committed while on probation or release, multiply the total score by 1.5 instead of C 324 on p. 128.

*21. Under the present method for dealing with prior convictions, some states impose a mandatory life sentence after 2 convictions (Texas); others add a 30-year sentence for being an habitual offender to the sentence for a current offense (Indiana); federal courts may

add up to 25 years for being a dangerous special drug offender (21 U.S.C. §849) or a dangerous special offender (21 U.S.C. §3575); and up to 30 years for a second offense of carnal knowledge (21 U.S.C. §2032).

The criminal history table provides for substantially less additional time. It appears that the least additional time would be 10 months in the 1-17 range, while the most up to the 32-59 range is 54-68 months. This is figured by adding 54 to the total sanction units (TSU) as follows:

TSU	Range	+54	Range	Difference
84	72-90	138	126-156	54-66
144	132-164	198	186-232	54-68
186	174-216	240	228-284	54-68
234	222-276	288	276-344	54-68
252	240-300	306	294-366	54-66
306	294-366	360	348-434	54-68

Thus in the base offense value range of 32-59, the most that could be added for criminal history is 4 1/2 to 5 2/3 years. This would severely deprecate the significance of a criminal history, so the amount of time to be added on must be significantly increased. While life sentences or 25 to 30 years would not be appropriate, a maximum range of 10-20 years is required. Clearly, the higher ranges would be reserved for violent offenses and for serious drug offenses, but such ranges must be provided. The provision of C321 for application of the maximum statutory term for a violent offense when there are two prior felony convictions for violent offenses is inadequate where the maximum term is 5 years (18 U.S.C. §113(c); 2101); or 3 years (18 U.S.C. §§1112(b)); 1113). It is also inadequate for voluntary

manslaughter - 10 years (18 U.S.C. §1112); robbery - 15 years (18 U.S.C. §2111), because the offenses themselves warrant close to the maximum even as a first offense. Under the guidelines bank robbery with a dangerous weapon by two offenders who used force to take control over a bank would be scored 36 + 60 + 36 + 24 = 156. If they took $15,000 and inflicted serious bodily injury on someone in the bank, that would add 16 + 60 for a total of 156 + 66 = 222. This translates to 210-262 months (17-21 years). The maximum is 25 years under (18 U.S.C. §2113(d)). Suppose this was the third time the offender had done this same type of thing. The guidelines would add 4 years, which is miniscule and therefore totally inadequate.

For voluntary manslaughter the maximum sentence usually is 10 years (18 U.S.C. §1112(b)). Under the guidelines the base offense value is 120 (A213) or 108-134 months (9-11 years), so having 2 prior convictions for violent felonies would not mean anything.

The past practice of the largest percentage increase attributable to criminal record being for offenders convicted of the least serious crimes (p. 131) is a travesty and must be reversed so that those convicted of the most serious crimes receive what they deserve.

*22. Item E, p. 127, dealing with the effect of a positive urine test for drugs, may violate the prohibition against making narcotics addiction a crime, Robinson v. California, 370 U.S. 660 (1962), unless it can be proved that the offender committed the particular crime before the court to get money for drugs. Merely having the status of a drug user is no reason for punishing a person. The use of the

results of urine tests for drugs should be restricted to administration of probation or pretrial/posttrial release which may be conditioned on discontinuance of drug usage. It is a very different matter if the offender has been convicted of a drug offense, for that may be the basis for increased punishment. Finally, being on drugs at the time of an offense may reduce the seriousness of the offense from a specific to a general intent crime. A person should not be penalized for that. Besides, the drug user who commits the crime is already being punished for the crime itself; there is no reason to add more punishment for the status. It is noted that even convictions for public intoxication and similar offenses are not counted at all (p. 129); yet drunks commit crimes too.

*23. Offenses committed when a person is a juvenile should only be counted if the offender were tried as an adult. This is consistent with basing the criminal history score on previous sentences imposed (p.132). In other words seriousness of an offense is shown by how it was treated, not by whether the offense was against persons or involved drug trafficking (p.129). When a person is treated as a juvenile, that indicates the matter is not considered as serious as it might be in adult court. Also, the problem of record availability creates a significant problem, and because only about 5% of federal offenders are under 21, it hardly seems worth the trouble.
The option entitled Sentences for offenses committed prior to age 18, option A, should be used without regard to whether the sentence exceeded one year (p. 135). This is not to say, however, that a

juvenile record should not be a factor in deciding whether to imprison at all.

*24. The criminal history score option on pp. 135-36 is far better than the option on p. 127 because the sentence imposed is a more accurate indication of the significance of the offense than time served, because factors having nothing to do with the crime or the offender can control release dates. This is especially true where conditions of overcrowding prevail. Certain modifications of the alternative should be made as follows:

A. For each prior sentence of imprisonment that was imposed within 15 years of the commencement of the current offense behavior:

(1) Score 5 points if it was for 10 years or more of imprisonment, or

(2) Score 4 points if it was for 5 or more years but less than 10 years of imprisonment, or

(3) Score 3 points if it was for more than 1 year but less than 5 years.

B. For each prior sentence of imprisonment that was imposed within 10 years of the commencement of the current offense behavior:

(1) Score 2 points if it was for 60 days or more but less than 1 year of imprisonment, or

(2) Score 1 point if it was for less than 60 days of imprisonment.

C. Leave D as is on pp. 135-36. It is the same in both options.

Adding A(1) and (2), above, will ensure that the most serious prior criminal conduct will be counted. (P. 136).

The option endorsed here does not rely on other criminal conduct to revive a prior conviction. The passage of time is enough to remove a prior conviction from consideration, regardless of what the offender may do during that period. The time periods are long enough so that no real purpose is served by counting the ancient offense after the period ends.

*25. Section 994(e) of Title 28 states that it is generally inappropriate to consider the education, vocational skills, employment record, family ties and responsibilities, and community ties in determining whether a term of imprisonment is appropriate, and if so, the length of the term.

The last three factors (9, 10, 11) have already been addressed in the draft, so the question is whether age, mental and emotional condition, as well as physical condition, including drug dependence, need to be considered.

Except for the most serious offenses such as murder, rape, kidnapping, armed robbery or burglary, and aggravated arson, an offender under the age of 22 should not be incarcerated in an adult facility absent special circumstances indicating otherwise. This would be especially true if the young offender also suffered from a mental or emotional condition. After the offender reaches age 22, the court may assess the offender's progress and determine whether further incarceration as an adult is appropriate. The offender could be sentenced at the time of conviction without regard to age, but then

age would determine where the sentence would be served until age 22. On the other hand, consideration should be given to whether incarceration is appropriate for a person of advanced years, especially in light of that person's health. Congress has already concluded that it is inappropriate to imprison anyone to provide needed educational or vocational training, medical care, or other correctional treatment. 28 U.S.C. 994(k). The decision whether to imprison a person should not be based on the extent to which the offender suffers from a mental or emotional condition. It may be appropriate to hospitalize the person for a time before imprisonment is served, since one suffering from such a condition when it has reached a significant stage of development should be treated in a hospital environment. The same goes for drug dependence. But neither condition means imprisonment is totally inappropriate. Whether the sentence would be running during hospitalization is a different matter.

The factors excluded by section 994(e) could be considered in determining whether probation or some other form of release is appropriate.

*26. The guideline table approach should be adopted. It is unnecessary to make the conversion rate depend on the nature of the offense committed (p. 141) because it would appear that the base offense values already do that.

*27. The court should not be required to impose a sentence that satisfied all of the offender's sanction units, so long as the minimum guideline is met. Rather, the judge should have the option of

imposing alternative sanctions such as probation, in addition to the minimum guideline. The length of the non-imprisonment sanctions could be up to the statutory maximum. 18 USC 3561. For example, if the imprisonment range was 80-100 months, the judge could sentence the offender to 100 months, with the excess over 80 months to be probated for 3 years. The judge should be able to impose a fine or order restitution, regardless of the number of sanction units. There is no need for equivalency tables under these circumstances. (Pp. 142-43).

*28. The guideline range should govern over any statutory maximum sentence, but a statutory minimum sentence should govern over the guideline range. (A421)

*29. Plea ageements are crucial to the operation of federal courts and their use should be encouraged. While the judge should not be bound by any sentencing cap as a matter of law, it must be remembered that the judge's function is to resolve conflicts, not create them. If both parties agree to a sentence, the judge should have very compelling reasons to reject that agreement. Such reasons should not include reliance on factors the plea agreement specifically dealt with, such as dismissed charges or offenses which will not be charged or aggravating circumstances that will be left out. Perhaps the best procedure would be for the judge to act based on the case as it is presented to him by the parties and not seek to supplement the facts given to him. The sentence would then be based on the guideline range which results from the negotiations.

Miscellaneous Comments

A214- Would additional points be scored if the reckless conduct consisted of driving while being very drunk?

A215- What statute prohibits homicide resulting from negligent conduct? What level of intoxication makes the add-on for homicide resulting from reckless conduct (A214) different from that for homicide resulting from negligent conduct? (P. 23)
Why should points be added if the intoxication did not cause or contribute to death?

A221- There should be an add-on for assaulting the Vice-President.

A231- The Commentary says the threat of death or use of a deadly weapon is punished to the same extent as the actual use of force, yet there is an add-on for physical injury, which covers any physical injury (A225).

A231- The add-on for a victim who is age 6 should not be the same as for a victim who is age 14 when the offense is criminal sexual conduct by aggravated force.

A232- The Specific Offense Characteristics for a victim under age 16, in custody of the offender, or vulnerable should be scored less for criminal sexual conduct by a simple assault and battery than for such conduct by an degree of violence above a simple assault and battery.

A233- How can the victim of criminal sexual conduct with a minor, which is committed absent circumstances of any force or coercion, suffer any physical injury as provided in the cross-reference?

A242- Why is the special offense characteristic involving a monetary demand necessary when A243 refers to ransom money?

B211- Embezzlement and theft of US mail should have a much higher base offense value because embezzlement violates public trust and mail theft interferes with a public function.

B212- The add-on for being a professional fence (a.1) should be much higher since adding 12 will simply not deter such an offender.

B213- If a person set fire to a residence and did $1000 damage, the offense would be scored 2+4+60=66 or 54 to 66 months (4 1/2 to 5 1/2 years); yet this is aggravated arson. This offense is against the person because of the danger to persons who could be in the residence.

B213- If the property destroyed was undelivered mail and the offender was a postal employee, more than 6 should be added.

B221- The cross-reference to death of a victim during a burglary amounts to felony murder and should be punished as such. If felony-murder cannot be proved, the death should not be used as aggravation.

The base offense value for burglary should not be less than that for robbery, and there should be an add-on under burglary for use of a dangerous weapon at least in an occupied dwelling.

B222- The value for the special offense characteristics of trespass should be higher for a secured government facility or a nuclear energy facility than for a dwelling. Both values should be much higher than 12.

B251- The values in the property table should be the same as those in the tax evasion table (C211) because the offenses are similar in nature.

Theft of just over $2 million should not be treated the same as theft of $5 million, especially when the underlying principle for property offenses is that punishment should be based mainly on the amount involved. (P. 43)

D211- The add-on for distributing drugs to children or for use of children as assistants to distribute drugs is far too low, and it fails to differentiate between use of very young and older children. Perhaps there could be an add-on of 6 for every year the assistant or distributee is under 12, in addition to the 18 already provided. These offenses are far more serious as the age gets lower. Distribution of drugs to a 9 year old is far more serious than to a 16 year old.

One final prior conviction for a drug offense should not be treated the same as 3 or 5 such convictions. See #20, above.

D212- See comments under D211 regarding the special offense characteristic for use of children as assistants to commit the offense.

***The base offense values in K213 (unlawfully trafficking in, receiving, or transporting explosives); K214 (threats involving explosives); K215(unlawfully possessing an explosive in a government building) are all punished by the possibility of a sentence other than imprisonment. These offenses are far too serious not to

require imprisonment for an adequate deterrent. K215 is especially serious considering the potential danger to the public and to employees in a government building. The maximum penalty for this violation should exceed the one year currently provided in 18 U.S.C. 844(g). Having explosives or firearms aboard an aircraft (K216) is an especially serious offense and the values should be substantially increased above the 4-5 years which is proposed.

K217 (receiving an explosive knowing or intending it could be used to injure) is to be worth only 6-12 months, which is grossly inadequate.

K218 (using explosives during crimes of violence or drug trafficking crime) carries a minimum of 4-5 years, which is inadequate as a deterrent.

K241 (inciting a riot) and K242 (inciting a riot in a detention facility) are subject to a sentence other than imprisoment and 12-18 months respectively. These offenses are far more serious than that.

BECAUSE OF TIME CONSTRAINTS, IT HAS NOT BEEN POSSIBLE TO CAREFULLY REVIEW ALL OFFENSES IN THE PROPOSED GUIDELINES. ACCORDINGLY, FAILURE TO COMMENT ON A SPECIFIC OFFENSE IS NOT INTENDED TO INDICATE AGREEMENT OR DISAGREEMENT WITH THE TREATMENT OF SUCH OFFENSE.

00128
12-5

UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA

WARREN K. URBOM
UNITED STATES DISTRICT JUDGE
586 FEDERAL BUILDING
100 CENTENNIAL MALL NORTH
15TH AND O STREETS
LINCOLN, NEBRASKA 68508

December 1, 1986

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

Dear Members of the Commission:

Thank you for the preliminary draft of the sentencing guidelines.

My overall impression of the guidelines is favorable, although so far my application of those guidelines to the sentences I have administered this year would undoubtedly have resulted in many more imprisonments than I actually imposed. I have used as alternatives community service and house arrest or, in your terminology, home detention, in many of the instances that the guidelines presently would indicate as candidates for imprisonment. It seems to me that if community service and home detention are tailored carefully, they can be excellent substitutes for jail or imprisonment in many situations.

The two suggestions that I particularly want to make are these:

1. On page 145, §412c2 the guideline reads: "If a term of probation is imposed for a felony, the court must impose a fine, an order of restitution, or community service as a condition of probation."

My suggestion is that home detention be added as one of the alternatives.

2. Also under §A412c I suggest adding a paragraph 4, which would allow a judge to impose the payment of money to a community service organization as a condition of probation. I suspect that it should be necessarily tied to a community service project--that is, that personal service would be required along with the payment of money to assist in the performance of that community service project. The Eighth Circuit Court of Appeals in U.S. v. Missouri Valley Construction Company, 741 F.2d 1542 (1984), concluded that requiring a corporation (and perhaps any other defendant, as well) to contribute money

to a charitable organization that had not suffered actual damages or losses from the corporation's criminal offense was not authorized under the present statute. That kind of restriction puts a crippling limitation on alternatives to incarceration and efforts of judges to put constructive features into the sentencing process. In several bidrigging cases which preceded the holding in U.S. v. Missouri Valley Construction Company, I had what I deemed to be genuine success in constructive alternative sentences in such cases as United States v. Wm. Anderson Company, 698 F.2d 911 (8th Cir. 1982). Accordingly, I invite your consideration to the suggested alternative.

Very truly yours,

Aaron K. Sobom

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

DUANE REX LEE
CHIEF OF THE DIVISION
OF MAGISTRATES

December 3, 1986

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Attention: Guidelines Comments

Dear Sir:

I am writing in my capacity as the Chief of the Division of Magistrates of the Administrative Office of the United States Courts to comment on the impact that the preliminary draft of the Sentencing Guidelines would have on the magistrates system. The authority of United States magistrates to impose sentences in criminal cases is limited by statute to misdemeanors, including those considered minor in nature. I would like to take this opportunity to impress upon the Commission the need to be aware of the Sentencing Guideline's impact upon such minor offenses. During our statistical year of 1986, magistrates nationwide handled a total of 91,570 misdemeanors, comprised of 79,272 petty offense and 12,298 misdemeanor offense cases above the level of petty offense.

My main concern with the Guidelines lies with the application of certain mandatory procedures to high volume traffic offense cases. A fine is usually imposed in most of those convictions. Should the Commission determine that a fine should be proportionate to the offender's ability to pay, discretion should be provided to the judicial officer to determine whether the ability-to-pay requirement will be applied in those relatively minor cases. Unless such discretion is provided, the administrative work entailed would be overwhelming in some courts. On the other hand, the judicial offficer should not be precluded from recourse to such an approach in all petty offense cases.

Another problem involves the determination of sanction units for offender characteristics. If such a determination is required in each traffic offense case, the magistrates with high volumes of petty offenses will be in trouble.

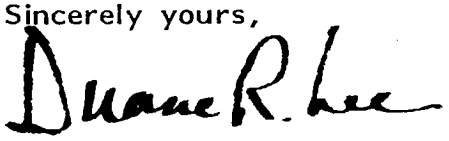
With regard to the conversion of sanction units into sentences other than imprisonment, the Commission has offered certain options for consideration. One option is the "mandatory satisfaction of all sanction units." As with the ability-to-pay approach with fines, this mandatory satisfaction of all sanction units will impose difficulties with the high volume petty offense caseloads. This is particularly so if sanction units for offender characteristics must be added to the base offense units. The additional sanction units could compel a judicial officer to sentence a traffic offender to certain penalties for a very minor traffic violation.

Finally, the Guidelines require the imposition of certain mandatory conditions of probation. Magistrates sometimes impose terms of probation in petty offense cases, including traffic cases. Whether or not all mandatory conditions are reasonable and necessary in such cases should be considered by the Commission. For example, is the condition that the probationer "permit a probation officer to visit his/her home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer" reasonable in situations involving petty traffic offense convictions?

Thank you for the opportunity to review and comment upon the preliminary Sentencing Guidelines.

With warm regards, I am

Sincerely yours,



Duane R. Lee
Chief
Division of Magistrates

746 U. S. POST OFFICE
AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202-3988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

December 1, 1986

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

Dear Judge Wilkins:

A number of copies of the Preliminary Draft of the United States Sentencing Commission Sentencing Guidelines have been received at the Probation Offices in Cincinnati, Dayton and Columbus in the Southern District of Ohio. The draft has been distributed among our probation officers and they have been encouraged to provide their input to me so that my response could be as complete and comprehensive as possible and represent to you not only my personal views, but the views of those of us who work for the District Court in Southern Ohio.

After having the draft in our possession for some weeks, a number of our staff met and took a day to discuss the guidelines. I would like the Commission to know that those in attendance at this discussion were most helpful in my forumulating response to the Guidelines. Those people were: Chief U.S. Probation Officer Gerald J. Wright, Supervising U.S. Probation Officer Robert F. Mahler, Jr., U.S. Probation Officers William R. Jones, Larry England, Charles P. Crowley, John C. Cole, Karen M. Brown, Margarette R. Foster and Bruce M. Burnside.

I can safely say on behalf of the group mentioned above, that we are truly amazed at the amount of work the Commission has completed in order to bring the Preliminary Draft Guidelines to their present state. The Commission is owed a tremendous debt of gratitude from those of us in the Criminal Justice System who will be directly affected by Sentencing Guidelines and from the public at large where the true test of sentencing guidelines will be given.

Along with this letter are a number of attachments representing our thoughts and input in specific areas outlined in the Preliminary Draft. As a member of the working group of Probation Officers, I realize how openly the Commission has conducted its business and I certainly appreciate that and the

opportunity to be a part of your work. I welcome any further opportunity you may see to utilize my input.

Sincerely,

David E. Miller

David E. Miller, Supervising
U.S. Probation Officer

DEM:bd

Enclosures

746 U. S. POST OFFICE
AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202-3988

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 22

In Section A212, Homicide, Level 2 in specific characteristic number 3 the term, "rises to the level of malice" is used. This same term also surfaces in the commentary of A216 on page 24. I do not understand what "rises to the level of malice" means and believe that this should be defined objectively.

DEM:bd

746 U. S. POST OFFICE
AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202-3988

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Pages 25 - 26

This is in reference to Section A221, Assault and Battery. The specific offense characteristics under this section need clarification. Specific offense characteristics 2,3,6, and 8 seem to have the same meaning. Application of these characteristics is difficult due to the language and their apparent similarity.

746 U. S. POST OFFICE
AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202-3988

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 27

With reference to the commentary of Section A221, I think some definition of terms is appropriate. What is family violence? Is this a violent act which occurs within a family structure, ie. the husband assaulting a wife or child? Is family violence taken to mean violence by third party directed towards an entire family?

Also, what is a bodily function? The levels of physical injury are difficult to apply without understanding that basic terminology.

DEM:bd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

746 U. S. POST OFFICE
AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202-3988

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 30

In the criminal sexual conduct with a minor listed in Section A233, a specific offense characteristic indicated in number 1 is if the victim was under age twelve or the offender was more than three years older than the victim, add sixty to the base offense value. I think the Commission should consider increasing the base offense value for younger aged victims as the offense appears to me to be aggravated and particularly more heinous when the victim is under six years of age.

DEM:bd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

746 U. S. POST OFFICE
AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202-3988

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 33

Regarding Section A242 - Abduction or Unlawful Restraint and the specific offense characteristics listed, it is noted that if the abduction lasted more than one hour, twenty-four points are added to the base offense value. It is my contention that the Commission should add additional points when the abduction has a longer duration. In other words, if the abduction lasts one day or one week, the offender should be punished more severely than the abduction which lasts only one or two hours. The increase in severity should be at a diminshing proprotionate rate. With this in mind, if the Commission chooses to adopt a standard of increasing the severity of the offense based on the length of time, I believe the base value of twenty-four indicated in Item 3 of Specific Offense Characteristics is probably too high a starting point.

746 U. S. POST OFFICE
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5TH AND MAIN STREET
CINCINNATI 45202

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Pages 34 - 35

This input deals with Section A251, Psychological Injury. Specifically, in discussing the levels of psychological injury the Commission establishes the test that a Court, in finding that extreme psychological injury exists, must use a preponderance of evidence based on expert testimony. I do not think that expert testimony should be required and that the Court, relying on the best information available to it through psychological reports, statements of witness and victims, and information obtained through the presentence investigation should have the ability to judge whether or not extreme or significant psychological injury occurred.

On page 35 in the commentary the term "outrage" and the phrase "infliction of emotional distress" are used. The definition of this term and this phrase are required for appropriate application of the guidelines.

Psychological injuries are very real and the harm caused to victims of a psychological nature are often more far reaching and longer lasting than any physical injury or property loss. The Commission should take these factors into consideration in its sentencing scheme. Although arriving at an appropriate level of harm may be somewhat subjective and difficult, the decision following the standard test of the preponderance of evidence is not unlike many others that the Court will have to make in applying the guidelines. The Commission should create standards of proof in determing psychological harm that is based upon objective data, such as diagnostic opinions, actual participation in psychological or psychiatric treatment or an objective loss of normal functioning by the victim (inability to work or attend school) due to the traumatic impact of the offense.

DEM:bd

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CINCINNATI 45202

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 38

On page 38 in the last paragraph of the commentary which relates to theft and property destruction, the Commission utilizes an example of an offense involving property damage which creates public disruption. The example given is the destruction of a $500.00 telephone line which may cause a significant interruption in services to thousands of people. This example could be developed into a fuller scenario with endless possibilities obviously. However, assume for the sake of argument that the cutting of the $500.00 telephone line disrupting numerous customers also indirectly contributed to the death of an elderly person because they were unable to use the telephone to call for an ambulance; it also left several robberies unreported indirectly enhancing the ability of the perpetrators to commit their crime. This example points up an issue which I think is important to note. In many cases the guidelines fall short in their attempt to remove sentencing disparity by creating a system where a judge's thought process can be duplicated. They fall short because the intent of the perpetrator of the crime cannot possibly be taken into account. Was the individual who cut the telephone line, in our example above, a teenager on a prank or was his act one of a deranged terrorist who intentionally cut the telephone line for the purpose of creating havoc in the community?

While I am not sure that our present system has the ability to capture some of these intent issues, I believe it is important to point out to the Commission the difficulty which is created when one attempts to apply the guidelines.

DEM:bd

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CINCINNATI 45202-3988

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Pages 38 - 39

These comments relate to Sections B221, Burglary, and B222, Trespass. In cross-referencing both of these offenses, I believe that if the offender possessed a weapon when he committed a Burglary or Trespass, additional points should be given as the possession of a weapon in these situations certainly enhances the danger of the crime.

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CINCINNATI 45202-3988

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 43

The property table in B251 contains various ranges of monetary values associated with offense behavior and corresponding offense values. I think that the last category of over 5 million dollars is entirely too low to adequately assess the severity of financial crimes. Here in the Southern District of Ohio, we have a prosecution pending which involves the Home State Savings and Loan Association and ESM. This offense involves well over $300 million dollars and its severity is certainly greater and its impact greater than an offense involving 5 or 6 million dollars. The Commission should redo the property table to take into account larger financial crimes.

DEM:bd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

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5TH AND MAIN STREET
CINCINNATI 45202-3988

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 48

In the commentary on Tax Evasion, Section C211, in the second paragraph the Commission discusses the treatment of an offender who fraudulently completes tax returns at the direction of an employer, or for that matter, someone in a position in control over the offender. The Commission indicated that it has tentatively elected not to attempt to make any distinction from that individual and the subject of the tax returns. I believe this is wrong in that a certain amount of duress might be imposed upon an employee whose job may be at stake unless he follows his superior's orders. Therefore, his sentence should be mitigated as compared with the sentence of the superior.

DEM:bd

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CINCINNATI 45202-3988

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Pages 56 - 57

With regard to Section D211, the Unlawful Manufacturing, Importing, Exporting or Trafficking of Controlled Substances, all of the tables which calculate base offense value provide cut-off points which are too low. In other words, one kilogram of heroin, two kilograms or more of cocaine, 200,000 or more doses of PCP or LSD, and to 20,000 of marihuana do not in my estimation represent the most severe cases adequately. Even in the Southern District of Ohio, we find that our drug conspiracy cases often contain quantities of these various drugs which are much greater than the cut-off which the Commission has proposed. My general belief again in areas of this nature, is that the severity should be decreased proportionately with the amount so that two kilograms is not twice as severe as one kilogram, but the cut-offs should be higher.

Also, regarding these drug tables I think the Commission should adopt a policy of considering drugs at 100% purity similar to the way the Parole Commission treats drugs at the present time. This provides a uniform system for offenders to be sentenced, and furthermore, the purity level of the drug being sold goes to the culpability of the defendant.

DEM:bd

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CINCINNATI 45202-3988

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 58

In Section D212, Continuing Criminal Enterprise, I think the Commission should consider the longevity factor of the enterprise. A drug conspiracy which lasts ten years and results in prosecution for continuing criminal enterprise should be considered more serious and should be punished more severely than a drug conspiracy which lasts six months to one year and is prosecuted similarly.

DEM:bd

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CINCINNATI 45202

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 61

Section D221, Unlawful Possession of a Controlled Substance, or what is commonly known as simple possession, as outlined in Title 21, U.S.C. Section 844, is the subject of this response. I am not sure if the statutes define quantities of various substances which could result in a charge of simple possession of one of those controlled substances. If not, I believe the Commission should set out some parameters to finding various quantities because, obviously, greater the quantity the more severe the offense.

DEM:bd

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Pages 76 - 79

In offenses involving fraud and deception under Section F211, the Commission proposes in number three (3) that if the fraud consisted of a scheme or artifice to defraud more than one victim, the base offense value is twelve (12). By so doing the Commission aggravates the offense by six (6) points over the fraud which involves only one victim, and when looking at the commentary on page 79 under number three (3), Multiple Victims, the Commission proposes a rationale that aggravated victim impact and property loss factors will be reflected by the scale of the offense and its cumulative impact on victims by utilizing the property table for fraud offenses. While I understand the logic for that argument, I still must disagree. I think the Commission should make a distinction between the con artist who defrauds twenty (20) farmers out of $10,000 each when he promises to build a pole barn and does not deliver, and the money finder who bilks one over-ambitious entrepreneur out of $200,000 through his unfulfilled efforts to fund the victim's project. Multiple acts involving multiple victims should aggravate the penalty because the perpetrator of the crime had to establish twenty (20) different relationships and had to consciously make a decision to bilk twenty (20) different people out of their money. He is much more unscrupulous in my estimation than an individual who gets the same amount of money from one victim.

DEM:bd

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CINCINNATI 45202-3988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 78

I may not clearly understand everything I have read about the fraud offenses, particularly the property table for fraud offenses as it relates or is compared to the property table in Section B251. However, it occurs to me through a simple application of the guidelines that a person who commits a theft offense, such as in B211 would receive a base offense value of two points. Assuming the monetary value of the theft is $5,000.00, he will receive an additional eight points for the offense value, totaling ten points. In a fraud case where the defendant defrauds the victim of $5,000.00, he would receive six points for the single occurrence fraud under F211 and two points for the base offense value for a total of eight points. It is my contention that an individual who commits a fraud does so with more sophistication, knowledge and planning than the individual who steals something of value. Therefore, I do not understand why the property tables tend to mitigate the con man or fraud artist. A more general question would be why is the property table for fraud offenses different than the property table for property offenses? Why is the amount of $25,000,000.00 listed as a ceiling on the fraud offenses and 5,000,000.00 is the ceiling on the property table? My comment here would be similar to my comment with regard to the property table on page 43, and that is that the ceiling is too low and that many fraud offenses exceed the $25,000,000.00 figure listed.

DEM:bd

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 86

In Section H221, Obstructing an Election or Registration, the Commission delineates a special offense characteristic in (a)(1) which indicates that if the offense involved twenty (20) or more voters, ballots, or registrations, add six (6) to the base offense value. Consistent with positions taken in other aspects of the guidelines, I believe that the Commission needs to establish more definition based upon a more widespread violation of this offense. The impact of numbers is one of the most crucial impacts there can be. Therefore, this offense should be aggravated as the obstruction to more voters increases.

DEM:bd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

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CINCINNATI 45202-3988

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 98

On page 98, in Section K221, which involves violations of firearms acts, there seems to be some problem. I have read and reread the specific offense characteristics listed in number 1 and number 2 and have a difficult time figuring out exactly the intention of the Commission. In reading these sections, it appears that a defendant who possesses a machine gun is, excuse the expression, getting "double-barreled" for this possession. He receives a base offense value of six for simply possessing the gun and then item 1 would suggest that he receive an additional ten points because it is a machine gun. Item 2 would suggest that he would receive an additional twelve points because it is a machine gun. I may be misunderstanding the intent of the Commission, but if my assumption is correct, I do not think it is fair to continue to add points on for the same possession of the same weapon.

DEM:bd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

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DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 100

In Section K223(a)(1), if the offender used or carried a machine gun or a firearm equipped with a firearm silencer, etc., it is my belief that the distinction of a machine gun is too specific in that the term machine gun should be changed to automatic weapon.

DEM:bd

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 113

In regard to Section S211, Securities Fraud and the calculation of the base offense value by utilizing the amount of loss to the investors table, it is my thought that the table provides too low of a ceiling at 25,000,000.00 and that offenses commonly exceed this amount substantially and should be punished more severely.

DEM:bd

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Pages 120 - 122

First general comment regarding the Overview to Chapter Three - Offender Characteristics. Part A, Role in the Offense; Part B, Offenders Post-Release Conduct; Part C, Prior Criminal History; and Part E, Other Offender Characteristics, are aptly classified as offender characteristics. However, Part D, Plea Agreements, should not be classified as an offender characteristic. Plea agreements are bargains or negotiations struck between the defendant and the government. The reward is inherent in a plea agreement. That is, the sentence exposure to a defendant is limited as a result of the bargain reached with the Government. Therefore, the Commission should not consider providing the defendant with another enhancement because he enters into a plea agreement with the government.

Moreover, the subject of plea agreements is such an overriding and overwhelming concern in a sentencing guideline system that it should be addressed separately, not only by the Sentencing Commission but probably in other forums. I will discuss my thoughts about plea agreements in more detail later. It is sufficient to say here that the plea agreement is not properly classified as an offender characteristic within the context provided in Chapter 3 of the draft guidelines.

Speaking specifically about Part A, Role In The Offense, as defined in Sections A311, 312, 313, and 314, it is noted that A311 provides the Court a range, or some discretion, over how much of an aggravator it is to impose if the offender was in a position of control over a criminal enterprise. An exception ofcourse is the continuing criminal enterprise conviction which mandates that the Court multiply the offender's base score by two. There is a 50% range built into A311, and five criterea are provided to assist the Court in making its determination.

We now come to Section A312, dealing with an offender who directed or supervised other persons in the commission of the offense, or used his special training or public position to facilitate the offense. Why is there no range for the Court to consider in enhancing the penalty for this offender? Also, why aren't the same five variables as listed in A311, applicable in A312?

The A313 Section is self-explanatory, and I agree wholeheartedly with the way the Commission has applied it. A314 is another argument for having a range in A312 as the Commission has provided a range within which the Court can use its discretion in applying A314, the minor participant in the offense.

In summary, I believe that the Commission has created an inconsistency in this section and that the Court should be permitted discretion in Section A312; and that the same criterea utilized in A311 be applied there as well.

DEM:nm

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Pages 122 - 126

In Part B of Chapter 3 the Commission proposes certain aggravating or mitigating adjustments to a sentence based upon post-offense conduct. In Sections B311 and B312 the Commission introduces the concept of obstruction of justice and perjury as aggravators to the offense score. The Court is entitled to 30% discretion for operation in this area of adjustment.

In Part 2 of Acceptance of Responsibility, as outlined in Section B321 and B322, the Commission has provided the Court with the opportunity to utilize a 20% discretion area to reduce the sentence if the defendant can demonstrate by deeds, as opposed to words, that he or she has accepted responsibility for the offense. Several areas of input are important here. The first is a technical matter. The Commission should express this adjustment in the same way that it has expressed all others; and if it chooses to stay with the 20% discretion it should make it a .8 for consistency sake.

On Page 124 the Commission states, "Acceptance of responsibility for the offense(s) may be established by conduct that includes, but is not limited to the following:". I have a question about number three (3) of those criterea. When is the defendant voluntarily admitting actual involvement in the offense? Does he get credit if he makes an admission prior to being recognized by the authorities as a perpetrator, or after he is caught? In my opinion a confession after the evidence has been obtained is useless and should not be rewarded. If the intention of the Commission is to reward confessions made prior to discovery by the authorities, then number three (3) needs to be clarified.

Another possible proposed criterea which would indicate acceptance of responsibility, is the defendant who enters a plea of guilty without a plea agreement, or without any charge bargaining occuring. In other

words, he has robbed three banks and pleads guilty to three banks. I believe that this is a demonstration of remorse and contrition worthy of judicial reward.

In general, I foresee that every defendant, through his attorney, will seek an adjustment under this section. This section will induce game playing and will be very difficult for the Court to resist using. Almost any attorney can fashion an argument using the existing number three (3) and number five (5). For example: the defendant has admitted his guilt and given a complete confession as to his involvement. He was addicted to cocaine during the commission during the offense and has now entered a treatment program and is doing well. Furthermore, Your Honor, he is attending Church with his family.

Philosophically I believe that acceptance of responsibility is an important aspect of sentencing. However difficult it may be, I think the Commission needs to create more objective standards for the application of this adjustment.

I now direct my attention to Section 3 on the subject of cooperation. First, I believe the Court should retain ultimate authority over whether to give an enhancement for cooperation. The Court should decide upon the significance of the cooperation of the defendant, using the U.S. Probation Officer and his presentence investigation as a guide. The probation officer will need to rely on objective facts supplied to him by the Government and the defendant. As the draft guidelines point out, cooperation by an offender is often a subject of a plea agreement. If the defendant is cooperating as a term of his plea agreement then he should not be eligible for a mitigating adjustment at sentencing. He has already been rewarded through the terms of the plea agreement and should not be rewarded twice.

One of the great fallacies of creation of the Sentencing Commission is the clout of the prosecutor in the system, because of selective prosecution and because of plea bargaining. While plea bargaining is seen necessary to the efficient administration of justice, the potential abuse of power can certainly undermine the apparent intent of Congress and all the work of the Sentencing Commission. To give an enhancement for cooperation when the Government has already done so is akin to "having ones cake and eating it too".

DEM:nm

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Pages 126 - 136

I have several comments with regard to the criminal history section, which is Part C of Chapter 3. Since one of the purposes of sentencing, as outlined in the statute, is to protect the public from further crimes by the offender, and since prior criminal history is statistically a predictor of recidivism, then logically the prior record should be calculated as an enhancement to an offender's sentence. Any method that can be devised in looking at prior criminal history will, for a number of reasons, have built in a certain amount of disparity. Records are not available as readily here as they might be elsewhere; expungement statutes in various states differ; some states will not disclose juvenile records at all; geographic considerations make some offenses considered more serious in some areas than others; the nature of the offense by statutory definition varies from jurisdiction to jurisdiction; and therefore I am satisifed that the Commission has established in Section One of Part C, a criminal history scoring system which is as fair as any other.

However, rather than the approach taken by the use of the Criminal History Score Table, I would rather see the criminal history scores divided into categories such as minor criminal history; serious criminal history; very serious criminal history; and persistent criminal history. Then the Commission should assign increasing adjustment values to those four categories, which might be 1.1; 1.2; 1.3; and 1.4. Although this system and a numerical chart, which the Commission has devised, may not create significant differences in the enhancement, I like the idea of using a consistent method with the other adjustments the Commission has developed.

A question for consideration is the impact of the case of United States vs. Tucker, 404 U.S. 443 (1972). In otherwords, in calculating the criminal history score are we considering only those convictions where the defendant had legal representation or intelligently waived same, or are we considering all convictions which can be established through the presentence investigation. In my opinion, the Commission should establish as policy that only those cases which were made in compliance with U.S. vs. Tucker should be counted.

In the special conditions and policy statements regarding prior record, in Section C322, the Commission allows for the Court to aggravate a sentence if it can be determined that the defendant failed to comply with an administrative order, a civil adjudication, or a preponderance of other evidence that the offender previously engaged in similar conduct, other than the conduct which resulted in a previous criminal conviction. The Commission provides no limit to the discretion of the Court in this regard, and I believe that it should. Similarly, in Section C323, a policy statement deals with the current offense being part of a pattern of criminal conduct from which the offender derived a substantial portion of his or her income. Again there is no limit on the judicial discretion, and furthermore, no indication of what is meant by a pattern of criminal conduct. How many prior convictions of similar behavior would constitute a pattern of criminal conduct? Much clarification is needed in these two sections.

I would also like to comment on the last paragraph of Page 128, which tells the probation officer to assume that an offender served one-third of the maximum term imposed, or one-third of the statutory maximum term when the maximum term was not stipulated. I believe that the probation officer should use the actual amount of time served if he knows it; and therefore suggest that the phrase, "unless the time served can be specifically determined", be added to the first sentence of the last paragraph of Page 128.

DEM:nm

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 136

The Commission has asked for a public comment on whether or not other offender characteristics should be incorporated in a guideline sentencing scheme. A dilemma exist regarding this issue. If the Commission is to duplicate the thought processes of a great number of Judges who must impose sentences, then surely sociological factors, such as age, education, employment history, family ties and responsibilities, would be taken into consideration. On the other side of the issue is the complexity of attempting to categorize these factors in a guideline system. This is complicated by the fact that two observers, looking at the same sociological factor, may interpret its relevance differently in light of the sentencing decision. An example might be, a defendant who committed a crime, but who had 20 years of stable employment history, a good education, and family background. Many would look upon that defendant and those factors as mitigating because of the exemplary life the individual had led to the point of the commission of the offense. However, there are those who would look upon that background as an aggravating factor, rationalizing that the individual had no reason to commit crime and had every benefit of stability and the "good life" society had to offer. These subjective interpretations on personal sociological factors make classification of them extremely difficult. The complexity involved might unduly complicate the sentencing process.

I think the Commission should adopt a policy statement allowing the Court to take these factors into consideration when imposing sentence within the 25% range of the guidelines. Furthermore, I think if unusual circumstances exist regarding such factors, that the Court should be permitted to go either above or below the guidelines. In going outside the guidelines, the Court should be limited so that the sentence cannot be mitigated or aggravated in an amount greater or lesser than 12-1/2%. This would give the Court a 25% range from the midpoint of the guidelines with which to operate in the area of other offender characteristics.

DEM:nm

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Pages 138 - 150

This is in response to the proposed guidelines outlining the determination of the sentence in Chapter 4. One thing that remains unclear after reading Chapter 4 is when can probation be imposed? In reading the draft guidelines it appears that probation can only be imposed when the total sanction units are less than 14, which results in a guideline range of imprisonment of zero to six (0-6) months. However, upon closer reading, specifically in Section A411(b), which states, "where the minimum number of months of imprisonment specified in the guideline range is greater than zero, that number must be satisfied by imprisonment or by custody for intervals of time as a condition of probation under Title 18, U.S.C. Section 3563(b)(11)." In looking at the statute, the conclusion is reached that if application of the guidelines to an offense and an offender result in total sanction units of less than 24, probation can be imposed. If my understanding is correct, this would mean that an offender who scored 22 sanction units could be placed on probation, but he would be required to serve at least ten (10) months in confinement. At any rate this remains somewhat confusing and the guidelines should be more explicit in explaining when probation sentences can be utilized.

I think the Commission should adopt a policy which requires the Court to impose imprisonment for a certain percentage of the sanction units based on the offense severity. This was the approach taken when the initial draft guidelines were conceived and considered by a group of working probation officers of which I am a part. Philosophically, I like this approach because it requires more punishment for the more serious offenses. Other offenders who provide a lesser risk to society must be punished, but the rehabilitative aspects of sentencing can be utilized more widely in their cases. The Commission should calculate the

weight of non-imprisonment sanction units independant of imprisonment sanction units; and the Court should have discretion regarding which types of non-imprisonment sanctions to apply, how many, how long, or to what degree depending on the type of sentencing option.

Utilizing a sentencing system of this type permits more individualized justice without significantly increasing disparity or the risk to the community. Further, it enables the Court to place greater impact on sociological offender characteristics, which are very difficult to calculate into a pure guideline sentencing system.

DEM:nm

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Pages 151 - 156

On August 4, 1986, I directed a letter to Mr. Rusty Burris, U.S. Probation Officer assigned to the Commission, regarding the subject of probation violation guidelines. I stand by the contents of that letter as they relate to the issues for comment the Commission request on Page 155 regarding this topic. Accordingly, a copy of that letter is attached to this memorandum for the Commission's consideration.

There is one matter which is not adequately or clearly addressed in the letter, which I will go into here. In the issues for comment section the Commission invites public comment on which violations of supervision should be considered less serious and more serious. The most serious violation is a violation of Condition A. The next group of violations I consider on a severity rating are B, H, I, J, and K. The final grouping include Conditions C, D, E, F, G, L, and M.

DEM:nm

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AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

August 4, 1986

Mr. Rusty Burress
United States Probation Officer
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

RE: PROBATION VIOLATION GUIDELINES

Dear Mr. Burress:

This is in reference to your July 21, 1986 correspondence and questionnaire requesting input on how violations of probation and supervised release should be handled in a guideline system. I have completed the questionnaire with some amount of difficulty as I was unable to make some specific decisions on how many violations should occur before the Court is notified on a number of the more technical type violations. At any rate, the completed questionnaire is attached for your consideration. You will note that I have added three additional conditions of probation.

Getting back to the questionnaire, I think the main reason I had problems completing it is because philosophically I am not certain I agree that the Sentencing Commission should establish guidelines for the revocation of supervision. When one views criminal activity, in a guideline system, it is clear that the behavior of the individual or the acts committed constitute criminal activity. In other words, the statute sets out certain elements of a crime and in order for a conviction to occur those elements must be willfully and knowingly met. Implementing sentencing guidelines on a historical event such as a criminal activity is, in my view, different from attempting to apply guidelines to the behavior of an individual under probation supervision. It is different chiefly because the majority of the 49 probation conditions listed in your questionnaire constitute behavior which is not by definition illegal. They represent technical violations of supervision which many times occur sporadically over a long period of time, and violations which occur in concert with one another which makes the variables necessary for a pure and exacting guideline system extremely difficult. It occurs to me that the relationship between the probation officer and the person being supervised is a dynamic, ever changing one, and the judgment of that officer, and ofcourse the sentencing court must be preserved.

August 4, 1986

I believe that the commission should address the issue of supervision revocation in a less confining method than the way it has addressed sentencing guidelines. A greater amount of flexibility should be given to the Court and the probation officer as he or she deals with the client on a day-to-day basis. Obviously, certain types of violations of supervision should be dealt with more quickly and more severely than others.

The six groupings of probation conditions you have established in your questionnaire seem to relate to the potential for some harm or loss to the community. I believe that group six, "Conditions That Offender Refrain From Violating a Law", represent those conditions which, if violated, should result in immediate report to the Court and in most cases revocation of supervision. Then, the groupings indicated in numbers one through five in your questionnaire should be treated in decreasing order of severity with conditions relating to the satisfaction of the sentence being treated less severely than the law violations section, but certainly more harshly than conditions relating to administratin or conditions relating to family responsibilities.

I would hope that the Commission can establish policy statements or suggested guidelines of operation for probation officers that gives them a general set of discretionary guidelines for operation which could positively influence the problem of disparity in the revocation process. Then, the Commission could review the results of actual cases after a period of time to determine if more binding and structured guidelines need to be established.

I have considered your question of whether the sentence imposed upon revocation of probation should be more severe than might have originally been. I think upon the revocation of supervision, probation officers should reapply the guidelines utilizing the guideline worksheet. He should include all the behavior which resulted in the probation violation in these calculations using the original offense score as a base. If criminal behavior were involved, this should go toward recalculating his total prior criminal conduct score. Also, if he had no prior record and received an enhancement for that initially then the enhancement should be removed upon revocation. Likewise, if he originally received credit for genuine and sincere remorse or cooperation with authorities he should lose that credit as a result of having his probation revoked. Lastly, I think that no less than 90% of the sanction units arrived at for sentencing should be applied

to incarceration in all cases of probation revocation. The only thing that keeps me from recommending 100% is that the Court still may wish to require the defendant to pay a fine, undergo supervised release or serve some other sanction. Placing a person back on probation upon a determination of revocation would not be an option available to the Court.

Please let me know if you have any questions about the contents of this letter. I sincerely appreciate the opportunity for this input.

Sincerely,

David E. Miller

David E. Miller, Supervising
United States Probation Officer

DEM:ws

Attachment

746 U. S. POST OFFICE
AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Pages 157 - 161

Fines in a sentence are meant to be punishment, and I believe that the sentencing Judge should have the discretion, based on the circumstances available to him at sentencing, in determining whether to utilize this sentencing option. The use of a fine should not be limited to a certain type of crime. The ability of the offender to pay can be determined through the presentence investigation. The financial investigations conducted by the probation officer will become increasingly important with the implementation of the guidelines. I cannot say specifically that the amount of the fine should bear a particular relationship to the offender's gain or the victim's loss, but the amount of the fine should not inhibit the ability of the offender to pay restitution to the aggrieved parties. Therefore, I believe that fines can be fairly and proportionally assessed as a percentage of an offender's assets and disposable income.

Regarding the offender's assets, the Court should have the power to foreclose on assets that an offender possesses, or place liens on property, to insure that its fine will be collected. Regarding disposable income, the Court should consider that amount of money necessary for the defendant and his dependents to survive at an average lifestyle, and use the balance for fining. If a defendant fails to pay a fine and it can be determined that he has the ability to do so, then he should be jailed. Furthermore, if it is determined that the offender concealed assets or income from the Court at the time of sentencing, then the Court should be permitted to proceed with resentencing as it relates to the fine only, based upon the newly gained knowledge; or perhaps the Commission can consider some other punitive action which would deter a defendant from attempting to hide assets.

In my opinion, the cost of prosecution is a very difficult calculation, and one in which would bring further dispute to the sentencing process and prolong it unreasonably. Moreover, fines go to the general treasury of the Government and indirectly can be considered reimbursement for the cost of the agents time, the Court's time, etc.

DEM:nm

746 U. S. POST OFFICE
AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: December 1, 1986

TO: The United States Sentencing Commission

FROM: David E. Miller, Supervising
United States Probation Officer

RE: PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
Page 166

Plea Agreements - they are at once the nemesis and savior of the criminal justice system as we know it. None of us possess adequate knowledge of all variables of human behavior to arrive at a system that would take every possible variable into consideration in sentencing any defendant of any background for any crime. If that is true, then a system without disparity would be a system where a defendant is charged with every violation of law the prosecutor is aware of. In that system the law would proscribe specific penalties for all of the specific criminal acts committed by the offender. It is a pure just desserts system if you commit the crime you must pay a penalty.

Our system has not functioned that way and philosophically I do not believe that it should. However, we then must recognize a basic weakness in the system which will create a certain amount of disparity at sentencing. There is disparity and perceived disparity. Our present system lends itself more, I believe, to the perception of disparity on the part of the public than to real or actual disparity.

We must also recognize that disparity exists and is created by the United States Attorney, by the Probation Office, and by the Court. Disparity is also influenced by the cultural demands prevalent at a certain time and place, and by political considerations.

Common perception of the public is that disparity is created solely in the courts. The impact of sentencing reform will limit judicial disparity, but will not eliminate it due to the many places along the guideline trail where a judge must exercise his or her discretion in their application. But if Congress is willing to accept the amount of disparity which is perpetrated by the guidelines, we must now concern ourselves and focus on the disparity which remains in the office of the U.S. Attorney.

How can a judicial branch agency control that disparity? Has Congress provided the opportunity for prosecutorial disparity to flourish or shifted the balance of disparity inappropriately from the Court to the Attorney General? These are serious overall concerns which have surfaced during a discussion of the plea agreement in a sentencing guideline system.

I will now examime more specifically my beliefs regarding the questions posed on page 166 of the draft guidelines. Rule 11 precludes the participation of Judges in the plea bargaining process, but other than that I do not think the Court should be limited with regard to its power to either accept or reject plea agreements. In other words, I believe the Court should have absolute discretion on whether or not a plea agreement is in the best interests of justice. One objective test that can be applied to the validity of a plea agreement is whether or not it compromises the integrity of the sentencing guidelines. For example, let us assume a probation officer completes a presentence investigation and determines the overall offense behavior of the defendant. He then applies the sentencing guidelines and the Court approves this application. However, through the plea agreement the U.S. Attorney has placed a ceiling, or "cap", on the sentence, which is less than what the guidelines call for. In those instances the Court should reject the plea agreement and require one where it can sentence within the guidelines, or force trial.

I fully realize the difficulty in the scenario just presented. It assumes that the U.S. Attorney and/or the Case Agents have provided full disclosure of the defendant's participation in the offense. While my experience leads me to the conclusion that complete and accurate disclosure probably occurs in 90% of the cases, I am still concerned about the 10% where, for whatever reason, incomplete or inaccurate disclosure is made. The crux of the problem lies here. It is also here where we get into the issue of charge bargaining, which again dovetails with how the stipulated fact pleas should be handled.

I am of the opinion that the Court should defer approval of plea agreements in every case until after it has received and reviewed the presentence investigation report. This would give the Court some advantage, depending on the ability of the probation officer to find overall offense behavior, to determine whether

the plea agreement is in keeping with the applicable sentencing guidelines. Along those same lines, the U.S. Attorney and the defendant should not be permitted to enter into stipulated facts or agreements, which are inconsistent with the sentencing guidelines for overall offense behavior. Sentence bargaining, which is authorized by Rule 11(e)(1)(c), should be banned. I do not think that the Government and the defense should possess the authority to negotiate a plea which is based on a specific sentence outcome. Stipulated facts or agreements lead to the same end as sentence bargaining and have no place in a guideline sentencing system.

I realize that the present criminal justice system cannot function effectively without plea agreements. Defendants must be provided with incentives to plea, or court dockets will be clogged indefinetly. The United States Attorney operates on a selective prosecution system and certainly does not possess the manpower to charge every offense he or she uncovers. However, we must be aware of the potential of the shift in perceived disparity from the Courts to the U.S. Attorneys Office. This appears to me to be a more dangerous place for disparity to have an opportunity to grow when one compares the overall mission of the U.S. Attorney with the overal mission of the Court, and when one takes into consideration political issues which may surface.

I have two suggestions for changing our system which address those serious concerns. I realize the Sentencing Commission might not be the proper forum for these issues. First, Congress should consider establishing a guideline system under which the United States Attorneys must operate in charging criminal defendants. In this way attorneys would have to be accountable for their actions in the same manner as Congress is now making Courts accountable for theirs in sentencing. Also, a body established by Congress to promulgate guidelines for charging and plea bargaining would also, in theory, have the ability to be a check and balance system on the prosecutors.

Secondly, to the extent that is possible, Congress should remove political considerations from the office of the United States Attorney. Appoint United States Attorneys based solely on merit and make their jobs nonpolitical, to the extent that is possible. In other words, United States Attorneys would not change when the politics of the Administration change. They would be career civil servants who gain and retain their jobs based upon their ability to prosecute crime and serve the community at large.

In my discussions with my Chief Probation Officer, and with other probation officers about this topic, there was an alternative method suggested to attempt to control plea agreements. In this method the United States Attorney, through discovery, would outline to the defendant and his attorney all of the offenses he thinks can be proven at trial. For example, The defendant would agree that he is guilty of five of the eight charges outlined for prosecution by the Government. They could then proceed on plea bargaining based on those five counts, with an understanding that both parties would agree that a conviction could be had on those five counts, and that the defendant opens himself up to the full impact of the guidelines as they relate to those five counts. His incentive to plea bargain is based upon reducing the maximum possible sentence which could be imposed under the statute. In this way, the Government would be forced into a position of plea bargaining only on those counts for which it could obtain conviction. The defendant would be required to own up to all of the offense behavior in a sentencing scheme. The Court would get a truer look at overall offense behavior and still be able to use the guidelines effectively, thus potentially reducing prosecutorial disparity.

While the system described above has some merit, theoretically I do not think in practical application it solves the problems which crop up in the majority of our cases. My opinion is based on the premise that the Government does not proceed in federal prosecutions without a fairly strong certainty that it can obtain conviction on numerous counts. So again the system comes back to the prosecutor operating in the daylight, and if he indeed could prove that all five banks were robbed, then in honesty he could not provide an incentive for a negotiated plea.

DEM:bd:nm

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

PROBATION OFFICE

DAVID E. JOHNSON
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PLEASE REPLY TO:

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December 2, 1986

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

Dear Judge Wilkins:

Thank you for the opportunity to submit written comments on the Preliminary Draft of the Sentencing Guidelines. I am enclosing comments which I received from members of my staff on several of the questions posed in the preliminary draft. I also wish to make some observations about the proposed sentencing guidelines scheme.

I recognize that a great deal of time and effort went into preparing the draft and that the Commission has a mandate to fulfill. However, the guidelines scheme seems too detailed and is hard to apply. It will require a large investment of probation officer time in doing the presentence investigations, calculating the guidelines, and ironing out differences of opinion between the prosecution and the defense.

The scheme particularizes many points, but leaves many "up to the Court", making probation officers unsure about their role in determining the proper guidelines. The draft designates the judge to make judgments about remorse and appropriate "multipliers" which will make it virtually impossible for probation officers to determine the appropriate guideline range before the sentencing hearing.

Would it be possible to use a less detailed measure and still adequately reduce sentencing disparity? I think that less detail will avoid sentencing problems with points, etc., being negotiated.

Yours truly,

David E. Johnson, Chief
U.S. Probation Officer

DEJ/dmh

Attachments

COMMENTS ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES FROM THE U.S. PROBATION OFFICE FOR THE DISTRICT OF MARYLAND

CHAPTER ONE

Page 17 - Question 3 - Comments on the use of the modified real offense sentencing system.

This can be argued indefinitely. Can the attorney only reveal certain facts that he wants known to the Court that would be to his client's best interest? There will be fewer plea agreements.

Page 17 - Question 6 - Do cross-references adequately identify additional offense conduct?

Prior drug sales come in here. Some of these things are very difficult to put a score or a measure on. The whole issue of disparity is back in your face again. How do you make these things operational? Things have to be cleared up somehow.

COMMENTS ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
FROM THE U.S. PROBATION OFFICE FOR THE DISTRICT OF MARYLAND

CHAPTER TWO

Page 78 - Property Tables

The Commission seems to perpetuate the different treating of white collar crimes and blue collar crimes since theft offenses carry more points for lower dollar amounts than fraud offenses. Should there be one economic chart for all offenses or should we keep all as they are in the guidelines? There must be a reason for the different charts, although one chart would be much easier to work with. The different law enforcement agencies have contributed to the charts. The number of charts should be kept at a minimum if at all possible.

COMMENTS ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
FROM THE U.S. PROBATION OFFICE FOR THE DISTRICT OF MARYLAND

CHAPTER THREE

Page 125 - Question 14 - Should an automatic sentence reduction be given to a guilty plea or should "acceptance of responsibility" be the point-earning factor?

The judge has to decide whether the defendant is sincere in his remorse statement or whether he is doing it for the points. Perhaps this should not even be considered other than the situation where the defendant pays restitution before sentencing to show his remorse in action in addition to words. Trying to measure someone's attitude is difficult. Would there be a double benefit to the defendant -- he has a good plea agreement and then additional consideration is given for the remorse factor?

Page 125 - Question 15 - How should disputes regarding defendant cooperation be resolved?

When will the certification be made that there has been this cooperation by the defendant? Frequently we don't find out until the day of sentencing. Cooperation can go on up until and after the sentencing date. The U.S. Attorney would have to certify to the probation officer ten days before sentencing since that is when the report will be due. The calculations could be done at the sentencing hearing, doing the other calculations ahead of time. The defense counsel will, of course, be thinking what is best for his client, not what is always right and true. But the judge will have the decision whether to factor in defendant cooperation or not. This won't be determined until the sentencing. The judge makes the determination in points, the probation officer will not have to. The probation officer only has to tell the judge what the defendant has related to him. The probation officer will make the baseline value based on what can be substantiated, and the judge can go 20% more or less either way. Going into sentencing, everyone will know basically what the defendant's baseline score has been determined to be. The judge can then reduce the score further if he sees fit.

Page 131 - Question 16 - Should the criminal history score be determined by the score table or by the three-step method?

The score table seems to be easier, although the scores seem to come out pretty close using either method.

Page 133 - Question 17 - Should criminal history points be given for various forms of prior drug use or should it be restricted to prior opiate use?

We recommend against all of this. Just go on the sentence imposed instead of prior arrest. There should be a difference for a bank robber and a check writer. Do we have the manpower to find this information out? To get this information is difficult. We should count convictions and nothing else. We would need additional staff, automation, accurate record keeping by the State and local agencies (which doesn't exist). Some information will not be available until after the time is served. If you get an institution report, you should have the information there, but you usually won't have the report.

COMMENTS ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
FROM THE U.S. PROBATION OFFICE FOR THE DISTRICT OF MARYLAND

CHAPTER THREE
(Continued)

Page 135 - Question 20 - Which prior sentence decay factor should be used —
a) nothing in past ten years, then back no further or
b) go back no more than fifteen years in all cases and then selectively score?

If there is a significant break in the arrest pattern of ten to fifteen years then you would not count those things. We are very much in favor of some factor. However, we are not comfortable always including certain type of drug offenses.

Page 136 - Question 21 - What, if any, other offender characteristics should be considered (i.e., education, employment, etc.) and how should they be considered?

Taking into consideration the offender characteristics seems to contribute more to disparity than to eliminate it. If certain factors had not been considered, the defendant would have been sent away. If the judge does not consider these factors in determining the time to be served, will he consider them in giving the defendant time or probation? One judge could give a completely different sentence from another judge and the defendant will have the same score. Everybody who commits a crime should get a sentence within the same range, but they won't because of the personal factors. It should be determined what relevance these factors have in sentencing. Do they have any relevance? It determines whether a sentence of probation be imposed if the defendant has a certain profile of these factors. Instead of factoring them into the imprisonment score, it determines whether the sentence will be suspended and probation imposed.

COMMENTS ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
FROM THE U.S. PROBATION OFFICE FOR THE DISTRICT OF MARYLAND

CHAPTER FOUR

Page 141 - Question 22 - Comment on guideline table approach or "any other" method of converting sanction units to terms of imprisonment.

Page 141 - Question 23 - How should sanction units be converted to sentences other than imprisonment (Options 1 and 2 mandatory or permissive)?

It is a good idea to separate sanction units. Use two tables -- one on the community side and one on the imprisonment side, and an area where those two would overlap. Pick from those two tables. If the score falls on both scales, it would be the judge's decision as to which way to go. Offender characteristics and community sanctions could be combined into a separate scale. All other options are ways to ameliorate the probation term even further. If there is a sanction unit chart used, we will be bound by it. Fewer people will be getting probation.

Page 143 - Question 24 - Should any more specific lengths of probation be provided?

No. We could be weighed down by policy statements by the Sentencing Commission that would try to regulate the time of probation. It would be better for us to leave the length of the term of probation as now stated. What about extensions of probation or early termination? At the violation proceeding, the probation could be extended.

COMMENTS ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
FROM THE U.S. PROBATION OFFICE FOR THE DISTRICT OF MARYLAND

CHAPTER FIVE

Page 155 - Question 25 - For violation purposes, which conditions of probation should be considered more serious or less serious?

How can it be decided which violations are serious or less serious? The Federal Public Defender will have a field day with this. With lesser technical violations, the probation officer has a lot of discretion as to how to handle it. Our opinion is that there is such a wide perimeter of the conditions of probation that distinction between serious and non-serious technical violations becomes a task which might encourage disparity and that making these two concepts operative would really be impossible. Within any one condition, you might have both serious and less serious. It should be decided which violations are serious and less serious. Once the violation is reported, do you treat it as a less serious or more serious technical violation? The following determinations were made from the list of Conditions of Probation beginning on Page 143 and continuing onto Pages 144 and 145.

A - More serious
B - More serious
C - Less serious
D - More serious
E - Less serious
F - More serious
G - More serious
H - Less serious
I - More serious
J - More serious
K - More serious
L - More serious
M - More serious

Page 156 - Question 26 - What discretion should probation officers have before reporting violations to the Court?

Probation officers have discretion regarding less serious conditions. Technical violation is anything other than a new conviction. Anything that constitutes new criminal behavior must be reported. Make it optional to report an arrest unless a conviction is received was one suggestion. Make it discretionary to report an arrest short of a conviction. But the problem with this is that if the judge is not made aware, when it comes time for the violation proceeding the judge will say this if the first I heard of this type of behavior by the probationer. We need to advise the judge to cover ourselves. The new Title 18 has not been changed. We could be sued by any number of people if we don't notify the Court. The Court can either agree to move for violation of probation or not agree. It is up to the judge to decide what to do. We have got to report on the behavior and conduct of the probationer.

COMMENTS ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
FROM THE U.S. PROBATION OFFICE FOR THE DISTRICT OF MARYLAND

CHAPTER FIVE
(Continued)

Page 156 - Question 28 - Should probationers receive "credit" for time spent on probation once they are violated?

Day by day credit should not be given, but the time spent on probation should be considered. We propose that it seems to be exceptionally harsh. Do not feel this would be a good practice. How do you determine what time is spent "satisfactorily" on probation. The extra conditions of probation would make it worse. To just impose the violation sentence would be a lot clearer.

Page 156 - Question 29 - How should probation violations for organizations be handled?

The only penalty is a fine so that is all that can be done. Would it be possible to hold the officers of the company in contempt? If it is legally sound, this would be a good idea (to hold an individual accountable for the actions of the organization).

COMMENTS ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
FROM THE U.S. PROBATION OFFICE FOR THE DISTRICT OF MARYLAND

CHAPTER SIX

Page 157 - Question 30 - What method should the Court use to determine the amount of fine for an individual -- a) based on available income or ability to pay or b) based on the harm done by the offense and the need to compensate society and prevent criminal conduct?

The Court should use a combination of both methods.

Page 161 - Question 31 - Should the offender be fined in an amount that also takes into account the costs of investigating and prosecuting his case?

No. The costs of investigating a case could be astronomical. The Government should incur this cost.

Page 166 - Question 40 - How should a judge evaluate if a plea agreement is acceptable in light of the guidelines?

The probation officer should not be involved in the plea agreement or the pretrial proceedings. We do not have the expertise to get involved in this. The Could should have full discretion in the plea agreement.

Page 166 - Question 42 - To what extent may counsel "stipulate" offense and offender facts when those facts determine guideline scores?

None at all. Counsel should not be allowed to do this as they would be determining the sentence in most cases if they were given this opportunity.

Page 167 - Question 43-What sentencing purpose will be met by community confinement (CTC) or home detention?

Page 167 - Question 44 - What offenders/offenses should be eligible for community confinement or home detention?

Page 167 - Question 45 - What offenders/offenses should be excluded from community confinement or home detention?

Page 167 - Question 46 - Would placing low-risk offenders in community confinement or home detention be a waste of money?

Page 167 - Question 47 - Should, and how should, supervised releasees be placed in community confinement or home detention?

Would not want violent offenders to be eligible for community confinement. Would not, ideally, want drug users, but you could not exclude them because they are most of the CTC population. The use of home detention is limited in the Federal system. It seems like we should not be involved in home detention because of the staffing problems it would cause. The U.S. Marshal's Office or

COMMENTS ON THE PRELIMINARY DRAFT OF THE SENTENCING GUIDELINES
FROM THE U.S. PROBATION OFFICE FOR THE DISTRICT OF MARYLAND

CHAPTER SIX
(Continued)

Page 167 - Question 47 - Should, and how should, supervised releasees be placed in community confinement or home detention?

(Continued)
the Bureau of Prisons should handle this. Do we have a class that is excluded from this type of treatment or is there an earning of this type of confinement after you have done some hard time (violent criminals). Leave it up to the program director. People are going to become more in need of a transitional period from confinement to the community. Should look at the Bureau of Prisons regulations that are now in place instead of getting the probation officers involved in this. It is a custody function.

Page 169 - Question 49 - What unusual aggravating or mitigating factors should be considered, either by a) giving them point values under offender characteristics or b) allowing sentences outside the guidelines when such factors are present?

Allow sentences to go outside the guidelines when strong circumstances are present. The judge can do this. Cannot cover every circumstance that would come up. There are so many mitigating factors and combinations of circumstances, it would be impossible to assign a certain number of points for each factor. The term "unusual" will be abused by the defense counsel. Attorneys will be bringing up anything that could be remotely considered mitigating.

00147
12-8-8

UNITED STATES DISTRICT COURT

PROBATION OFFICE
DISTRICT OF NEW JERSEY

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December 1, 1986

U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 2004

ATTN: William W. Wilkins Jr.
Chairman

Dear Mr. Wilkins:

I welcome your invitation to comment on the preliminary draft of the newly proposed sentencing guidelines. I do this with almost twenty years of experience as a field officer (eight years as a N.J. State Parole Officer and eleven years as a U.S. Probation Officer).

As a suggestion, it might be advantageous to take 100 or so cases for various types of offenses which have already been sentenced, to determine under the new guidelines what their sentence would now be and to evaluate the differences.

In the proposed conditions of Supervised Release (page 146) conditions F and G would be difficult to enforce, in my opinion, because of the word "promptly" which could be misinterpreted. As an example, if a releasee were arrested on November 1, 1986 and did not report this arrest until December 2, 1986 when he was due to report, he might consider "promptly" possibly being on his next scheduled reporting day. If an individual is arrested and released from custody three weeks later, he might give the excuse that he was unable to report the arrest "promptly". The same thing applies to employment changes. Perhaps the wording could be more specific such as "within three days" instead of "promptly".

It also would be helpful in adding to condition F to notify the probation officer within three days of any change of address, obtaining employment, leaving employment or any change in employment status. "Employment Changes" are often not considered to mean notifying the probation officer when one obtains employment especially when an individual first comes under supervision. Also it gives the probation officer an opportunity for more contact with the individual when he is first released. In some cases, a probationer or parolee never informs the probation officer if they were out of work for three months as technically they may still

be employed and receiving salary. It might clarify this problem by requiring individuals to report these employment changes by the suggested rewording of condition F (eliminate second sentence of condition G).

As for condition H, would there be any exception to an offender possessing a firearm by permission to do so by the probation officer, for instance an income tax case who wished to hunt within the confines of his own state (not regulated by ATF) or given permission for out of state with ATF clearance.

Another area that I would like to mention is in the statutes when the crime is less than "$100". There are very few crimes today where an amount of "less than a $100 theft or U.S. check for less than $100" is taken. Why not consider raising these amounts to less than <$1,000 and more than >$1,000. This, in my opinion would be realistic. It also would give more jurisdiction to the Magistrates, make it easier to collect restitution and avoid many plea bargain reductions. We often see individuals charged with one (or several) checks or stolen goods with a value of $400, $700, $900 etc. appear before a Magistate charged with less than $100. Restitution for more than the $100 becomes a legal question and to prosecute for a felony before a District Court is many times impractical when it involves less than $1,000, an amount of money which in today's society, many may feel is comparable to what $100 was worth when Title 18 was first enacted.

Again, I wish to thank you for this opportunity to comment on the proposed sentencing guidelines and hope that my suggestions will be viewed in a positive and constructive fashion.

Very truly yours,

Stewart R. Resnick
U.S. Probation Officer

SRR:gse

001
12-8-

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
FRANK H. EASTERBROOK
CIRCUIT JUDGE

December 5, 1986

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

Dear Judge Wilkins:

I offer some comments on the draft sentencing guidelines.

I have little to say about the structure of the guidelines. They are well thought out and executed, given the nature of the task. It is not a task on which the United States as a whole should be engaged. I have argued against determinate sentencing. See Easterbrook, Criminal Procedure as a Market System, 12 J. Legal Studies 289, 322-30 (1983). Congress obviously disagrees. If we are to have a system of determinate sentences, the proposals reflected in this draft seem about the best we can hope for -- and I mean this as considerable praise, given the difficulties involved.

There are nonetheless ways in which this system could be improved, and some constraints that must be observed. One constraint, which is reflected in comments you have received from some of my colleagues, is that the sentences given by the guidelines cannot depart too far from existing sentencing practices. The draft does not afford data on actual time served for categories of offenses. I strongly recommend that as you revise the number of points (and the conversion table) you ensure that the result approximates the median sentence for similar offense and offender characteristics. If it does not, there will be considerable civil disobedience -- by juries who refuse to convict, by judges who jigger the results (by mid-trial acquittals or by cooked findings of fact bearing on sentence), by prosecutors who change their charging decisions or keep out of evidence facts that might otherwise add points. This has been the experience with other mandatory sentencing systems, such as mandatory minima for the use of drugs, and there is no reason to believe that human nature has changed recently. Criminal Procedure as a Market System offers an explanation for this, based on the efforts of prosecutors (and

judges) to equate the marginal returns of different cases. Raising the sentence for a particular case will increase the absolute deterrence, conditional on conviction, but also will increase the defendant's willingness to fight the charge and seek acquittal (as well as the jury's willingness to give that relief). The higher the penalty, the more likely a defendant to fight. This is a straightforward implication of the economics of settlement. When defendants fight harder, using more of the prosecutor's time per case, the prosecutor will bring fewer cases. (The Commission cannot provide additional resources to the U.S. Attorneys to offset this effect.) Total deterrence can easily go down when the prosecutor is constrained to bring fewer cases with higher stakes in each. Thus there will be manipulation all around -- and the net result may be both a perpetuation of sentencing disparity (for an acquittal of a guilty person produces the greatest disparity of all) and a reduction in deterrence.

All this is in addition to simple civil disobedience by judges who, unable to give their customary sentences, will ensure acquittal. A judge who thinks the "right" sentence is 30 days will find acquittal preferable to a mandatory two years; acquittal has, from the judge's perspective, the lower cost of error. I do not suggest that many district judges are unwilling to obey the law and their oaths of office -- although some are -- but there are subtle effects that escape conscious attention of even the best judges. These effects will lead judges to take the routes open to them under the guidelines, including acquittal and cooked findings, unless the guidelines are close enough to the current ranges and leave enough leeway.

A more technical observation concerns the way in which points are added to the tables. The guidelines uniformly use addition. For example, in the theft section (§B211), a theft of a gun adds 12 to the base value, embezzling adds 6, and so on. The value of these additional 12 units of punishment will be added at the end of the sentence. If the defendant had enough points to land him in jail for five years, an additional 12 points will add, say, another 14 months. If he had enough to warrant 10 years, the 12 points will still add another 14 months -- but now it will come in the eleventh year. The problem with this is that the 12 points will produce a lower deterrent when added as the eleventh year of imprisonment than when added as the second or sixth year of imprisonment. Future years of imprisonment are discounted. I expand on this at 12 J. Legal Studies 294-95, 312-16. To get the same deterrence out of an aggravating factor -- and to get the same reduction out of a mitigating factor -- it is necessary to use multiplication rather than addition. Perhaps you could express these factors in terms of percentage increases or decreases in

the sentence, subject to a minimum absolute number of points (to take care of cases where the aggravating or mitigating factor accounts for a substantial fraction of the sentence). Other parts of the guidelines, such as the discount for cooperation, use percentage changes rather than subtraction of points. The use of multiplication should be more general.

The draft solicits views on the appropriate use of fines for business enterprises and the question of liability by corporate officers. On the role of officers' liability, the best available work is Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 J.L. Econ. & Org. 53 (1986). Professor Kraakman observes that imposing liability on corporate officers greatly raises the risks to which the operation of business is exposed, and that the officers -- unlike the business -- are unable to spread risk. Penalties therefore should be imposed directly on the firms, which can decide how to induce compliance within the organization. See also Posner, An Economic Theory of The Criminal Law, 85 Colum. L. Rev. 1193, 1228 (1985). Exceptions arise when for some reason this strategy does not work, when for example the firm is thinly capitalized and will not respond properly to fines. Kraakman's well reasoned assessment demonstrates when officers' liability is desirable and when not, and I commend his conclusions to you.

On the relation between the size of fines and the size of the defendant: it is evident from my published writings that I am in the "deterrence" camp, as the draft frames the issues at 158-66. The criminal law is not a device to transfer income. Why make crime (relatively) cheap for small corporations? Crime is hardly something in which small corporations should be allowed a comparative advantage. Exxon does not pay more for a car than does a tiny corporation, and the same thing should be true for a crime. Indeed, it is misleading for the draft even to discuss the "size" of the firm, as if the corporation "owned" its assets. The assets are owned by the investors and other contributors of capital. If we are to think of "size" or "poverty" or some such thing, we should think of the investors' wealth. After all, a $1 fine paid by a small firm, like a $1 fine paid by a large firm, comes from the investors' wealth. But there is no evidence that investors in small firms are less wealthy than investors in large firms. The investors in many small firms are very wealthy individuals; the investors in large firms often are mutual funds, pension trusts holding the assets of the United Auto Workers, and other financial intermediaries. I cannot think of an argument for imposing a larger fine on the Auto Workers than on the wealthy individual investor, given a crime that creates an equal harm in either case. Once it is understood that the corporation is just a

shell, and that the size of the firm has nothing to do with the wealth of any real person who may be hurt by the fine, an approach that takes firm size into account in computing a penalty becomes untenable. In other words, we should have real-person sentencing as well as real-offense sentencing.

Larger firms and wealthier people still will pay larger aggregate fines, for three reasons. One, the more wealth a person has, the more of the penalty the criminal justice system can extract in money. A fine of $100 million smarts! Only when a fine will not inflict enough hurt should we use jail, which is more costly to society. Two, the more wealth a person or firm has the less likely he (it) is to be judgment-proof. Three, larger firms will commit more crimes than smaller ones, because they have more employees and more occasions to commit crimes, and therefore will be called on to pay more often. A tiny maker of engine regulators does not have many criminal opportunities; General Motors, which makes 10,000 different parts and participates in the market for hundreds of goods, can violate more laws. The larger firm has the potential to do more damage than the smaller, and it should pay more too -- but the reason it should pay more in aggregate is that (a) it causes more harm per offense, or (b) it commits more offenses, or (c) it gets caught more often. (Larger firms have more potential whistleblowers, and so their criminality is more likely to be exposed.) There is no reason to assess the firm more per offense, if the amount of injury done is held constant. That would be a form of double counting.

One common fallacy is to suppose that because larger firms commit more offenses, they are "less law-abiding." But because size increases the number of opportunities for crime, a raw count of the number of offenses is not illuminating. We need to know the number of offenses per opportunity. It is important to minimize that number whether the firm is large or small. Suppose a given employee moves from Jumbo Corp. to Midget, Inc.; we would like him to be as deterred in his new employment as in his old. A system that imposes penalties based on the harm an offense does will achieve that end. A system that loads extra penalties into "larger firms" will not. It will instead promote dis-integration; there will be a competitive advantage in being smaller. This is a serious problem in the taxicab industry, the waste disposal business, and others that have substantial risks of tort liability. They dis-integrate so that the available pool of assets is smaller. This does not either promote efficient production or discourage torts (or crimes); in fact it reduces the incentive to obey the legal rules.

The approach that disregards the "size" of the firm also

implies that the criminal law should disregard bankruptcy. The failure of a firm is no good reason to relieve it of its debts, least of all debts imposed by the criminal law. Although the draft points out at p. 165 that in bankruptcy the fine will be paid by the creditors, there is nothing wrong with this. A creditor is just another investor, and investors of all sorts put their money at risk. Investors of all sorts will engage in monitoring (or can be induced to do so), and it is no less "fair" to impose costs on pension funds that hold debt instruments than to impose them on pension funds that hold equity instruments. In either event the fine is necessary to induce optimal precautions. We don't want firms on the brink of insolvency to think that their crimes are "free" or even cheap; the only way to avoid this excessive risk-taking is to make fines payable, bankruptcy or no, and to determine the amount of the fine without regard to the financial condition of the firm. See Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 786 F.2d 794 (7th Cir. 1986) (concurring opinion).

One brief comment on antitrust. The draft at pp. 110-11 selects a single multiple of the damages imposed. It is generally sensible to use the criminal law against horizontal arrangements exclusively. But I think it may be desirable to subdivide the horizontal offenses into those that are open to public view and those that are concealable. When the offense is concealable, many violations will escape detection. Then it is necessary to impose steep fines on whoever gets caught, to make deterrence work. When the conduct is open -- for example, the NCAA's arrangement concerning the telecasting of college football, which was adopted and operated under the careful scrutiny of hundreds of reporters and TV stations -- the multiplier is unnecessary. I do not think the criminal law should treat the NCAA identically to cartel members who meet in the dead of night. The argument for making fines turn on concealability is developed further in Easterbrook, Detrebling Antitrust Damages, 28 J.L. & Econ. 445 (1985).

Securities offenses, which the draft covers at 113-16, are more complex. The draft proposes to make "the amount of loss" the basis of the fine, except for insider trading, where the insider's "profit" is the basis of the fine. I think this is right in principle, but there is a big problem in determining loss. The problem in securities markets is the wash. Suppose the fraud is that the firm tells an optimistic story to the market and withholds material, gloomy information; later the information comes out. In the interim the price of the stock will be "too high." But of course there are two sides to every trade during the interim period. One person buys and pays too much; the other sells and gets too much. The loss to one side

is offset by the gain to the other side. What is the net loss? It is greater than zero only because the prospect of these trading losses impose excess risk on the market in general. I discuss this and related securities problems in depth in Easterbrook & Fischel, Optimal Damages in Securities Cases, 52 U. Chi. L. Rev. 611 (1985). One way out of the problem of washes is to make all damages in securities cases turn on the offender's profit, with some appropriate multiplier. This is the simplest and therefore the best way. I'll skip the details, which the article fills out.

Another problem in securities law that needs some special attention is the problem of the irrelevant fraud. Often a firm, manager, or investor will think he is committing a fraud but fail. For example, suppose a firm withholds news about a toxic waste deposit at one of its plants, thinking this will buoy up the price of its stock. Suppose too that when the firm later announces the news -- or the EPA does as part of a suit -- the price of the firm's stock is unchanged. Here is a "fraud" that harmed no one because professional investors learned of the news in other ways. They may have contacts at the EPA, and so on. The right penalty for this sort of behavior is nominal, because no one is hurt. This is a variation of the "fraud on the market doctrine", which recognizes that prices may adjust to injure investors even though they did not rely on the fraudulent information (or lack of information); so too adjustments of prices may eliminate any injury from fraud. The table of penalties should allow for both possibilities.

Finally, some brief comments about plea bargains and about the use of stipulations in fixing sentences. These are the same thing; one rule should govern both. I believe that the parties should have total freedom to reach bargains and set their own sentences. The guidelines will set out the entitlements (and threats) against which the bargains take place. The guidelines reflect the demands of justice and deterrence, just as rules of the civil law reflect the demands of society. The bargains will reflect these entitlements, in criminal cases no less than in civil cases. Once the guidelines are in place, there is no sound argument for attempting further control of the contents of bargains -- no more for criminal cases than for civil cases.

There is every reason to think that additional judicial controls of plea bargains would be unfortunate. The prosecutor has full control of the charge, and he can manipulate the guideline ranges by selecting the charge (and the aggravating circumstances) -- with or without bargains -- no matter what the guidelines say. Any formal effort to control these

decisions would only drive them underground. It is a bad idea to encourage dissembling by prosecutors and defense counsel. (Recall the shams that occurred before Santobello, when everyone would deny for the record that there had been a bargain.) If judicial control did work, however, the principal effect would be to induce more defendants and prosecutors to choose trial. Bargains are made only when they make both sides better off, compared with the expected outcome of the trial. If judges refuse to allow the parties to settle cases on mutually satisfactory terms, the likely result is that one or both parties will find trial preferable. Any substantial increase in the percentage of criminal cases that must be tried would be a calamity. These guidelines, by reducing the uncertainty the parties face in contemplating sentencing, should make plea bargains easier to reach. As written, they will reduce the number of trials -- enough, I hope, to make up for the increased time that must be spent on sentencing. This will occur only if bargains in the shadow of the guidelines are left unregulated.

I would be pleased to expand on these remarks if the Commission should believe that helpful.

Sincerely,

Frank H. Easterbrook

Frank H. Easterbrook

Enclosures (3)

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INTERNATIONAL UNION OF POLICE ASSOCIATIONS AFL-CIO

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Testimony of

ROBERT B. KLIESMET

President

INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO

before the

UNITED STATES SENTENCING COMMISSION

December 3, 1986

Thank you for the opportunity to address you today. This Commission has been charged with a responsibility which is both complex and solemn. I hope that my comments will be of some value to you.

The Need for Realism in Sentencing

I come to you today with the perspective of the average street cop. Quite purposefully, I am avoiding the "ivory tower" type of testimony which often dominates discussion on these issues. If we can analogize the problem of crime to a flood, I think we can see the value of such a perspective. From a mountain top, you can see where the flood is coming from, and where it is going. But, you can't really see the extent of the damage caused by the flood unless you come down from the mountain top, and spend a little time where the flood is raging.

The ivory tower judges and scholars attempt to isolate causes and effects of crime, but they don't see the human cost. The average police officer does. They deal with both the criminal offender and his victim. It is the police officer, more than anyone, who sees the true cost of crime in human terms. It is the police officer, not the judge, who has the sad duty of informing a wife that she is now a widow; it is the police officer, not the scholar, who daily sees promising young lives destroyed by drugs.

One of the greatest frustrations in a police officer's

career occurs when a violent criminal is given what is essentially a slap on the wrist by a lenient judge. Police officers know the cost of crime; they see it every day. They know well that most criminals are not deterred by our criminal justice system because it is simply too lenient. They also know that, more often than not, criminals who kill police officers are repeat offenders.

Lenient sentences do more than just frustrate police officers. When courts release dangerous criminals, they undermine public confidence in the criminal justice system and increase the public's fear of crime. At best, the public feels cynical; at worst, it feels helpless.

As a police officer, I spent many years dealing with criminals and their victims. I know from this experience that some people rape, kill, and steal without remorse. People who commit premeditated murder, people who rape, people who push drugs on young people are not simply misguided -- they are evil. They need to be put away somewhere where they cannot harm innocent people.

Probation and Supervised Release

The Comprehensive Crime Control Act grants this Commission the general authority to issue policy statements regarding the revocation of probation and supervised release. Innumerable crimes are committed by offenders under some form of probation or supervised release. Here are just a few examples of parolees who

have committed violent crimes:

In nearby Virginia, one convicted criminal with an extensive criminal record dating back to 1940, a Andrew Lee White, was prosecuted in 1974 for armed robbery of a Stafford County bank (case number 185-74-A). He received a 15 year sentence, but was paroled after five years. The parole board went so far as to terminate his parole the following year after his release. Then, on May 10, 1983 he held up the same bank in Stafford, VA. He was again convicted and sent to prison, but once again the parole board released him in 1985. In May, 1986 he held up the same bank a third time, but this time he was shot and killed trying to escape the scene of the robbery. A police officer was wounded during that incident.

An even worse example, it seems to me, involves prisoner Ronaldo Alexander Marine. He has an extensive record of crimes committed in Virginia, Maryland and the District of Columbia. He was sent to prison after being convicted for

interstate travel in the aid of racketeering; actually dealing in narcotics. This was in July of 1978. He was sentenced to four years, but was paroled two years later. He was returned to prison in 1982 after being released on parole in 1980. In 1984 he violated his parole again, this time with an assault and battery conviction, and again was sentenced to prison. However, his ten year sentence has been reduced to five years and he will be again eligible for parole soon.

Perhaps we should talk about convicted murderers. Clarence Blair was sentenced in 1975 by the District of Columbia Superior Court to 10 years to life for murder (case number 30343-1975). While serving his 10 years to life sentence for one murder, as an inmate at Lorton, he was convicted of another murder committed while in prison in 1979. But, instead of serving the sentences for both murders, the District of Columbia Department of Corrections and Parole are now saying that both convictions can be served concurrently so that he could be eligible for parole at any time now. The US Attorney's

Office for the Eastern District of Virginia is of the opinion that this ruling may be given by the District of Columbia Corporate Council's Office making Blair, a twice convicted murderer, eligible for parole now.

There are many more examples for persons convicted and sentenced for rape, and then paroled only to come back into society to commit further rapes. Frank Hargrove was sentenced in District of Columbia Superior Court on July 22, 1986 for raping a 15 year old girl (case number F 410-7-86). He had been on parole for two years from a 1979 rape conviction. Still another, Robert Harper, also convicted in the District of Columbia, was convicted of armed rape on September 30, 1986. He raped a 57 year old woman while being on parole for eight months from a 1975 conviction for rape.

These examples are cases from the District of Columbia and the Eastern District of Virginia only. Just imagine how many more similar cases have occurred throughout this nation.

Some have testified before this Commission that probation is

an effective alternative to prison. My belief is this: if a person shows by a criminal act that he poses a threat to society, he should be in prison. Placing dangerous persons on probation in the hope that they may be reformed through community service is an unreal expectation. It is playing Russian Roulette with the lives of innocent people. Any form of punishment which releases a violent criminal is insufficient, inappropriate, and dangerous. Whatever attempts we make to reform criminals -- and I believe that we should attempt to reform first and sometimes second offenders -- should be made inside prison, where they cannot harm innocent people in the event reformation proves to be ineffective.

A person who has committed a serious crime, for example, murder, armed robbery, or rape, has already shown himself to be dangerous. I see no need in giving a sentence of probation in such a case. In fact, I believe that it is counter-productive. A prison sentence is fully justified, and the chances that the criminal will commit another serious crime are too high to risk probation.

Poverty and Crime

Some witnesses have criticized the Commission for the alleged "harshness" of some of the proposed sentences. They seem to go out of their way to explain what they would call the "root causes" of crime. Chief among these causes is poverty. Where poverty does not cause crime, the apologists for criminal behavior

claim that it is a mitigating factor. In other words, the person born into poverty is somehow trapped by sociological forces he cannot control, and is drawn into committing criminal acts.

All this ignores the fact that the vast majority of poor people are decent, law-abiding citizens. It also ignores the role of individual choice. The nature of poverty may tend towards increased temptation to commit criminal acts, but that is not relevant in the sentencing process. Nor does it mitigate or excuse the criminal act.

High level executives in business are undoubtably faced with many temptations to commit criminal acts ranging from fraud to insider trading. Yet the fact that he or she is faced with temptation is not a mitigating circumstance, nor should it be. We demand ethical behavior from such people.

For years, defendant's attorneys in rape cases inferred that the appearance and demeanor of the rape victim enticed the defendant and somehow made this abhorrent act the victim's fault or mitigated the defendant's guilt. Courts rightly rejected this tactic. The notion that a rapist is not responsible for his act is not longer accepted, and fortunately, is for the most part behind us.

Even so, the notion that poverty somehow mitigates a defendant's guilt or excuses criminal conduct is still popular in some circles. This notion should also become equally unacceptable.

It simply should not be a factor in sentencing. Courts should assume that sane criminals act out of free will, and should sentence accordingly.

One of the witnesses before this Commission took great care to point out that a large number of convicts come from the ranks of the hardcore unemployed. Again, this infers that somehow unemployment "causes" crime. Perhaps programs to teach criminals employable skills have their place: inside prison walls. I, for one, am not prepared to risk the safety of society at large on the off chance that the violent criminal will be reformed when he can get a job. The lives of our citizens are too precious to risk in such a cavalier manner.

I would point out that this same witness argued that prison sentences should not be used because it will deprive the families of the convicted offender's potential earnings. This is not merely inconsistent, it is illogical. It ignores the economic consequences of criminal activity. The professional criminal, and even the casual criminal, inflict an economic cost on society far in excess of their contribution through legitimate earnings. Besides, one might ask from where do the earnings come to support the criminal's family: are they derived from lawful employment or are they actually the fruits of criminal activities?

Additionally, much of the harm caused by crime cannot be quantified in economic terms. You can measure the approximate loss

of income to a family when the head of the household is murdered. But how do you measure the grief suffered by the survivors? How do you put a dollar value on the humiliation and fear inflicted upon the victim of a rape, or the loss of quality of life when the elderly are too frightened of crime to venture out of their homes or apartments?

Criminals inflict a huge cost upon society in ways that are quantifiable and unquantifiable. This loss far exceeds the economic loss to the criminal's family.

Sentencing and the Children of Crime

Some witnesses have bemoaned the unwholesome effect of separating families by imprisoning a criminal parent. This same witness asserts that imprisoning the criminal will somehow cause the children of the criminal to become criminals themselves. If this were said by an ordinary person we might pass it off as laughably naive. But it was stated by a federal judge, who presumably takes this into account in sentencing.

I assert that the opposite is true. Parents, if not overtly, teach values to their children by example. If the criminal parent remains with his or her children, what values will they impart to their children? Even if they make some conscious effort to teach them honesty, or any other virtue, is the child likely to learn the lesson? Or will the children instead follow the parent's

example?

The latter is more likely. If they remain with the family, the children probably run a greater risk of becoming criminals themselves than they would if the offending parent was incarcerated.

Conclusion

In summation, I would like to reiterate that I reject the notion that sane individuals are not responsible for their own behavior. Courts must recognize that criminals intentionally commit evil acts and should take this into account in the sentencing process. Among those people are murderers, rapists and drug dealers. These people should be given lengthy prison sentences so that they will not pose a further threat to the innocent public.

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December 8, 1986

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1331 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004

ATTN: Guidelines Comments

Dear Commissioners:

In response to the Chairman's invitation, and with apologies for the tardiness, I offer herewith some comments on the September 1986 preliminary draft sentencing guidelines.

I cannot emphasize too strongly that these comments reflect my views alone. Neither the Research Division nor the Federal Judicial Center has an institutional position on any of the issues I raise here.

In a letter to Chairman Wilkins dated August 20, 1986, I expressed some views about an earlier draft of the guidelines. I will not elaborate on those views here, but I note that most of them apply to the current draft. In particular --

1. I continue to believe that there is too much emphasis on the objective harm resulting from a criminal act and not enough emphasis on the offender's culpability.

2. I continue to believe that the guidelines are excessively specific, and that the Commission would be well advised to focus on the common situations that come before sentencing judges, leaving the fine gradations to be handled by the exercise of discretion to choose a sentence within a guideline range or to go outside the guidelines.

3. I remain concerned about the characteristic that the guidelines often attribute large differences in punishment outcomes to small differences in factual situations.

There are three other matters of general application that I would like to address.

First, it seems to me there is an inconsistency in the draft guidelines in the evaluation of offense behaviors. Where only property is involved in an offense, the guidelines recognize that sentences should not be proportionate to the amount taken. A larger property offense carries a greater penalty than a smaller one, but doubling the size of the theft does not double the penalty. In other circumstances, however, the guidelines do not appear to recognize the same principle. If an offense involves both an assaultive crime and the taking of property, the base values for the assault and the taking are added. If more than one enhancement applies to a particular base offense, the two enhancements are added together. It seems to me that such a system may often produce unduly severe sentences. To take just one example, if a robber gets away with any property at all, no matter how little, at least 6 units are added to the base offense value of the robbery (§ B231 and § B211). Since robbery will almost always carry a term of imprisonment, this translates into a six-month difference in the imprisonment sentence. It may well be that a small theft, standing alone, should be a 6-unit offense. It seems very doubtful that a small amount of money taken in a robbery should add six months to the term of incarceration, as contrasted with the robbery in which the offender didn't succeed in acquiring something of value. I believe that many similar examples can be found in the guidelines, and that they reflect a basic problem with the system by which harm values for different elements of an offense are combined.

Second, I am concerned at the extent to which language in the draft guidelines implies that the determination of "modified real offense" is to be handled in the traditional adversary mode. It is stated at page 17, for example that, "[t]he government will bear the burden of proof except if a mitigating factor is in issue," and that "[a]greement among the parties, particularly when a guilty plea is entered, is likely to resolve most" disputes. I presume the purpose of "modified real offense" sentencing is to ensure that the sentence will not depend upon the prosecutor's charging decision or upon the results of a plea bargain. That purpose would be utterly vitiated if the prosecutor were permitted complete discretion about what "real offense" or offender characteristics to allege or if the parties were free to negotiate about the offense description and offender characteristics on which the judge is to sentence. The evils of charge bargaining would simply be transferred to the sentencing procedure. The answer, I suspect, lies in building on the role of the probation officer as an agent of the court whose obligation is to prepare as accurate a report as possible of the offense, the circumstances under which it was committed, and relevant offender characteristics. Whatever the mechanics, it is terribly important that the Commission make it clear that offense descriptions, prior records, and the like are nonnegotiable.

Finally, I suggest that the "road map" system for determining what harm should be considered in "real offense" sentencing should be modified. As the system stands, offense behaviors will not be taken into account unless the Commission has anticipated them. For example, under §B2l1, if someone is convicted under a federal theft statute for an offense which in fact involved violence, the violence will not be taken into account because the road map does not anticipate it. You can of course repair §B2l1, but it isn't conceivable that you should anticipate all the situations in which related behavior should be considered in sentencing. It would thus be better if the guidelines enunciated the general standards that should be applied in determining what behavior should be taken into account. That approach would not be inconsistent with the inclusion of examples of particular behaviors that the Commission regards as being within the general standard or outside it.

On the enclosed pages, I also offer a few comments on specific guideline provisions.

Sincerely,

Anthony Partridge

Anthony Partridge
Associate Director
of Research

Enclosure

Comment on §A212

In my capacity as a government employee, I do not understand why the penalty for killing me should turn on whether I am "in . . . the performance of official duties" when the crime occurs if the killing is unrelated to my official status. The same question arises under §A213 and §A221.

Comment on §A215

In cases in which negligent homicide is criminal, it does not seem appropriate to increase the penalty on the ground that a weapon was involved, at least if the weapon was legally possessed. It does not appear to me that killing someone in a hunting accident should bear a higher penalty than another negligent killing.

Comment on Commentary at page 25

The commentary indicates that persons guilty of negligent homicide are indifferent to the identity of the victim. That is not necessarily the case, at least in the sense that negligent people sometimes have knowledge of who is at risk. Producers of baby food, managers of nursing homes, and school bus drivers are obvious examples.

Comment on §B213

Under paragraph a.2., combined with §B251, the offense value for setting fire to somebody's free-standing mailbox would be 30, as would the value for shooting a hole through a stop sign in Rock Creek Park. These penalties seem excessive for acts of petty vandalism.

Comment on §B222

Paragraph a.2. speaks of trespass "on the premises of a dwelling." The third paragraph of the commentary refers to trespass "in a dwelling." It is not clear whether this enhancement applies to somebody who trespasses in the front yard of a park superintendent.

Comment on §B231

It would appear under paragraph a.3. that robbing a government-owned commissary would be penalized substantially more heavily than robbing a concessionaire's grocery store in a national park. This is another case in which I do not understand the special status accorded by the guidelines to government employees.

Comment on §C213

Paragraph a.2. refers to cases in which, "at the time of the offense," the tax had not yet become due. In the commentary on page 50, it says that the arbitrary 30% rate is to be used in cases in which, "as of the time of conviction," there was not yet a tax deficiency. Time of sentencing might be better than either time of conviction or time of offense.

Comment on §F211

I question whether the enhancement in paragraph a.6. for a fraud offense that potentially endangered health and safety is adequate. Consider the example, given on page 79, of the laboratory that falsely represents that voltage regulators being supplied to the military conform to goverment specifications. That would be a fraud that endangered both our servicemen as individuals and all of us as citizens interested in successful national defense. Treating it as only 10 units more severe than a fraud that has only financial consequences seems inadequate.

It is also unclear to me why the property table for fraud offenses should call for more leniency than the property table in §B251.

Comment on §K216

It is not clear to me what offenses under this section would not qualify for the enhancements listed under "Specific Offense Characteristics."

Comment on §S211

Comparison of this table with the table at §F211 suggests that relatively small-scale securities fraud is regarded by the Commission as worse than other fraud of similar magnitude, but that relatively large-scale securities fraud is not as bad as other fraud of large magnitude. Comparison with the table at §B251 indicates that neither form of fraud is considered as bad as theft or embezzlement. The rationale for these distinctions is unclear.

By cross-referencing part F, paragraph b.1. indicates that the conduct described there will be treated more leniently than other securities fraud in some cases but more severely in others. The commentary at pages 114-115 indicates that the purpose was to treat such conduct more severely.

Comment on §A311

I have considerable doubt whether discretion to choose a multiplier is consistent with the statutory restriction on the width of guideline ranges which was, after all, understood to be a limit on the amount of discretion that could be accorded by the Commission to the sentencing judge. The question also arises at §A314 and §B321.

Comment on §B321

I do not think it makes sense, except in rare cases, to provide a reduction in sentence on account of acceptance of responsibility by the offender. The draft guidelines refer to a number of actions done "voluntarily" by the offender as showing evidence of acceptance of responsibility. Once someone is enmeshed with the criminal justice system and not yet sentenced, however, he is operating in a fundamentally coercive environment. There will be nothing "voluntary" in making restitution before sentencing if offenders understand that making restitution is something you do to get a lighter sentence. To say in this circumstance that the sentencing judge "is in a unique position to evaluate whether the offender's post-offense conduct is sincere or merely self-serving" is unrealistic.

Indeed, this entire section seems anomalous in the context of a determinate sentencing statute. Congress has firmly rejected the notion that public authorities, after sentencing, can reasonably make judgments about the rehabilitative progress of offenders that would be used to shorten their terms of incarceration. The belief in the unwisdom of a system based on making such judgments is at the very core of the Sentencing Reform Act. For the Commission to reintroduce this kind of decisionmaking at the sentencing stage would be quite inconsistent with the philosophy of the Act.

Comment on §B331-§B333

I would not give the prosecutor the last word on the size of the concession to be made for cooperation. I suggest that you consider requiring that the prosecutor's certification of the level of cooperation be "reasonable." That would give the judge some power to control abuse of the certification process without requiring the judge to second-guess legitimate borderline decisions.

Comment on §C321

This section is properly denominated a guideline rather than a policy statement, in that it directs the sentence to be imposed.

Comment on pages 128-29

The rule that the offender will be assumed to have served one-third of a prior sentence of incarceration is not a happy one, particularly in view of the growth of determinate sentencing statutes over the past several years. In jurisdictions in which parole release has been abolished, the one-third rule will systematically and substantially underestimate the actual time served. While I recognize that it may sometimes be difficult to develop accurate information on how long an offender actually served, I suspect the effort has to be made if time of service is to be an important determinant of an offender's sentence. If an estimate has to be made, it should at least not produce an assumed release date that is earlier than would have been permitted under the law of the relevant jurisdiction.

Comment on §A422

If, under the guidelines, the sentence is not to be determined by aggregating the sentences on individual counts, it seems unwise to suggest that the court engage in allocating the guideline sentence among counts on some arbitrary basis. If the sentence has been allocated among counts, reversal on less than all of the counts will leave the sentence standing on the counts on which the conviction stands. But the sentence left standing may not be within the guidelines for the valid counts. I do recognize that existing law in some circuits holds that a general sentence is improper, but it seems to me that the the logic of the guidelines calls for a general sentence so that the entire sentence may be reconsidered if the conviction is reversed in part.

Comments on Pages 159 and 164

I note that there is a logical error in the discussions of the deterrent approach to fines on these pages. At page 164, for example, it states that crime would be unprofitable if the fine were set at a level equal to the harm caused by the crime divided by the probability of conviction. That would indeed make crime unprofitable on the average, at least if harm caused is assumed to be equivalent to the offender's profit. The total of the profit from crimes subject to fines would be equal to the total of the fines imposed. It is far from obvious that such an equilibrium situation would provide adequate deterrence. Lots of people gamble at casinos with full knowledge that the odds are less favorable than equilibrium. There may well be situations in which a potential offender, knowing that the probable sanction was equal to the amount to be gained through crime, would choose the crime. Offenders in difficult financial straits, for example, may conclude that the prospect of current gain outweighs the risk of a future fine. Beyond that, many offenders believe that they are cleverer than the average criminal at avoiding detection, and therefore think that their individual risk of being apprehended and convicted is lower than the statistical risk on which the Commission's formulation would be based. With fines, just as with incarceration, potential offenders have different threshholds of deterrence. Raising the sanction will in all probability increase the number of people deterred, but to a degree that we do not know. There is no magic in selecting a level of fine to produce as much revenue in fines as the aggregate gain from the offenses involved.

00155
12-12-8

TESTIMONY OF THE WASHINGTON LEGAL FOUNDATION

PRESENTED BY PAUL D. KAMENAR

EXECUTIVE LEGAL DIRECTOR

BEFORE THE

UNITED STATES SENTENCING COMMISSION

WASHINGTON, D.C.

DECEMBER 3, 1986

WASHINGTON LEGAL FOUNDATION
1705 N STREET, N.W.
WASHINGTON, DC 20036
202-857-0240

Mr. Chairman and Members of the Commission:

On behalf of the Washington Legal Foundation (WLF), I appreciate the opportunity to testify once again before the Commission on its formulation of sentencing guidelines to be used by federal courts. I refer you to our earlier testimony relating to our views on the issues of offender and offense characteristics.

In today's testimony, I would like to comment generally on some of the issues raised by the Commission's preliminary draft of the sentencing guidelines and on some of the comments by other witnesses in these hearings.

WLF is a national non-profit public interest law and policy center with over 200,000 members and supporters nationwide. We have devoted a substantial part of our resources to areas of criminal justice reform, judicial accountability, and crime victims' rights. As part of our Court Watch Project, all too often we see cases of undue leniency by both federal and state judges in sentencing violent criminals, rapists, drug dealers and child molesters to probation or minimal prison terms. In that regard, we applaud the general approach taken by the Commission in these proposed guidelines which would increase the length of incarceration periods for most federal offenses.

We heartily agree with the reasons for this approach as articulated by the Commission on page 7 of the Preliminary

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Draft, i.e. providing just punishment (retribution) and deterrence and protecting the public from future criminality. Accordingly, probation should be used, if at all, only for minor, nonviolent offenses.

In reviewing the draft guidelines as well as some of the criticisms offered by some of the commenters such as the charge that the guidelines are cruel, inflexible, usurp the judge's role, and so forth, I am reminded of a letter written by Thomas Jefferson, the drafter of the Declaration of Independence, to Edmund Pendleton on August 26, 1776. Thomas Jefferson, as you know, from his seat in the Virginia House of Delegates sought far-reaching legislative reforms. While he succeeded in passing his Bill for Religious Freedom, he was unsuccessful in replacing Virginia's harsh criminal code with one that some considered more enlightened and humane.

Jefferson describes his penological views to Pendleton as follows:

> The fantastical idea of virtue and the public good being a sufficient security to the state against the commission of crimes, which you say you have heard insisted on [me] by some, I assure you was never mine. It is only the sanguinary hue of our penal laws which I meant to object to. Punishments I know are necessary, and I would provide them, strict and inflexible, but proportioned to the crime. Death might be inflicted for murther and perhaps for treason if you would take out of the description of treason all crimes which are not such in their nature. Rape...&c. punish by castration. All other crimes by working on high roads, rivers gallies &c. a certain time proportioned to the offence....Laws thus proportionate and mild should never be dispensed with. Let mercy be the character of

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> the law-giver, but let the judge be a mere machine. The mercies of the law will be dispensed equally and impartially to every description of men; those of the judge, or of the executive power, will be the eccentric impulses of whimsical, capricious designing man....

The Portable Thomas Jefferson, at p. 357, Peterson Ed. (Penguin Books, 1977).

I guess there is something for everybody in Jefferson's statement. Capital punishment is a constitutional and appropriate punishment for certain heinous crimes (and is an issue which we think should be addressed by this Commission as discussed below). On the other hand, castration would certainly not be tolerated in today's society. To the extent that the guidelines would transform judges into "mere machines", this may be necessary to some extent to reduce the capriciousness of the sentencing authority. Yet Jefferson does not include incarceration as one of his suggested forms of punishment, preferring instead to use what today may be called "community service."

At this point, I would like to address those areas of the draft that are of particular concern to our Foundation.

Capital Punishment.

As you know, federal law currently provides for the death penalty for certain federal crimes such as homicide, espionage, and aircraft hijacking. For example, on page 21 of your report, Section A211 expressly and properly refers to the availability

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of the death penalty for "Homicide--Level One." However, the Commission has developed no guidelines on when this sentence should be imposed.

There are some who argue that the federal death penalty is unconstitutional in light of the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), because there are no procedures to implement the penalty. However, the Supreme Court has never addressed the constitutionality of the death penalty for federal crimes, and if it did, we maintain (as did the federal district judge who first addressed this issue in 1984) that the Court would find the federal capital punishment laws to be constitutional. Our position is described in detail in legal briefs which we filed in all of the Walker spy ring cases, and which I personally argued in the Jerry Whitworth case before federal judge John Vukasin (a copy of which is submitted as an Exhibit).

In short, our argument is that unlike the state sentencing procedure found unconstitutional in Furman v. Georgia, the federal system provides for a bifurcated trial, i.e., a guilt and innocence stage and a sentencing phase. Further, under Rule 32 of the Federal Rules of Criminal Procedure, a pre-sentence report is prepared focusing on the particular defendant and his crime, and that aggravating and mitigating circumstances can be presented and considered by the judge before imposing the sentence. Indeed, Rule 32 was cited by the Supreme Court with

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approval in Gregg v. Georgia, 428 U.S. 153, 190, n. 37 (1976) as an example of focused, sentencing discretion when the Court upheld Georgia's revised capital punishment law.

The authority for the Commission to draft capital punishment guidelines may be found in 28 U.S.C. §§ 944(a)(1)(2), (b). In § 944(a)(1), for example, Congress mandated that the commission promulgate "guidelines...in determining the sentence to be imposed in a criminal case, including" probation, a fine, or term of imprisonment. The term "including" is not exclusive of all other punishments that can be imposed. In § 944(b), Congress stated that the "Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall,...establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." Clearly, the capital punishment provisions in title 18 are pertinent sentencing provisions. Finally, in § 994(a)(2), the Commission may issue "general policy statements regarding the application of the guidelines or any other aspect of sentencing [that]...would further the purposes set forth in section 3553(a)(2)...." (Emphasis added).

If, however, the Commission decides not to issue any guidelines on capital punishment, we suggest that the Commission make clear in the preface to those guidelines why it decided not

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to do so and to indicate that the Commission's failure to issue such guidelines should in no way indicate that capital punishment is not an available or proper form of punishment for those federal crimes where Congress has expressly provided for it.

Standard of Proof.

On pages 8-9, the Commission describes the standard of proof and burdens of production and persuasion that are to be used in determining the appropriate sentence under these guidelines. In particular, the Commission suggests the "preponderance of the evidence" standard whch was recently upheld in McMillan v. Pennsylvania, 106 S.Ct. 2411 (1986).

In the first place, it is not all that clear whether this standard of proof is required or permissive. The Commission states that "the court may rely on any information" that the court finds "is supported by a preponderance of the evidence". Does the Commission mean that the court may only rely on such information? We see no reason why the current 18 U.S.C. § 3577 which gives courts a broad latitude in considering information should be subject to a particular level of proof which would certainly spawn endless litigation. As the Supreme Court stated in McMillan, "sentencing courts have always operated without constitutionally imposed burdens of proof." Furthermore, the "preponderance of the evidence" standard for finding an offense characteristic suggests that the information must pass evidentiary rules. Yet many courts have held that hearsay and

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other information can be considered by the sentencing court. See, e.g. U.S. v. Tracey, 675 F.2d 433 (1st Cir. 1982); U.S. v. Marshall, 519 F.Supp. 751 (E.D. Wis. 1981).

Our foundation has filed sentencing memoranda in the Walker spy cases which some courts accepted and others rejected. In the Whitworth case, we suggested that the Court impose a lengthy term of years under 18 U.S.C. 4205(b) rather than a life sentence under 4205(a) which would enable the defendant to be eligible for parole in only 10 years. Judge Vukasin in San Francisco followed our suggestion in sentencing Jerry Whitworth while Judge Harvey in Baltimore imposed the life sentences on John Walker. Yet, under the Commission's standard of proof, such sentencing memoranda by amici or the victims may be prohibited since it does not follow evidentiary rules.

Accordingly, we recommend that no change be made to the current practice by federal courts under 18 U.S.C. § 3577.

Modified Real Offense Sentencing.

We generally support the Commission's intitial decision to use the modified real offense sentencing as opposed to the offense of conviction standard. We believe that justice will be better served by considering the various factors that surrounded the commission of the crime. To give you an example of the injustice of the offense of conviction charge, a man in the District of Columbia broke into a house and shot a young mother

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three times in the head. The women's grandmother witnessed the killing. He was arrested at the scene and indicted for first degree murder. In the District, the commission of a crime of violence with a weapon requires a mandatory sentence of 5 years for first offenders and 10 years for second offenders. Yet this killer was sentenced only to a year of weekends in a halfway house. How did he do it? The U.S. Attorney for the District of Columbia allowed him to plead guilty to one count of second degree murder and one count of carrying a pistol without a license, each of which allows for probation. Thus, the prosector and the judge made a mockery of justice by putting blinders on to ignore the facts of the real crime. It was as if the murderer choked the woman to death and he happened to have an unregistered gun in his car at the same time.

In that regard, we do not think the modified real offense system should be interpreted too strictly but rather should be flexible, allowing the court to consider relevant information. For example, in the hypothetical given by the Commission on page 16, number 6, a cocaine distributor was found to have an illegal shotgun in his apartment. Under your system, the shotgun is not added to the offense value because the possession of the shotgun is allegedly not related to the offense of cocaine dealing. We think, however, that a sentencing authority could consider the shotgun to be related to the offense. Most drug dealers possess illegal weapons to protect their illegal business from other drug dealers or dissastisfied customers. It would be different

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if the offense was check forgery. This exclusion of the gun in the cocaine case seems to contradict the Commission's guidelines for drug offenses on page 58, item (b)(1) which states that if a firearm "was in the possession or under the control of the offender...during the commission of the offense, add the appropriate offense value from Part K..." Surely, the illegal firearm was in the possession of the cocaine dealer, regardless of whether he was busted in his apartment or on the sidewalk just in front of it.

With respect to drugs, we believe that the Commission cannot do too much in this area in terms of offense values. Furthermore, the Commission should assign the highest offense values to the use and distribution of crack. I believe that the U.S. Parole Commission has undertaken some rulemaking with regard to crack which may be useful to this Commission.

CONCLUSION

We look forward to working with the Commission as it further develops these sentencing guidelines and believe these guidelines will go a long way towards restoring justice in the criminal justice system. Thank you.

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00157
12-15-8

U.S. Department of Justice

United States Attorney

Middle District of Tennessee

879 United States Courthouse
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615/736-5151
FTS/852-5151

December 4, 1986

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

ATTN: John Steer

Re: Remarks to U.S. Sentencing Commission
Regional Hearing of October 29, 1986,
Atlanta, Georgia

Dear Chairman Wilkins:

Please find enclosed my written comments concerning the Sentencing Commission's hearing which was held in Atlanta on October 29. I found the hearing to be most informative. The divergent opinions expressed by the participants clearly indicates the very difficult job that the Commission has in attempting to resolve these conflicting interests in opinion concerning sentencing reform. I remain firmly convinced that the Commission with its present draft guidelines is on the right track and should proceed to fill in the gaps and correct some inconsistencies within the guidelines. Unfortunately, I believe that the federal judiciary may well remain the strongest block in opposition to the guidelines. From the discussion that I had with several judges, it appears that many of the judges, both the appellate and district court level, are very poorly informed concerning the Commission's work and have an initial reaction that any tampering with sentencing which limits their discretion is inherently suspect and evil. Unless the district and appellate judges can be convinced to give the guidelines a fair chance, I fear that whatever guidelines the Commission comes up with will be in for a very difficult time. I would hope that the Commission would be able to schedule some intensive educational programs for the judiciary so hopefully they will be operating from a base of knowledge rather than simply negativism.

If there is anything that I may do to assist the Commission in its work, please do not hesitate to contact me.

Sincerely,

JOE B. BROWN
United States Attorney

JBB/pww
Enclosures

R E M A R K S

JOE B. BROWN

UNITED STATES ATTORNEY

MIDDLE DISTRICT OF TENNESSEE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

REGIONAL HEARING

OCTOBER 29, 1986

ATLANTA, GEORGIA

During the last 21 years, in the Criminal Justice System, where I spent my first 6 years in the Judge Advocate General Corps of the United States Army as both a trial counsel and as a military judge, and 15 plus years with the Department of Justice as first assistant United States Attorney and United States Attorney, I have seen a number of changes occur.

When Congress mandated changes in sentencing law and set up the structure for the Sentencing Commission in 1984, they wrought a fundamental change in the entire sentencing process. Unfortunately, as Congresses often want to do, they have passed legislation requiring fundamental change but have delegated to others the responsibility and duty of implementing those changes. Since the Bill went through in somewhat of a frenzy with the entire federal budget being held hostage at the time, the statutes are not exactly a model of legislative clearness. The legislation raised several fundamental questions considering the criminal justice process.

1. Will it destroy the defendant's ability to plea bargain?

2. Will it result in more contested trials?

3. Will it flood the district court with hearings on sentencing factors, endless arguments over matters in mitigation extenuation as well as restitution and damages?

4. Will it flood the district court and courts of appeal with appeals from defendants who have nothing to do while in jail except work on alleged errors in the application of the

guidelines?

5. Will it really improve uniformity in sentencing or will it be so full of exceptions that it will simply replace an existing system with an extremely complex, but in the end, no more efficient system?

It appears to me that the main problem in implementing whatever guidelines the Commission finally arrives at will be in educating the federal judiciary so they will be accept and reasonably execute the guidelines. Particularly for district judges, the implementation of the guidelines will be a traumatic experience. The federal district judges are not used to having their discretion fettered in sentencing matters. Many judges feel very strongly that certain type violations should be probated. These judges will be extremely unhappy if they feel they must sentence individuals to incarceration. Likewise, other judges may feel that the guidelines are either too severe or too lenient in a particular case and will make every effort to avoid the application of guidelines as they were intended.

Unless federal judges can be educated and convinced of the necessity and reasonableness of the guidelines, there will be severe difficulty in implementing and carrying them out. From testimony which was presented by a district judge and a court of appeals judge at the Sentencing Commission's hearing in Atlanta, I believe the predictions I gave in my hearing before the judges testified are unfortunately being born out. If the individuals

involved in a process are committed to carrying it out, almost any system can be made to work. If the individuals are not willing to carry out the purpose of the guidelines then almost no system will be effective.

Personally, I am satisfied that the guidelines are a giant step in the right direction and are absolutely necessary. Over the years I have seen too many sentences which could not be justified. As one example, I can recall several years ago during a 30 day period two bank tellers with roughly the same background, one who had embezzled in excess of $120,000 and the other who had embezzled in excess of $10,000 were brought before two different district judges on their plea of guilty. The teller with the $120,000 plus embezzlement received probation; the other received a jail term sentence of approximately 2 years. Examples such as this have convinced me of the need for mandatory guidelines.

Obviously, the draft that the Commission has presented for public study and comment at the present time is preliminary and it will need some additional fine tuning. I hope that my remarks will be able to address some of the areas that I believe will need some further consideration and tuning.

There will be many disputes between the government and the defendant over aggravating and mitigating factors that go to make up the final sanction score. It is absolutely necessary that this be decided by the preponderance of evidence with the burden

being on the government for those matters in aggravation and on the defendant for those items in mitigation. Likewise, it should be clear that the district court should be able to resolve this without being bound by the strict rules of evidence and should be able to consider all relevant and reliable information. I am not sure what the present comment to the effect that the court may consider relevant and reliable information not barred by evidentiary rules means. There are often evidentiary rules that prohibit hearsay and other evidence of misconduct. This evidence must be admitted. If it simply means to exclude evidence obtained by illegal means or which is untrustworthy and which is privileged, then the guideline on this needs to be spelled out in some additional detail.

In describing the modified real offense system in Item 6 on page 16, we see that possession of a shotgun in a drug distributor's apartment would not be an added violation, yet in our specific guidelines (D211-213), we put on added sanction values for firearms possessed during the course of drug distribution. It seems that the guidelines are internally inconsistent on this particular area.

Another area that seems to have some basic inconsistency concerns the statutory rape offenses (A233). In this instance, we have a situation where we have a base offense with 12 units if the participant is less than 3 years older than the victim with an added enhancement of 60 units if the defendant is more than 3 years older than the victim. A system which jumps the sanctions

unit by a factor of 5 for a one day difference in age seems to me to be inherently suspect. Likewise, under unlawful sexual conduct (A235), we have a 4 year difference in age between the defendant and the victim, whereas earlier we used a 3 year difference. It seems to me that the age differential should be the same and further that there should be some sort of a sliding scale so that we do not jump so drastically. In property crimes we have a sliding scale based on the value of the property. It would appear that if age is to be considered relevant that there should be some sort of a sliding scale employed in the sexual conduct violations.

Another issue that is troublesome is the definition of psychological injury to the victim. In extreme cases this is required to be established by expert testimony. The use of expert testimony in these cases is in my judgment of somewhat limited value in any case. The requirement to use expert testimony will undoubtedly lead to a mini trial in which, based on my experience with psychiatrists, I have some serious doubt will produce any more accurate results than lay or other testimony. It appears to me that psychological harm to the extent that it exists should be considered under bodily harm and should be demonstrated by reasonable medical testimony. I have some cynical doubt about psychological harm that is not manifest by objective medical testimony.

Plea Bargaining and Cooperation (B321-322)

The present system allows a defendant to secure credit for cooperation following a jury verdict of guilty. I believe

there is serious difficulty in allowing a defendant who has rolled the dice with a jury trial and lost to then be allowed to come in and claim credit for sentence reduction. It seems in this area the defendant should be allowed credit only if he has made an early admission of guilt, made a good effort to correct the harm he has done, and in fact saves the government substantial time and effort in both preparation for trial and a trial. A defendant who sees the light only after a jury has returned a verdict of guilty should not be entitled to substantial rehabilitation credit.

The Cooperating Defendant (B331)

The defendant who cooperates is an essential part of a criminal investigation, and particularly in a complex case may be absolutely essential to unravelling the full scope of criminal conduct. Unfortunately, it is often necessary to give these individuals substantial credit in return for their cooperation in order to secure that cooperation. The cooperation itself may not come until after a verdict of guilty, however, in keeping with having sentences reflect the realities of the real world, the defendant should be given a reduced sentence in recognition of his cooperation and not under some theory that he has, in fact, been rehabilitated. I would recommend in order to have a stronger tool to secure cooperation that the factor for cooperation be increased from .6 to .5. A certification by the U.S. Attorney should be furnished in this matter and should be observed by the court, absent a finding of bad faith by the court.

Scoring the Criminal History (C126)

The Commission is using an arbitrary factor of 1/3 of the sentence actually imposed to calculate the criminal history score. The present guidelines provide that a defendant can show that he has served less, however, the government is not presently allowed to show that he in fact served more. Under the present parole guidelines, particularly in the federal system, many defendants are routinely serving sentences in excess of 1/3 of their time. It appears that the government should be allowed to show that a defendant in fact served more than 1/3 of his sentence. The problems mentioned by the Commission in determining how long a sentence an individual actually serves did not appear to me to be as great as the Commission believes. The criminal history should be based on actual time served and the 1/3 should be used only when it cannot reasonably be determined that the time served was either higher or lower. Likewise, in scoring criminal history, it appears to me that military convictions by summary courts should be considered the same as other lower court convictions. The defendants have a right to an attorney before summary courts and there is no reason to treat them separately from misdemeanor convictions by state general sessions courts. Likewise, purely military offenses should be considered. Under the present guidelines, a desertion charge which is a very serious but purely military offense would not be considered, but a state conviction for breach of the peace, which resulted in jail time, would be. I see no reason to distinguish purely military offenses from other type offenses. They are part of the defendant's

criminal history and should be scored accordingly.

The Department of Justice also has a pretrial diversion program which often diverts some offenders from the formal justice system. In considering criminal history, the Commission might well want to take into account the fact that an individual has been in a pretrial diversion program in ascertaining his criminal history score.

Other Offense Characteristics (E136)

The Commission has been charged by Congress to consider 11 other appropriate sentence factors to the extent that they are determined relevant. Items 9, 10 and 11 have been considered by the Commission. I do not believe that the other factors are as easy to qualify as those three. As an example, many citizens feel that a "pillar of the community" should not be sentenced to a sentence of incarceration since the mere fact of the conviction will be a severe punishment to him. Others, myself included, feel in many cases the "pillar of the community" should be incarcerated. Because of his age, education, and experience he has less need to resort to commit criminal acts. Therefore, both as a punishment and as a deterrent the "pillars of the community" should not be given any additional consideration. One way to handle this may be to assign a range of plus or minus .1 or .2 to all these factors, add them up and then have a percentage adjustment at the end. The difficulty with this system would be whether you consider for example a good education to be a positive or negative factor in determining whether the individual should be

punished more or less severely. The other possibility would be to allow the judge to consider these factors in justifying a sentence outside the range in extreme cases. My overall assessment is that these factors should not be given great weight under any system, and only in very rare cases should there be a significant adjustment. An example perhaps might be a situation where a bank teller embezzles money to secure treatment for a dying relative as opposed to a bank teller who wants to take a trip to Mexico for the holiday seasons. On the other hand, if the criminal conduct does not relate to a family situation, then even if the defendant had small children. It would perhaps be inappropriate to punish the defendant in that case less severely than a defendant committing the same violation with the same intent and the same damage to the victim but who happened to be a bachelor.

Fines (A417)

Fines must be related to the ability to pay. U.S. Attorney's offices at the present time are clogged with uncollectible fines dating back 20 or 30 years. Many judges put in a large fine simply because they believe it will make the public believe that the defendant has been severely punished with no consideration as to whether in fact the fine can be collected. Fines should not be used to significantly reduce the period of imprisonment that would be otherwise be imposed. To do so would allow a rich defendant to buy his way out of prison where an indigent defendant would not have that alternative available to him. Fines are most appropriate where the defendant has enriched

himself or caused great harm to some entity and the enrichment or harm cannot be adequately addressed through restitution. Substantial fines should certainly be considered in cases where defendants have caused a prosecution to go on at great cost to the government. A fine in that case could well be used to reimburse the cost for prosecution of the defendant.

Fines against organizations (A157)

It is in the area of fines against organizations that fines should be employed most often. The fine should be sufficient to convince an organization as a whole that it must internally police its employees. Many of the larger organizational type fines, such as bidrigging, kickback schemes, production of substandard materials, etc. are done so because they are extremely profitable to the corporation. If the corporation can agree to plead guilty and pay a modest fine, they will have no incentive to get rid of the employees which have brought in the profits and will continue business as usual and will simply charge the fine off as a cost of doing business. The maximum fines should be sufficient to substantially effect the corporate bottom line. If it is a closely held corporation, this will certainly induce the corporate officers who will be the stockholders to take appropriate action. If it is a large corporation, it may well cause stockholders to bring suits against the responsible directors to recover money lost to the stockholders and will make stockholders and outside directors much more attuned to the action of their corporate officers. Likewise, in dealing with

corporations, probation may well be considered an important part of such a sentence. Conditions of probation, such as the termination of certain responsible corporate officers or the requirement of setting up of independent directors or committees, may well be factors that should be considered as an element of probation in order to deal effectively with the large corporation.

Plea bargaining (C166)

Obviously major changes in plea bargaining will be required by the sentencing guidelines. In the Middle District of Tennessee, at present, we bargain both the number of counts a defendant will plead to as well as a sentence cap. As an example, a defendant charged in a 6 count indictment may well agree to plead guilty to counts 1 and 2, with imprisonment not to exceed 3 years on count 1, with imposition of sentence to be suspended on count 2, and the defendant to be placed on a period of probation to be determined by the court, with such period of probation to begin upon the release from any imprisonment on count 1.

One benefit of the guidelines will be to require the defense attorney and the prosecutor to meet at a very early stage to discuss the case. In order to secure full benefit of cooperation and rehabilitation, it will be necessary for the defendant to begin early cooperating with the government. Likewise, it will be in the defendants best interest for the defense attorney to try at an early point to determine exactly what his client will be charged with. The parties will

undoubtedly try to agree on various factors involved in the violation, such as the amount of the theft, the amount of drugs, in the nature of the defendant's participation in the criminal conduct. In order to minimize the number of "mini trials" that the district court will have on sentencing, the court should accept the agreement of the parties unless bad faith is apparent.

Charge bargaining will often be used to the extent that the defendant can secure an agreement to be charged only with a violation which carries a punishment less than that that might be imposed under the guidelines. There may well be some inventive pleas and the use of some statutes which have not been used before in order to secure sentences which the prosecutor and defense attorney feel would be reasonable in order to avoid a trial and the imposition of more strenuous sentences under the full guideline.

Sentencing bargaining, that is a plea to a cap, will obviously be used much less since the district court will be limited to a range of sentencing. I would expect that there would be some situations which the government would recommend that the defendant be sentenced to the minimum range in a sentence as a part of the plea bargaining.

Cost considerations

Undoubtedly under the proposed sentencing guidelines, the number of individuals who will receive some type of incarceration will increase substantially. The cost of incarcerating an individual is very substantial and it is apparent

that in order to carry out incarceration in constitutionally acceptable facilities that Congress must be willing to appropriate additional money, build additional jail facilities, etc. Unfortunately, many times Congress takes a piecemeal approach to the criminal justice system. They will authorize more investigative agents but will not increase prosecutorial and court resources. This causes an obvious imbalance to the system. Likewise, it may be that Congress has provided for sentencing guidelines which will result in increased jail sentences but has not at the same time increased the ability to house these defendants. Congress must give appropriate consideration to authorizing the necessary jail facilities. Obviously, we do not need Level 5 institutions for many of the individuals who will be receiving incarceration. Unless this issue is faced before the guidelines become fully implemented, we will suddenly find ourselves with an overcrowding crises and the net result may be that Congress will go back and change the guidelines. I would hope that the Commission would, in its recommendations, point out the necessity to Congress to address this issue before it becomes a crisis. Unfortunately, I have found that in giving speeches I can often ask the audience how many in favor of increased jail sentences and are concerned that the courts are too lenient on prisoners, almost universally the audience will indicate that they feel that more jail time is appropriate and that the defendants are let out too early, etc. I then ask how many of them will support a tax increase to build a jail in their neighborhood.

Generally at this point, I get a rather blank stare from the audience. We must be consistent in our approach and if we truly feel that additional incarceration is necessary, we must be willing to pay the cost. I, for one, believe that the guidelines will be a great improvement in the criminal justice system and I am willing to vote for the increased taxes that will be necessary to support the matter.

In one final matter addressing the guidelines, I believe that it would be entirely appropriate for the Commission to recommend to the judicial councils of the various circuit as well as the Supreme Court that the annual circuit conferences be used to educate the judiciary and the members of the bar attending those functions in the guidelines, their purposes and plans. It would appear to me that within the next 2 years that these conferences should devote a substantial portion of their time to the guidelines and the issues raised by their implementation.

I thank the Commission for the opportunity to testify and wish you well in your extremely difficult task.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
PROBATION OFFICE

December 5, 1986

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Honorable William W. Wilkins, Jr.
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Attention: Guideline Comments

Dear Judge Wilkins:

Recently, our probation staff met to discuss and critique the Sentencing Guidelines Draft. I will quote salient facts from various officers that best represent the consensus of our office.

Supervising U.S. Probation Officer James D. Sager: "I have had the opportunity to meet Judge Wilkins and Commissioner Helen Corrothers, along with Larry Burress, a probation officer assigned to the Sentencing Commission. I know they take their jobs very seriously and have been extremely open and solicitous in seeking input from all interested parties in developing the guidelines. The Commission and its staff have put in tremendous numbers of hours together attempting to come up with a workable plan. I believe our letter to them should recognize their hard work.

"We are extremely fortunate in the Southern District of Illinois. We are a small district and for most of our history have had only two active judges sitting at any time. They have always been concerned with the sentences they each give in relation to the other judge on similar offenders found guilty of similar crimes. They are both aware and interested in comparing the sentences given in federal court with our local state courts. Consequently, we are fortunate that disparity is not a problem here."

U.S. Probation Officer James D. Parker: "Sentencing is too important to be left to the discretion of computers and mathematicians.

"Unwarranted disparity (page i) may not be a problem now. (Congress sets the penalties range - if judges work within the guidelines, there is no problem.) If there is disparity, then it is in favor of defendants, and that type of discretion should be kept.

"Sentences vary dramatically (page i). They should, because people vary dramatically; a judge has to take an educated guess at the attitude of the defendant and his ability to reform and conform in society .

"Certainty of punishment. This expanded Salient Factor Score will not and should not guarantee punishment. The inequity of qualifying all defendants by "Sanction Units" undermines the Court's discretion in sentencing. The mathematical equation does not take into consideration the emotional impact of a sentencing hearing, which many times a judge and probation officer use as a rehabilitative tool.

"The disparity in sentencing has not caused an unfavorable system of justice but rather keeps the necessary human and emotional element attached to the court system which is otherwise cold, calculating, and undesirable to most citizens. Disparity may be a favorable reflection of the Court's conscience. Certainty of apprehension and certainty of timely prosecution are of far greater importance than certainty of punishment when considering fairness to offenders and society.

1) Apprehension is unpredictable.
2) Prosecution is discretionary.

a) Legislation - Speedy Trial Act

Disparity is natural, understandable, necessary and acceptable.

"This entire "sentencing Guideline" formula will do no more than the Court is able to do now. It is the same thing said in a more complicated way. (Quote, page 139 "d": "Right now Congress sets a minimum and maximum time frame on offenses ... the minimum being probation or fine only.")

"The "Sentencing Guidelines" appear to be nothing more than an expanded "Salient Factor Score" which has limited usefulness. In computing a Salient Factor Score, a person has to use discretion and make value judgments. These same value judgments will be taken away from the sentencing judge through the use of a mathematical equation. The long-range effect could cause more harm to the Court System of Justice and breed more disrespect for the system than disparity in sentencing ever did.

"Federal judges are screened before hiring, monitored by the Administrative Office, and policed by the Appellate Court. Sentencing is a miserable task and at best an educated guess. Society accepts and honors the human error factor associated with judgeship, yet depends on personal integrity

as the ultimate conscience of the community. District judges do not need additional restraints regarding sentencing guidelines."

U.S. Probation Officer Mark Berkowitz believes there will be many occasions that the judges will consider going above/below the guidelines but will be deterred from doing so at the risk of "another appeal."

Supervising Probation Officer James D. Sager added: "If a new system is to be implemented and eliminate what they view as disparity, it must not have a numerical scoring system which allows for ranges. For example, Chapter 3, Paragraph A314 of the proposed guidelines, "If the offender was a minor participant in the offense, multiply the total offense value from Chapter Two by number within a range of .5 to 7, depending upon the offender's relative culpability and the nature of the criminal conduct involved." Wherever there is an option of assigning numbers you will have disparity. True partity could be achieved by changing the present criminal penalties from "not more than" to fixed definite numbers such as 5 years.

"Range options will lead to additional court hearings where defense counsel will argue for the lower number and prosecutor the higher number. Sentencings may be delayed for weeks. Court time is most crucial.

"While the judge will be charged with determining the actual sentence in each case, past history indicates that it will be the probation office doing the actual figuring. If the proposed guidelines are adopted, immediate probation officer training will be required or the new system will be implemented with a self-destruct mode built into it.

"If the proposed guidelines are adopted, there would exist the potential for disparity in the probation system figures, disparity that can only be eliminated by providing each probation officer with a programmed computer which would lead the probation officer through the guideline process and give the judge a printout of the final numbers.

"If negotiations between defense counsel and prosecutor are to be within the purview of the probation office, the probation officer position should be graded at a 14 similar to the Parole Commission's Hearing Examiner position. The duties would be the same, if not more difficult, because the probation officer would be arbitrating between two members of the bar."

I personally believe less people will plead guilty if they cannot have a written plea agreement, which might not be appropriate for a specific guideline. For example, Level Six Marion, Illinois U. S. Penitentiary inmates would most likely never qualify for a concurrent sentence, but in reality for them to be a government witness in a murder or gang related trial, they enter Rule 11 agreements. If the government doesn't bargain, cons won't testify and a valuable resource is lost.

I have a problem evaluating cooperation and determining when cooperation ends (page 125). The prosecutor will have 40% discretionary leeway in evaluating cooperation for reduction and judges will have a maximum of 20% reduction in B231 for acceptance of responsibility. Is this a case of disparity?

Page 124 - B322, should a person be punished or should we admit that it happens when they go to trial? I was always told that was unconstitutional.

Page 130 - Diversionary Disposition, should not be a countable offense as that is exactly what some state law makers wanted to avoid. Further, who will determine on the long-term offender when the risk posed is sufficient to justify the prison cost?

Page 136 - Other Offender Characteristics, I submit we must consider significant predictors beside culpability and prior record as they primarily are past oriented. Health, living conditions, supportive contacts, family, employment are most significant factors that are indicative of the present and also influence a prognosis for the future.

The Sentencing Commission Guidelines will not only enhance the probation officer's responsibility, but will overwhelm the probation officer. Not only will we be negotiators between lawyers, we will need computer training to implement sentencing data, monitor house arrest, tabulate interest of uncollectible fines, and become financial investigators as that is one phase of the presentence investigation that will definitely have to be expanded.

(18:3563) It is absurd to require that all people granted probation shall be ordered to pay restitution, fined or ordered to community service. We know now that most fines and restitution are difficult to collect under discretionary orders. Community service sounds great but should not be abused as a catch-all category as U.S. Probation Officer Berkowitz pointed out after years of personal experience with community service. The Probation Manual, Supervision Publication 106, states on page 25, a sentencing criteria of characteristics unacceptable for community service. There is a third party risk and question considering liability insurance for the offender. Studies prove and/or predict young illiterate offenders are poor risks. (Yet, these are people most often unable to pay fines or restitution.) See National Literacy Day, Public Law 99-351 (see attached) on percentage of prison population and juvenile offenders that are illiterate.

Pages 155-157 - Issues for Comment, Meaningful Fines. I propose a fine that is uncollectible is not meaningful. Examples in point are prison inmates. Some prisoners won't plead guilty now as they do not want the $50.00 special assessment taken out of their government commissary fund. Is it worth going to trial for $50.00. Our district would like a working definition of a meaningful fine. A person's financial ability to pay will result in disparity. A mandatory fine, restitution or community service is not the answer. Judges need unlimited discretion to address this realistic problem.

Page 166, Part D - Community Confinement and Home Detention. The Congressional mandate indicated the primary purposes for sentencing are just deserts, deterrence, incapacitation and rehabilitation. I submit house arrest meets none of these purposes. House arrest is for low risk cases. It is ineffective after six months. It's cost effective considering jail, but most of these people shouldn't be incarcerated in the first place. Surveillance is not preventive or considered punishment.

In closing, I do want to thank the members of the Sentencing Commission for their dedication and hard work on such a monumental task. We greatly appreciate the opportunity to offer our insight and suggestions. Our sincere hope is that positive changes will occur in the sentencing guidelines.

Respectfully submitted,

J. Bruce Chambers

J. Bruce Chambers
Chief U. S. Probation Officer

JBC/jt

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December 16, 1986

Mr. William W. Wilkins, Jr.
Chairman
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Dear Mr. Wilkins,

We are happy to reply to your letter of 17 September soliciting our views on guilty pleas and plea arrangements. While we hardly fancy ourselves as experts on criminal law, we feel that our study of plea bargaining using the choice-theoretic tools of economic analysis provides insights on the subject that may have been overlooked in earlier studies using alternative methods.

Our article in the September 1984 issue of the American Economic Review, "Plea Bargaining and Social Welfare", makes two points about the role of plea bargaining in the judicial system. Both of these points argue in favor of downward sentence adjustments for negotiated guilty pleas, as we show that plea bargaining affords unambiguous societal benefits in relation to a system where such arrangements are outlawed. What we will try to do in this letter is to explain these points in non-technical terms. This approach allows us to address only a limited subset of the concerns raised in your letter. We hope, nonetheless, that you will find our arguments to be of use as you prepare your final guidelines.

Assumptions of the Analysis

Our analysis is premised on two key assumptions. All of our conclusions are heavily dependent on these suppositions, so it is important that we put these forth clearly at the outset.

First, we assume a two-fold objective for the legal system. We assume that society wishes to punish the guilty "appropriately". Thus, we do not consider a rehabilitation role for the penal code. Where a guilty party is concerned, society is assumed to be best off when the criminal justice system metes out a "punishment that fits the crime". Punishments that are too harsh or too lenient yield a loss of benefit for society as a whole, with the loss being larger for larger deviations of the actual punishment from the appropriate punishment. The second objective of the society for its criminal justice system is to exonerate the innocent. Society suffers a loss whenever

an innocent party is wrongly punished, the more so the larger is the punishment.

Second, we assume that the legal system is not perfect in identifying guilty parties, and in distinguishing them from the innocent. That is, we suppose that sometimes the guilty are wrongly found not guilty in court, and that sometimes the innocent are wrongly convicted. We do assume, however, that a trial has incremental value in discerning truth. By this we mean that the probability that a guilty party will be found guilty exceeds the probability that an innocent party will be found to be so; and the probability that an innocent party will be acquitted exceeds the probability that this will be the outcome of the trial for a guilty party.

From these basic assumptions we derive two propositions about the beneficial role of plea bargaining in the criminal justice system.

Plea bargaining as Insurance

One role of the plea bargain is to insure society against the possibility of an incorrect acquittal of a truly guilty party. This insurance works much the same way as does homeowners insurance, whereby an individual is willing to pay a certain sum every year rather than bear the risk of having to pay a larger sum himself if a loss should occur. In our case, the prosecutor (acting in the state's interest) foregoes some part of the appropriate penalty for those who are guilty but are offered and accept a plea to a lesser offense. Where these individuals would have been found guilty and appropriately punished had their cases gone to court, society suffers a loss from the leniency of the plea. But given that trial is not a perfect process, some of the guilty parties actually would have been acquitted in court or found guilty of lesser charges. For these individuals, the plea extracts greater punishment than would the court. Of course, the prosecutor will not know beforehand which cases he will win and which he will lose (just as the homeowner does not know beforehand whether his house will be the one to suffer a fire). But, we show in our paper that as long as the indictees have an aversion to risk, it is always possible for the prosecutor to find a "punishment bargain" to offer to guilty party ex ante so that this individual will accept the offer and so that the average gain to society from avoiding the chance of a mistaken acquittal exceeds the average loss arising due to undesired leniency in the event that the criminal who would have been found guilty.

Plea Bargaining as a Screening Device

The second potential role of the plea bargain is perhaps more subtle, but we feel that it is also the more important.

To make the point simply at first, let us assume (unrealistically) that all defendants, guilty or innocent, view the prospect of being punished the same, and that they have the same aversion to risk as concerns the prospects of gambling by going to trial. Note that by this assumption we do not mean

that the guilty and innocent have the same forecast about the outcome of a trial. Indeed, this is not the case. The guilty will know themselves that they are culpable, while the innocent will know that they are not so. So a guilty party will view the probability of being (correctly) convicted at a trial as being higher than the probability of (an incorrect) conviction as expected by an innocent party. Rather, our assumption is that, all defendants, be they guilty or innocent, facing a certain given probability of conviction and an associated penalty from trial would view this prospect similarly and hence would be willing to accept the same offers of leniency. We will discuss the implications of departing from this assumption below.

Now, the prosecutor (or whoever has the authority to offer the plea bargain) will not know with certainty whether he or she is dealing with an innocent or guilty party in a given instance. If guilty, he (and society) will want the criminal justly punished, while if innocent, the defendant would optimally be set free. Now, our claim is that under the assumptions we have specified it is possible for the prosecutor to offer a relatively unfavorable "deal" so that the guilty will accept while the innocent will not. That is, the plea bargain serves to separate out the guilty, or to "self-select". Why is this the case? Since the guilty know that they are indeed culpable, and since they therefore view their prospects for acquittal at trial as being worse than do the innocent, they will be willing to accept a worse deal than would an innocent individual, who knows that he or she stands a better chance in the courtroom. So the plea bargain can be used in this case to add to the efficacy of the legal system, by helping to ensure that the guilty receive at least some punishment while the innocent "get their day in court". If the bargain offer is chosen judiciously, it will never induce an innocent party to falsely plead guilty, at least under the assumptions we have made so far.

Finally, what of our unrealistic assumptions? Suppose that individuals vary in their aversion to risk, in their aversion to jail sentences or financial punishments (i.e., fines) and in the complexity of the case. Then it will not be possible for the prosecutor to find a plea in any given case such that <u>all</u> guilty will accept it and <u>only</u> guilty will accept it. In this situation, a relatively unfavorable plea offer will induce acceptance from a guilty party with a relatively poor defense, but also from an innocent party who is especially averse to taking the gamble of a trial. Nonetheless, it will often be possible for the prosecutor to set a deal that at least some of the guilty will accept (because they themselves know that their chances at trial are not particularly good, although their private information about their prospects may not be shared by the prosecutor) while none of the truly innocent would wrongly plead. Then trials will take place for all of the truly innocent, and for those guilty who view their courtroom prospects as good or who are more willing to accept a gamble.

<u>Summary</u>

To summarize then, the plea bargain is a potentially valuable tool for society in structuring its criminal justice system. In some cases, the bargain allows society to avoid the risk associated with the possibility that

a truly guilty individual will not be convicted by the jury. And the bargain can be used to induce some of the guilty to self-select; that is, to accept the offer when a truly innocent party would not do so.

To serve these roles effectively and beneficially requires that the prosecutor set the offer appropriately. Our analysis suggests that the offer should not be "too good a deal", or else it will cause social losses that are too great in the case of truly culpable parties, and also will wrongly induce the risk averse innocent to accept. In general, the offer should be set so that it is attractive (but barely so) to most guilty parties, but is too stiff to be attractive to the innocent. Of course, offers that are not sufficiently attractive will not serve these roles either, since the guilty parties will not be led to reveal themselves as such.

Finally, we comment on the role of sentence guidelines in the context of our analysis. Guidelines that remove the ability of prosecutors to offer leniency in exchange for a guilty plea are detrimental to social welfare. There is, however, a potential role for guidelines in the plea bargaining process; namely, guidelines can make the prosecutor a tougher bargainer. When a defendant recognizes that the prosecutor is constrained not to offer a deal that is more lenient that the guidelines allow, the guilty party will be more likely to accept an offer that entails greater punishment.

Although our discussion here has been highly stylized, we hope that it has been helpful in identifying possible roles for plea arrangements. We thank the Commission for giving us this opportunity to express our views.

Sincerely yours,

Gene M. Grossman

Gene M. Grossman

Michael L. Katz

Michael L. Katz

GMG/MLK:gh

cc: Commissioner Michael K. Block

00177

NATIONAL TROOPERS COALITION

112 STATE STREET, SUITE 1212, ALBANY, N.Y. 12207 518-462-7448

December 30, 1986

The Honorable William W. Wilkins, Jr.
Chairman
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Dear Judge Wilkins:

I am corresponding on behalf of the membership of the National Troopers Coalition. The National Troopers Coalition is composed of 40,000 men and women of State Police and Highway Patrol Agencies throughout the United States. These men and women are the first line of defense in providing safety to our citizens. Our Troopers are charged with the responsibility of tracking, arresting and bringing these offenders to trial. In all too many cases, our members are killed or seriously injured in the process. If apprehended, the criminal responsible is tried and convicted; however, the sentence imposed never seems to fit the crime.

During the 98th Congress, the National Troopers Coalition proposed legislation that would cause all states to enact some form of capital punishment. Restoration of enforceable death penalty provisions for those offenses that now include a capital punishment sanction is both necessary and appropriate in the criminal justice system. The death penalty is necessary to protect society from heinous type crimes and to exact just punishment and retribution for such offenses. In regard to an important purpose of sentencing, retribution or just punishment, the death penalty serves a vital function. There are crimes committed that are so harmful to society that no other penalty, not even life imprisonment would be an adequate response to the defendant's behavior. Again the death penalty is the logical response to criminal acts which shock the conscience of society.

The death penalty will also serve the legitimate sentencing purpose of incapacitation. Statistics prove that inmates serving life sentences are responsible for numerous killings in prison of police officers, prison guards, and other inmates. In the most secure cell block of the United States highest security prison, the Control Unit of Marion, Illinois Penitentiary, there were, in March 1984, 19 inmates who had murdered prison officials or other inmates while confined. These murderers are already serving life sentences; however, by not allowing additional punishment to be imposed it allows the inmates to murder at will.

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Congress itself in enacting the new sentencing law directed the Commission to insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. If the war against crime is to be won, the Commission must adopt strong measures and promulgate guidelines designed to permit the implementation of the death penalties included in present federal statutes.

In the fifteen years since Furman vs. Georgia, 408 U.S. 238 (1972), over forty of this country's fifty states have acted to restore the death penalty. Such action reflects a popular consensus in favor of capital punishment.

The plain language of the Sentencing Reform Act of 1984 under which the Commission was created and operates contains clear authority for the Commission to develop death penalty guidelines.

I welcome the opportunity to comment on the Death Penalty Provision. If other information or comments would be requested, please do not hesitate to contact me.

Sincerely,

Johnny L. Hughes
National Troopers Coalition
Legislative and Congressional Affair